
DIGEST OF LEGAL OPINIONS OF THOMAS B. PATON

BY THOMAS B. PATON JR.

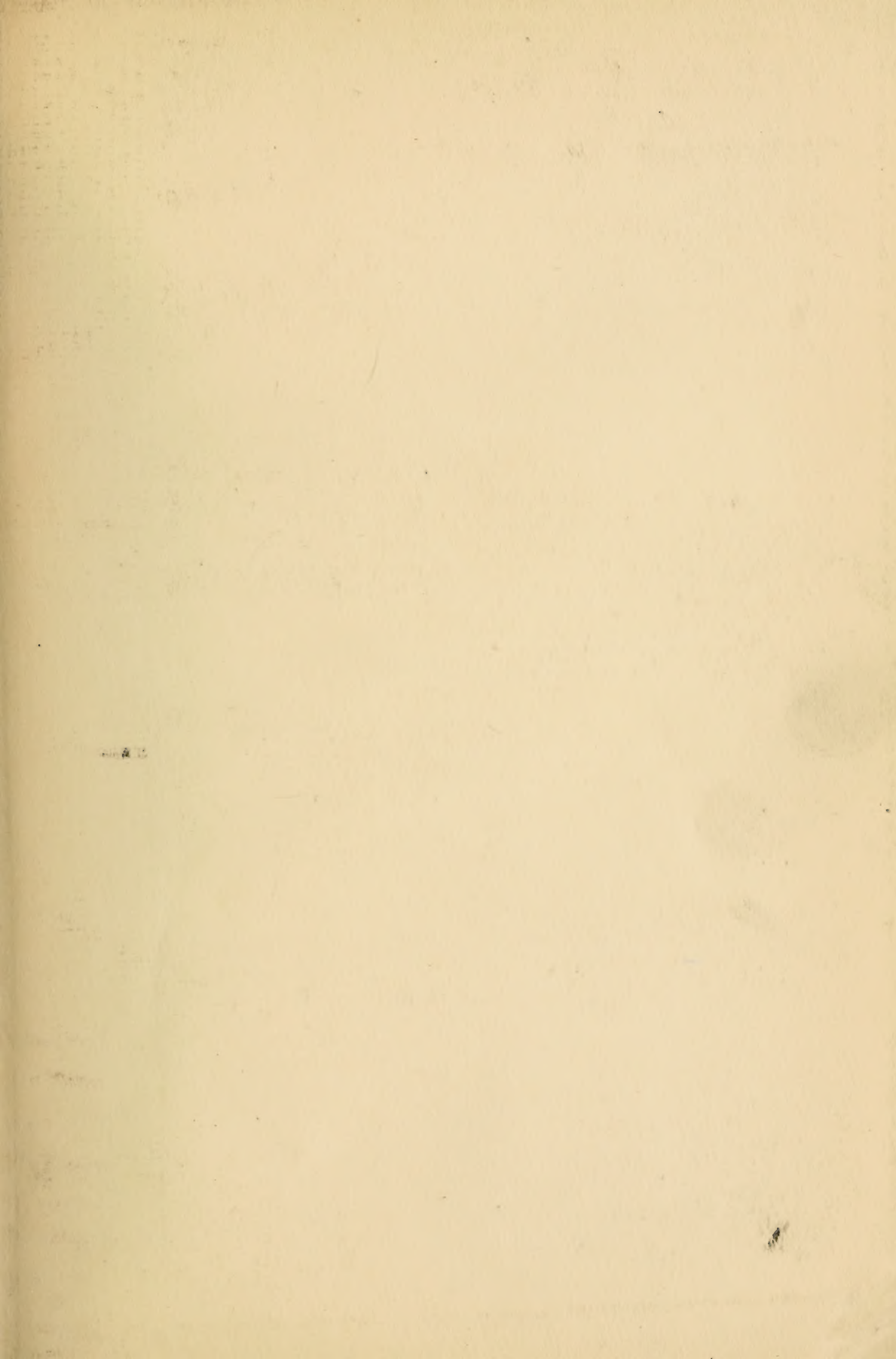
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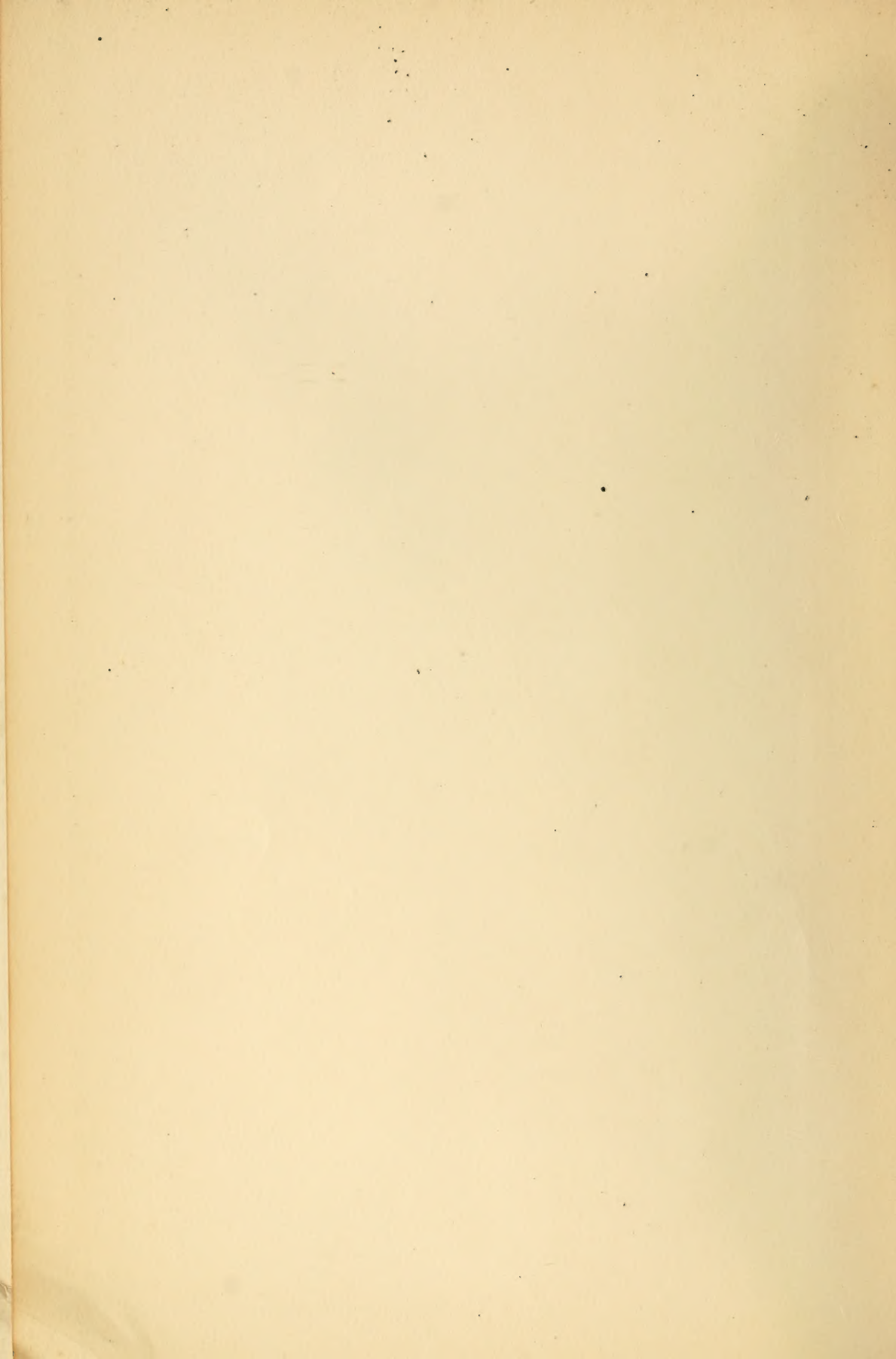
AMERICAN BANKERS ASSOCIATION

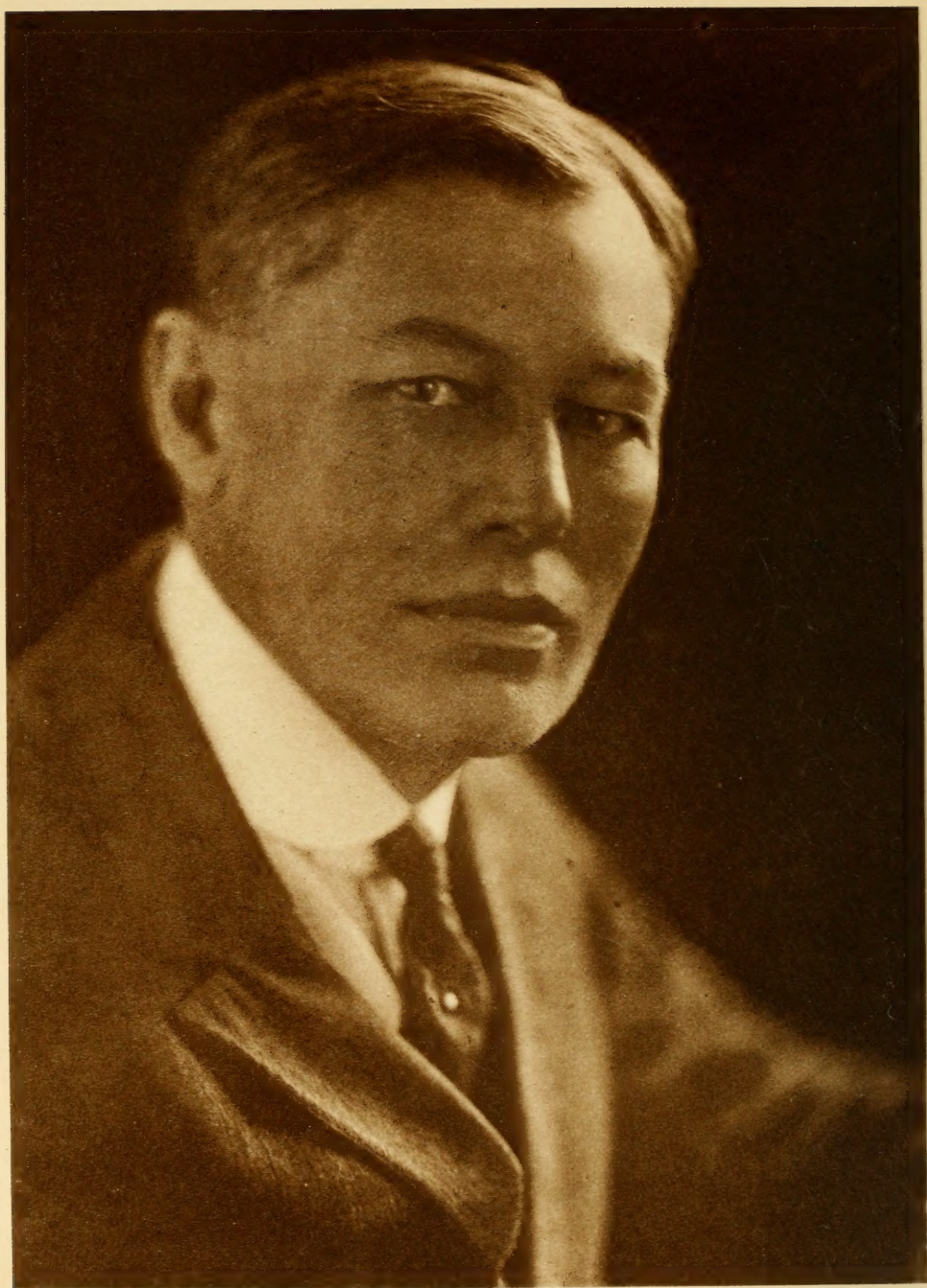


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Thomas D. Paton

DIGEST *of* LEGAL OPINIONS *of* THOMAS B. PATON

General Counsel of the American Bankers Association

1908 - 1922

With an Index and Legal Citations

Complete Edition, 1922

By

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PREFACE

FOR the past thirteen years there have been submitted to the General Counsel by members of the American Bankers Association many letters of inquiry requesting legal advice upon a given statement of facts. These questions, arising in the actual experience of banks, have been answered and advice has been given in the form of an opinion based, in most cases, upon legal authority. Inasmuch as so many opinions have accumulated, it was thought advisable, in the interest of all members, that a digest of them be made and published. In view of the fact that a large number of the situations dealt with are of importance to the business world, it is intended that its use as a reference book be extended not only to members of the American Bankers Association but also to lawyers and business men.

An attempt has been made in each case to write in concise form a statement of facts, followed by the opinion, together with such legal authorities as could be found.

For the variety of subjects treated and their practical bearing upon banking operations, the bankers are solely responsible, as it is they who have voluntarily submitted questions on the problems confronting them in every day business. It would then seem to follow that the book has the advantage of containing a selection of subjects confined to those matters only which have been troubling bankers most and which have already proved of sufficient interest to cause them to request legal advice.

It is, of course, understood that the opinion of a lawyer, even though based on decisions of the courts of last resort or, in the absence of legal precedent, reasoned out upon sound legal principles, still remains an opinion. At most the reader can choose to use it and to depend upon it as a possible guide and source of information, and for these objects this book is published.

Where an opinion is rendered on a subject upon which no case had ever been decided, the writer has cited legal authorities that are analogous to and in support of the principle involved. It is important, therefore, for the reader to note that those citations which are not directly in point are useful as supporting authority and collateral reading.

The name of the state which follows each digest indicates the state from which the inquiry came, and where the abbreviation "Jl." appears, it signifies that the full text of the same has been published in the "Association Journal."

Each opinion, unless it clearly appears to the contrary, can be regarded in most cases as applicable to inquiries from all of the states in addition to the state from which the inquiry came.

This volume has been preceded by and includes the smaller 1919-1920 edition, bearing the same title, containing a digest of the published opinions. It contains, in addition thereto, a digest of all of the opinions which heretofore have never been published in the "Association Journal" and which are in the large majority.

THOMAS B. PATON, JR.

New York, N. Y., 1922.

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ACCEPTANCE AND CERTIFICATION

Payment or certification of check after banking hours

1. A depositor gave a check after banking hours. The payee presented the check at the bank at 8.30 o'clock the next morning, and the bank certified it. The drawer of the check arrived at the bank promptly at 9 a. m. and ordered payment stopped. The regular business hours of the bank are from 9 a.m. to 4 p.m. Was payment or certification by the bank valid? *Opinion:* In *Butler v. Broadway Savings Institution*, 157 N. Y. Supp. 532, it was held that a by-law of a savings bank that the bank shall be open for business daily from 10 a.m. to 3 p.m., does not render illegal the payment of a draft outside of the fixed hours. In this case payment was made at 9.30 a.m., and at 9.40 a.m. on the same morning, the depositor arrived for the purpose of stopping payment. The court said: "The rule quoted does not expressly prohibit the payment of a draft without the fixed hours. The rule is merely a regulation for the convenience of the bank." It would seem to follow from this authority that payment or certification of the check in question at 8.30 a.m. was valid. (*Inquiry from Wash., June, 1916.*)

2. A bank certifies or pays a customer's check after banking hours and the customer, before banking hours of the next day seeks to stop payment. The question was raised whether the payment or certification was binding on the customer. *Opinion:* Such payment or certification is probably valid, although the point has never been directly passed upon by the courts in a case between the customer and the bank. *Marshall v. Am. Express Co.*, 7 Wis. 1. *Spokane Tr. Co. v. Huff*, 15 Pac. 80 (Wash.). *Interstate Nat. Bk. v. Ringo*, 83 Pac. (Kan.) 119. *Averell v. Second Nat. Bk.*, 6 Mackey (D. C.) 358, 2 App. cases (D. C.) 470. *Briton v. Lewiston Nat. Bk.*, 81 Pac. (Idaho) 112. *City of Phila.*, 98 Fed. 485. *Salt Springs Nat. Bk. v. Burton*, 58 N. Y. 430. *Morse on Banks*, Sec. 431 (4th ed.). *Neg. Inst. A.*, Sec. 75 (Comsr's. dft.). (*Inquiry from Ala., July, 1912, Jl.*)

Note: Point later decided. See Opinion No. 1.

Acceptance must be written

3. A live stock company instructed its bank to honor a draft drawn in its name

by C and D, who were buying stock for it, and the bank agreed to such instruction, telephoning a prospective seller of live stock that the check for \$4,000 was good. Relying on this oral promise to pay the amount, the cattle are turned over to C and D. Later, the live stock company stopped payment on the check, claiming that C and D had no authority to draw it or to buy so large an amount of stock. The holder seeks to hold the bank liable on its statement. *Opinion:* While a bank which promises over the telephone to pay a check cannot be held on such promise, the acceptance not being in writing, the bank may be held liable to the holder where, by agreement between the bank and depositor, the deposit is appropriated for the payment of such check. If there are special circumstances from which it would appear that the depositor assigned a certain amount of his deposit with the consent of the bank, the latter, although it could not be held liable as acceptor of the check, might be held as trustee of a specific deposit or as a debtor to the assignee for the amount so assigned. *Rambo v. First St. Bk. of Argentine*, 128 Pac. (Kan.) 182. *Van Buskirk v. St. Bk. of Rocky Ford*, 35 Colo. 142. *Ballen v. Bk. of Krenlin*, 130 Pac. (Okla.) 539. *Gruenther v. Bk. of Monroe*, 133 N. W. (Neb.) 402. *Ballard v. Home Nat. Bk.*, 136 Pac. (Kan.) 934. *Neg. Inst. A.*, Sec. 189 (Comsr's. dft.). (*Inquiry from Ark., April, 1917, Jl.*)

4. A bank was requested to certify check by wire. It refused on the alleged ground that the check did not transfer the funds until it reached the bank and that the depositor could revoke the payment after it was certified. *Opinion:* A bank can certify by wire and after such certification the drawer has no right to stop payment. While an acceptance, to be valid, must be in writing, there is no requirement that the acceptance in all cases must be written on the bill. *Elliott v. First St. Bk.*, 152 S. W. (Tex.) 808. *First Nat. Bk. v. Muskogee Pipe Line Co.*, 139 Pac. (Okla.) 1136. *Oil Well Supply Co. v. MacMurphy*, 138 N. W. (Minn.) 784. *Neg. Inst. A. of Ill.* (Secs. 131, 132, 133, 186.) (*Inquiry from Ill., Dec., 1917, Jl.*)

5. In all states where the Negotiable Instruments Law is in force and in other states where the statutes require acceptance to be in writing, a promise over the telephone

to pay a check, not being in writing, does not bind the drawee; but in Indiana where the common law rule prevails that verbal acceptance are valid, such telephone promise would probably bind the drawee in favor of one who in reliance thereon cashed the check. Where, however, the drawee simply answers that the check is "good" or "all right" without coupling with such answer any specific promise to pay, such answer is insufficient to bind the bank as an acceptor. *Louisville Co. v Caldwell*, 98 Ind. 245. *Spurgeon v. Swain*, 13 Ind. App. 188. *Van Buskirk v. St. Bk. of Rocky Ford*, 35 Colo. 142. *First Nat. Bk. v Commercial Sav. Bk.*, 87 Pac. (Kan.) 746. (*Inquiry from Ind., Dec., 1910, Jl.*)

Note: The Negotiable Instruments Law requiring acceptances to be in writing was passed in Indiana in April, 1913.

6. The indorser of a check attempted to cash it at Bank A, which bank as a precaution telephoned Bank P, the drawee. In reply to the question whether or not the check was good, Bank P said "Yes," and when asked if it would protect Bank A on the check, it replied over the telephone, "We will." Bank A cashed the check on these representations and upon dishonor wishes to hold the drawee liable, because the indorser proved worthless. *Opinion*: Bank A cannot hold Bank P on the latter's oral promise to pay the check, because the Negotiable Instruments Act requires acceptance to be in writing; nor is Bank P bound to Bank A, the holder, who has cashed the check on faith of such promise, on the principle of estoppel, as this principle is inapplicable in the face of positive statutory requirement of written acceptance. Bank A, however, would have a right of recovery against the drawer of the check. (*Inquiry from Ohio, Sept., 1914, Jl.*)

7. A bank purchased a check from the payee after receiving a statement over the telephone by the drawee that the check was good. Payment was stopped. *Opinion*: Under the leading case construing the Negotiable Instruments Law of Colorado the bank had no recourse upon non-payment against the drawee, as certification over the telephone is invalid, not being in writing. The bank's sole recourse is against the drawer and payee. (*Inquiry from Okla., Aug., 1912, Jl.*)

8. An acceptance of a check or draft by telephone in Texas is valid, because there is no Negotiable Instruments Act or

any other statute in force requiring acceptances to be in writing. *Newman v. Schroeder*, 71 Tex. 81. (*Inquiry from Tex., July, 1913, Jl.*)

Note: The Negotiable Instruments Law requiring acceptances to be in writing was passed in Texas in March, 1919.

Acceptance on note by third party

9. A regular form of a negotiable promissory note, made by A payable to his own order forty-five days after date at the X bank, was indorsed in blank by A. Across the face the following acceptance was written by a third party: "Accepted payable at the X bank, signed B." The question is asked what is the liability of the acceptor. *Opinion*: Where a third person writes an acceptance across the face of a promissory note, the holder has the option of treating the instrument as either a bill or note and the person so signing can be held liable as acceptor of a bill of exchange. *Block v. Bell*, 1 Manning & Ryland (Eng.) 149. *Edis v. Bury*, 6 Barn & Cres, 433. *Lloyd v. Oliver*, 18 Q. B. 471. *Heise v. Bumpass*, 40 Ark. 545. *Neg. Inst. A., Sec. 17* (Comsr's. dft.). (*Inquiry from Pa., Jan., 1918, Jl.*)

Banks' refusal to certify bearer checks

10. It is stated that certain bank officers or paying tellers refuse to certify checks payable to bearer or payable to "John Doe or bearer" on the ground that it is not good banking practice. *Opinion*: Legally certification of either form of check is valid but not compulsory. Why some banks refuse to certify bearer checks is a question for the bank arising out of the practical conduct of banking. It may be that they desire a record of the payee. (*Inquiry from Conn., February, 1917.*)

11. A paying teller asks what are the objections from a banker's standpoint to certifying a bearer check. *Opinion*: It might be that bearer checks so certified would be used to circulate as cash and that a claim could be made that the bank was liable to the Federal tax for issuing notes which circulate as money. It may be that the bank wishes to keep a record of payees of certified checks. In the event a bearer check was raised after certification and paid by a teller, there might be more difficulty in determining whether the amount was correct or not if the check was payable to bearer than where it was identified by having a

specified payee. The Toledo Clearing House passed a resolution prohibiting the payment of "bearer" checks and requiring all checks to be drawn to the order of the payee. The reason was that certain bearer checks issued by customers in order to be rid of the necessity of coming and sending to the bank to identify payees, had been stolen from the mails and raised and the tellers had been victimized through paying such checks. These reasons may account for the statement that it is not good practice to certify checks payable to cash. (*Inquiry from Mass., Aug., 1915.*)

Bank's obligation to pay, not to certify

12. A check was presented at the drawee bank at a time when there were sufficient funds. The drawee returned it for proper indorsement and inquires if it was under obligation to first certify the check in case of subsequent depletion of the maker's account. *Opinion:* The certification is optional not obligatory, and the bank would not be liable for refusal to certify, if the check in this case thereafter became "not good." (*Inquiry from Iowa, June, 1910, Jl.*)

13. The payee of a check demands certification where it is impossible for him to give proper identification. The bank asks if it can be held liable for refusing certification in case the drawer's balance is depleted before the proper identification can be obtained. *Opinion:* There is no liability of the bank to the payee. The bank's obligation runs only to the drawer; if it wrongfully refuses to pay, it is liable to the drawer, but the holder has no right of action against the bank because of such refusal to pay, much less where the bank refuses to certify. Concerning liability to the drawer, the bank is entitled, where the payee presents the check in person and is unknown, to delay or refuse payment until there is reasonable opportunity for identification. Where the account is depleted, this is the drawer's own act and there is no liability to him. (*Inquiry from Mass., Feb., 1915.*)

14. A customer gave instructions to his bank not to certify any of his checks and the bank desires to know if there is any ruling which makes it compulsory for the bank to certify upon demand if the funds are sufficient. *Opinion:* The bank is not obliged to certify a check when requested. Its only obligation is to pay. The customer's instruction is sufficient reason for the bank's refusal. (*Inquiry from Mass., July, 1912, Jl.*)

15. A check made payable to a firm was brought to the bank by the firm's agent with the request that it be certified. The bank doubted the authority of the agent and refused to certify. *Opinion:* Certification is a matter of favor on the bank's part and cannot be claimed as a right. Morse on Banks, Sec. 404. (*Inquiry from Pa., May, 1912, Jl.*)

Not necessary to communicate with drawer before certifying

16. A bank asks if it is necessary to communicate with the drawer of a check before certifying it. It believes there is a possibility of the drawer making a good claim for an offset. *Opinion:* A bank can certify a check before reporting to the drawer. As soon as certified, the check is paid so far as the drawer is concerned, the bank making payment not in cash but by certified obligation, which is virtually the same as a certificate of deposit. (*Inquiry from Va., April, 1916.*)

Bank can certify for holder without drawer's consent

17. Many traveling agents and solicitors present local checks for certification before sending them in to the houses which they represent. A bank refuses to certify upon the ground that it has no authority to charge its depositor's account without his order. *Opinion:* The bank is within its rights when it refuses to certify, but if it chooses to certify and charge the check to the account of the drawer, it does not require his previous consent or authority so to do. It is the general practice to return certified checks as paid vouchers to the depositor, the same as a check paid in the first instance without certification. (*Inquiry from Mont., June, 1916.*)

Distinction between certification for drawer and for holder

18. A bank states that it sees the justice for releasing the maker when the holder has a check certified but that the reasons would also seem to hold good when the maker has his check certified. It does not see any good reason why the maker should not be released in both cases. *Opinion:* When a man desires to raise money and his own name is not sufficient, if he procures another man to make an accommodation note to his order, which he

indorses to the lender or if he makes a draft to his own order and procures the other man to accept for his accommodation which he likewise indorses, there would seem no good reason in either case for saying that, because the borrower has tendered a note or acceptance on which another man was primarily liable, in view of this primary liability, the borrower was no longer liable on his indorsement but the maker or acceptor was solely liable. With equal reason it would seem, when a man desires to make payment and the creditor is not satisfied to take his ordinary uncertified check and the drawer thereupon procures the bank to certify, the payee should be entitled to look not alone to the primary debtor, the bank, but also to the drawer of the check if the bank defaults. Where, however, the holder procures the check to be certified the reason is different. If instead of taking the cash he receives the bank's obligation by way of certification, there is no reason why the drawer should longer remain liable. (*Inquiry from N. Y., Dec., 1913.*)

19. A bank asks whether there is any difference in law when a check is certified by the bank for the drawer before he delivers it to the payee, and when it is certified for a holder after it has been delivered by the drawer. *Opinion:* In the former case the drawer is not discharged from liability to the holder in the event the certifying bank fails. The latter case is covered by the section of the Negotiable Instruments Law which provides that: "Where a holder of a check procures it to be accepted or certified, the drawer and all indorsers are discharged from liability thereon." (*Inquiry from Pa., Oct., 1913.*)

Illegal to certify post dated checks

20. A bank certified a post dated check before its date at the request of the holder. The bank questions its responsibility should it refuse another check not post dated, which would have been good but for the certification of the post dated check. *Opinion:* The bank has no right to pay or certify a post dated check at the request of the holder before its date and so acts at its peril. Such certification at the request of the drawer is also held irregular, although in Idaho, it is held proper, if the funds are sufficient, when the amount becomes immediately chargeable to his account and payable to the holder irrespective of the date *Morse on Banks* (4th ed.), Sec. 389. *Godin v. Bk. of Commonwealth*, 6 Duer (N. Y.) 76. *Champion*

v. Gordon, 60 Pa. 474. *Clarke Nat. Bk. v. Bk. of Albion*, 52 Barb. (N. Y.) 592. *Pope v. Bk. of Albion*, 57 N. Y. 126. *Smith v. Field*, 114 Pac. (Idaho) 668. *Inquiry from Nev., May, 1913, Jl.*)

21. A check payable to A was post dated December 1, 1912, and was certified June 1, 1912, before its date. It was delivered to a trustee in escrow. The trustee in breach of the trust delivered it to A, who negotiated it to a purchaser for value four months after its date. *Opinion:* It might be held by the courts (1) that the irregular certification put the purchaser on inquiry, or (2) that the check was overdue when negotiated, so as to deprive the purchaser of the status of a bona fide holder. If such were held, the check in the hands of the purchaser would be subject to the same defenses as if held by the payee. *Bull v. Bk. of Kasson*, 123 U. S. 105. *Cowing v. Altman*, 71 N. Y. 435. *Girard Bk., v. Bk.*, 39 Pa. 92. *Morrison v. Bailey*, 5 Ohio St. 13. *Bowen v. Newell*, 4 Seld. (N. Y.) 190. (*Inquiry from Ark., Sept. 1913.*)

22. A gave B a check post dated. B wrote to the bank on which it was drawn, asking that payment be guaranteed. The cashier sent B a written guaranty that the check will be paid when due. *Opinion:* The cashier has no authority to certify a post dated check before the due date and a holder taking with notice, cannot recover thereon from the bank. In this case B could not hold the bank upon its cashier's letter. *Clarke Nat. Bk. v. Bk. of Albion*, 52 Barb. (N. Y.) 592. (*Inquiry from Okla., Oct., 1915, Jl.*)

Unwise to certify undated check

23. It is not wise to certify an undated check. While an instrument without a date is, according to the Negotiable Instruments Law, valid and negotiable, still for commercial completeness there should be a date, and, as certification is not obligatory but only optional with the bank, the better practice would be to refuse certification. (*Inquiry from Okla., April, 1917*)

Certification equivalent to acceptance

34. The Negotiable Instruments Law of New Hampshire requires that "an acceptance must be in writing" and further provides that "certification is equivalent to an acceptance." (*Inquiry from N. H. Dec., 1911, Jl.*)

Certifying bank's liability to fraudulent holder

25. According to a New Jersey decision, a certifying bank can refuse payment to a fraudulent holder where a check has been certified for the drawer, but cannot so refuse where the certification is for the holder. If this decision is sound law, there might be a desirability for separate certification stamps to indicate for whom the check was certified. An Ohio decision ignores this distinction and holds that a bank must pay fraudulent holder whether the check is certified for the drawer or for the holder. *Times Square Auto Co. v. Rutherford Nat. Bk.*, 73 Atl. (N. J.) 479. *Blake v. Hamilton Dime Sav. Bk. Co.*, 87 N. E. (Ohio), 73. (*Inquiry from Conn., May, 1913, Jl.*)

Right of bank to require identification before paying certified and uncertified check

26. A gives his check to C. Bank refuses to pay C on presentment because he is a stranger, but at his request certifies the check. Thereupon C indorses check and again demands payment claiming that when a bank certifies, it engages to pay when properly indorsed. The bank presents the question whether, C having indorsed the check, its certification waives its right to require the payee to establish his identity before making payment. *Opinion*: The law is very indefinite concerning this right of the bank to require the payee to identify himself, but there are expressions of the courts which indicate that such right exists in the bank and that it would be justified in refusing payment until the payee establishes his identity. Just what effect certifying the check for the payee would have upon this right is problematical. It can hardly be said that the bank thereby recognizes the identity of the payee because many checks are presented for certification by messengers or other agents who are not the real payees. It seems that this point has not been decided, but it is quite safe to say the proper course for the bank would be to refuse payment of its certified check until it is satisfied of the payee's identity for otherwise it would be taking the risk of paying to a thief or finder not the real payee. By such refusal the bank would incur no liability to the drawer who becomes discharged by the certification and whose credit would not be injured. But, of course, the payee might sue the bank and the question would be whether the refusal to

pay until the payee was properly identified was such a refusal as would authorize the beginning of an action. The question is uncertain, and it might be held that the payee was entitled to payment without proving his identity; but even so, it seems the payee's right of recovery would be limited to the amount of the check and interest and there would be no additional responsibility for financial loss suffered by the payee by being deprived of his money. These matters of requiring proof of identity before payment are generally adjusted directly between the bank and holder, and it is very seldom that a case gets into court. There is, therefore, an absence of authority on the precise proposition. (*Inquiry from Ky., Sept., 1913.*)

Note: In *Citizens' National Bank of Evansville v. Reynolds*, 126 N. E. (Ind.) 234 decided in February, 1920, the court held a bank entitled to require payee of a check to identify himself to its satisfaction before paying the check.

Payment of certified check on forged indorsement

27. A depositor had his bank certify his check for \$1,005, payable to X Co. Said check was indorsed "X Co., by M. J. S.," and was cashed by the Y bank, and was indorsed by the latter "All prior indorsements guaranteed." It was paid by the certifying bank. M. J. S. had no official connection with the X Co., and had no authority to indorse the check. Who is responsible for this loss? *Opinion*: The recourse of the drawee bank would be against the Y bank, which guaranteed the indorsements, and which would be the ultimate loser. (*Inquiry from Okla., Nov., 1920.*)

Drawer's liability on accepted draft

28. A draft was drawn by Smith and Company on Jones & Company at sixty days' sight and accepted by Jones & Company. *Opinion*: The effect of the acceptance is not to discharge the drawer but to constitute the acceptor the principal debtor. In Texas, the liability of the drawer of an accepted draft is fixed by due protest and notice, or without protest, by suit against the acceptor as provided for by statute. *Vernon's Sayles' Tex. Civ. Stat.*, 1914, Art. 579. *Seguin Milling & Power Co. v. Guinn*, 137 S. W. (Tex.) 456. (*Inquiry from Tex., Oct., 1915, Jl.*)

Certification of forged checks

29. A bank certified checks bearing forgery of the payee's indorsement. The checks were purchased by another bank which received payment therefor. *Opinion:* The certifying bank does not warrant the genuineness of the payee's indorsement and is not responsible to the purchaser. If money is paid by the certifying bank thereon, it may be recovered. *First Nat. Bk. v. Northwestern Nat. Bk.*, 152 Ill. 296. *Metropolitan Nat. Bk. v. Merchants' Nat. Bk.*, 182 Ill. 367. *Morse on Banks*, Sec. 482. (*Inquiry from Ill.*, March, 1913.)

30. A forged check was given in payment of a diamond ring. Before accepting the check, the seller required a responsible indorser, and the latter before indorsing the check telephoned the bank which promised to pay the check. The bank did not pay the forged check. *Opinion:* The bank's promise to pay was not binding where the check was a forgery, as its promise related to a valid check; even in case of a valid check, the bank would not be bound because its promise was not in writing. (*Inquiry from Kan.*, Oct., 1909, *Jl.*)

31. A bank certified its customer's check, which remained outstanding and which was claimed by the drawer to be forged. The bank doubted the fact of forgery and refused to reimburse its customer's account. *Opinion:* If the check remains outstanding the bank in a suit by the customer would be held liable for the amount of the deposit, for his positive testimony of the forgery would probably outweigh the presumption of genuineness arising from the fact of certification. *Iron City Nat. Bk. v. Fort Pitt Bk.*, 159 Pa. 46. (*Inquiry from Pa.*, Feb., 1914, *Jl.*)

Certification of check for stranger

32. The payee of a check goes to the bank on which it is drawn and demands of the paying teller the cash. The teller refuses and the payee in turn demands certification. The teller informs the payee that the check is good at the present time, but argues that he does not care to cash or certify the check because the payee is unknown to him. The payee deposits the check with his own bank and later payment is refused because of the drawer's stop payment order. Has the payee any legal action against the drawee? *Opinion:* The bank had the right to require the payee to identify himself as a prerequisite to payment and a refusal to pay

because the holder fails to identify himself is not a dishonor of the instrument which will render the bank liable to its depositor in damages. It is probably customary in such case for the bank to certify the check because the fund will then be saved to the holder and not subject to withdrawal or stoppage of payment before the holder succeeds in establishing his identity, but there is no legal obligation to certify in any event. (*Inquiry from N. Y.*, April, 1916.)

33. A stranger presents a check for certification. The question is asked whether the bank is justified in certifying the same rather than paying it. *Opinion:* Whether a bank is justified in certifying a check when presented by a stranger is a question of banking practice rather than law, there being no legal obligation to certify in any case as distinguished from obligation to pay. (*Inquiry from Md.*, April, 1916.)

Certification guarantees signature and sufficiency of funds

34. A bank certified a check payable to a specified person for a stranger who was not entitled to the instrument. The holder negotiated the check under a forged indorsement to an innocent purchaser for value. *Opinion:* The certifying bank binds itself that there are sufficient funds to pay the check and guarantees the genuineness of the drawer's signature. The bank is not responsible to the innocent purchaser because (1) it does not guarantee the genuineness of the payee's indorsement, and (2) it is not negligent in certifying a check for an unidentified person. *Neg. Inst. A.*, Sec. 188 (Comsr's. dft.). *First Nat. Bk. v. Northwestern Nat. Bk.*, 152 Ill. 296. (*Inquiry from N. J.*, Jan., 1917, *Jl.*)

Certification "subject to garnishment"

35. The account of a depositor in a bank was garnished and summons served on the bank October 11th. Several days thereafter the attorney for such depositor requested the bank to certify a check on the account, the certification to read: "Subject to a certain garnishment, served October 11, 1920, in the Civil Court of——County, in the suit, etc., etc." The bank refused to make such certification, and desires opinion of the point. *Opinion:* Where a depositor's account is garnished, and request is made upon the bank to certify a check on the account subject to the garnishment so that if vacated the certified check would

take priority over a subsequent garnishment, refusal of the bank to so certify is within its rights and proper, since a bank is not obliged to certify a check in any event, and the propriety of such a method of aiding a depositor to place his banking assets beyond the reach of his creditors is questionable. A check so certified would not be a negotiable instrument, but a promise to pay conditioned upon the fund being released from the described garnishment. See *Kitzinger v. Beck*, 4 Colo. App. 206; *El Reno Foundry & Mach. Co. v. West. Ice Co.* [Okla. 1915] 153 Pac. 1107. *La Barre v. Doney*, 53 Pa. Super. Ct. 435. *Welch v. Renfro*, 42 Tex. Civ. App. 460. *Stannard v. Youmans*, 110 Wis. 375. *Maxwell v. Bank of New Richmond*, 101 Wis. 286. *Rood, Garnishment*, Sec. 215. (*Inquiry from Wis.*, Jan., 1921, *Jl.*)

Duty of collecting bank to request certification

36. A bank received for collection a check on which payment was refused because not properly indorsed. The bank returned the check for correction and inquired as to its liability for failure to request certification, should the check afterwards be protested for lack of sufficient funds. *Opinion*: It is not unlikely that the courts might hold that due diligence requires that the collecting bank request certification before returning the check for correction, for such would seem the action a discreet person would take in his own interest in an attempt to insure ultimate payment. Although the payor bank is not obliged to certify, certification in such case is a common practice. The courts have not yet passed upon the precise question whether it is the duty of a collecting bank to request certification of an improperly indorsed check before returning same for correction. *First Nat. Bk. v. Fourth Nat. Bk.*, 77 N. Y. 320. *Exch. Nat. Bk. v. Third Nat. Bk.*, 112 U. S. 276. (*Inquiry from Ala.*, July, 1914, *Jl.*)

Indorsement must be properly made

37. A check for \$5,000 was presented at the drawee bank and payment was refused because the check was not indorsed. The presenting bank then indorsed the payee's name for the payee and again presented the check which was again refused. The holder demanded that the bank certify the check. *Opinion*: The drawee bank was under no obligation to the holder to certify the check. Its only obligation was to pay

when duly presented. (*Inquiry from Cal.*, Nov., 1912, *Jl.*)

38. A bank although in funds refused payment of a check because it lacked the payee's indorsement. Later, when the check properly indorsed was presented, there were no funds to meet it. The holder claimed that drawee was liable for failure to certify the check in the first instance. *Opinion*: The bank was not obliged to certify, but only to pay. Banks frequently certify such checks "good when properly indorsed," but do so purely out of accommodation. *Redington v. Woods*, 49 Cal. 406. *Bk. of Lisbon v. Bk. of Wyndmere*, 15 N. D. 299. *Canadian Bk. of Commerce v. Bingham*, 30 Wash. 484. *Greenwald v. Ford*, 109 N. W. (S. D.) 516. *Ford v. People's Bk.*, Supreme Court of S. D., April, 1906. *First Nat. Bk. v. Marshalltown St. Bk.*, 107 Iowa 327. *First Nat. Bk. v. Northwestern Nat. Bk.*, 152 Ill. 296. (*Inquiry from N. Y.*, Nov., 1909, *Jl.*)

39. A bank received through the mail a check drawn on one of its customers, but which was improperly indorsed. The bank returned the check for correction and in the meantime the customer reduced his account so that check was not good. *Opinion*: The drawee bank is not liable to the holder for failure to certify the check before returning it for proper indorsement. Many banks do certify "good when properly indorsed" but the bank is under no obligation to certify a check. (*Inquiry from Pa.*, Sept., 1914, *Jl.*)

Voluntary certification of check "good when properly indorsed"

40. A bank voluntarily certifies an incorrectly indorsed check "good when properly indorsed," when presented through the clearing house. Is the bank within its rights and does it assume any responsibility in doing this voluntary act when no such request is made by the holder? *Opinion*: Although this question has never been judicially passed upon, the propriety of such action might depend upon custom. It is likely that a court would hold that the bank incurred no responsibility to the drawer. The bank in so certifying obeys the order of the drawer to the extent of promising to pay the check upon proper indorsement. Certification cuts off the right of the drawer to thereafter stop payment upon the subsequent discovery of fraud of the payee, but if the check had been presented properly indorsed it would have been paid, and such contingency would not make the bank re-

sponsible to the drawer or give the drawer just ground to complain. (*Inquiry from Va., Oct., 1915*)

Certifying bank has right to charge customer's account immediately

41. A bank certified a check payable to a distant firm at the request of the holder who was its traveling salesman. Of this fact the depositor was ignorant. The depositor believing that the check could not be presented for several days, drew a second check, which overdrew the account because of the certification. He threatened suit for damages because of the bank's refusal to pay. *Opinion:* The bank had the right to certify the first check when presented by the holder and immediately charge same to the customer's account. *Merchants' Bk. v. St. Bk., 10 Wall. (Inquiry from D. C., Sept., 1912, Jl.)*

Language expressing certification construed

"Check of A. Brown for \$500 now good"

42. A bank in which A. Brown is a depositor sent the following telegram, "Check of A. Brown for five hundred dollars now good." *Opinion:* This telegram would not constitute a sufficient acceptance to bind the bank. It is not an absolute promise to pay, and there is an implication that the bank would not answer for Brown's check after sending the wire. *Meyers v. Union Nat. Bk., 27 Ill. App. 254. (Inquiry from Cal., Aug., 1916., Jl.)*

43. The drawee of a check in answer to an inquiry by the holder replied over the telephone simply that the check was good. Notwithstanding a subsequent stop payment order, the check was paid. *Opinion:* In Indiana, where the Negotiable Instruments Law has not been enacted, oral acceptances are valid. But it is doubtful if the mere oral answer that a check is good, so clearly indicates an absolute promise to pay as to be binding as an acceptance. (*Inquiry from Ind., May, 1911., Jl.*)

Note: The Negotiable Instruments Law which requires acceptances to be in writing was passed in Indiana in April, 1913.

"A's check good for amount"

44. A bank received a wire: "Will you pay check signed A, \$335?" and replied by wire, "A's check good for amount." *Opinion:* The reply will be held an acceptance binding the bank to pay check to a bona

fide holder who has purchased same on faith thereof. *Oil Well Supply Co. v. Mac-Murphy, 138 N. W. (Minn.) 784. Elliott v. First St. Bk., 152 S. W. (Tex.) 808. (Inquiry from Mo., July, 1913, Jl.)*

"A's check on us good for \$100"

45. A check may be accepted by telegram which is a sufficient compliance with the statutory requirement that acceptance must be in writing, but to be binding the telegram must clearly import an absolute promise to pay. Where a bank wired, "Will you pay A's check on you \$100?" and the drawee wired reply, "A's check on us good for \$100." *Opinion:* That the reply wire sufficiently imports an absolute promise to pay and is binding as an acceptance. *First Nat. Bk. v. Commercial Sav. Bk., 87 Pac. (Kan.) 706. Kahn v. Walton, 46 Ohio St. 195. North Atchison Bk. v. Garretson, 51 Fed. 168. Elliott v. First St. Bk., 152 S. W. (Tex.) 808. (Inquiry from N. M., Jan., 1918, Jl.)*

"John Smith good on our books for \$50 today"

46. In reply to a telegram asking "Is John Smith good on your books for \$50?" A bank answered by wire and confirmed by letter as follows: "John Smith good on our books for \$50 today." When the check reached the bank it was refused because the funds had been withdrawn. *Opinion:* The bank's wire confirmed by letter was not binding on the bank as an acceptance. It was not a promise but merely a statement of fact as to the condition of the customer's account on a given day. *First Nat. Bk. v. Commercial Sav. Bk., 87 Pac. (Kan.) 746. (Inquiry from N. Y., May, 1912, Jl.)*

47. A bank before advancing value in reliance upon a telegram concerning some particular check should see that the answer by wire contains or imports an absolute and unequivocal promise to pay. *First Nat. Bk. v. Commercial Sav. Bk., 87 Pac. (Kan.) 746. Kahn v. Walton, 46 Ohio St. 195. Coffman v. Campbell, 87 Ill. 98. North Atchison Bk. v. Garretson, 51 Fed. 168. For the wording of telegrams illustrating this point see 3 ABA Jl., 338. (Inquiry from Okla., Dec., 1910.)*

48. A drew two checks of \$303.40 and \$75 respectively and had his bank wire the purchasing bank as follows: "We will honor Mr. A's draft for \$400 this attached." Later A stopped payment and A's bank refused to pay the amount claiming

that its acceptance was of a single draft of \$400 and did not accept the particular checks of amount less than \$400. *Opinion:* The drawee is not bound to honor the two checks, as an agreement to pay a single draft of \$400 would not bind the bank to pay two drafts of a lesser amount. *Bk. v. Young*, 14 Fed. 889. *Glover v. Tuck*, 1 Hill, 66. *Lindley v. First Nat. Bk. of Waterloo*, 76 Iowa 629. *Brinkman v. Hunter*, 73 Mo. 172. *Ulster Co. Bk. v. McFarlan*, 5 Hill 432. *Gates v. Parker*, 43 Me. 544. *Murdock v. Mills*, 11 Metc. 5. *St. Bk. of Fox Lake v. Citizens' Nat. Bk.*, 114 Mo. App. 663. *Guthrie Nat. Bk. v. Dosbaugh's Bk.*, 11 Okla. 664. (*Inquiry from Okla., April, 1909, Jl.*)

49. Bank A phoned Bank B saying that C wants to draw on Bank B and is informed that C has no credit with Bank B. Thereupon, Bank A reads a letter from C stating that he will be at Bank B's place before the draft reaches and will give security for the draft. Bank B replied, "let him draw draft them." *Opinion:* Although an oral acceptance is binding on the drawee in Texas Bank B's promise should be construed as a conditional promise to pay after C does what he says he will do, and where C has not performed the condition, Bank B will not be liable. *Newmann v. Schroeder*, 71 Tex. 81.

Note: The Negotiable Instruments Law requiring acceptances to be in writing was passed in Texas in March, 1919. (*Inquiry from Tex. Feb. 1912., Jl.*)

Certification by bank president away from bank

50. The customer of a bank approached the president at a railroad station just at train time and stated that he was about to leave for a neighboring town and bid on an oil and gas lease that was to be sold through the court. He also stated that he wanted something to show the court that he had money with which to pay for the bid in case he bought. The president wrote on a scrap of paper: "We will honor the draft of Oscar Smith for \$3,000. Tulsa National Bank, by T. Miller, President." Smith was the successful bidder and drew and delivered a draft drawn not on the bank but on himself for \$3,000, attaching the slip of paper. Upon presentation at the bank, the draft was protested and returned because Smith had for some reason previously ordered payment stopped. The bank wishes to be advised in the premises. *Opinion:* The bank cannot be held

liable on this certification as it does not come within the terms of the promise of the president. In any event, certification of a customer's check away from the bank is improper and invalid (*Bullard v. Randall, Gray [Mass.] 605*) for how is the officer to know but that the funds have not been drawn out while he has been away. (*Inquiry from Okla., Dec., 1914.*)

Certification by wire—Does promise to honor check for \$550 cover two checks aggregating of \$550?

51. A draws two checks for \$500 and \$50, respectively. Before depositing them, a wire is sent to the bank on which they are drawn, requesting that the drawee certify "a check for \$550." The answer received from the drawee was that the check for \$550 was good. Before the checks were presented, payment was stopped, and the holder seeks to recover from the certifying bank. Does the promise to honor the check for \$550 cover the two checks? *Opinion:* Had the promise been to honor "checks" for \$550 the bank unquestionably would have been bound. See *First Nat. Bk. v. First Nat. Bk.*, 210 Fed. 543. The general rule is that one who promises in advance to accept or pay a check is bound upon such promise only when the instrument in its terms conforms to the terms of the promise. See *Lindley v. First Nat. Bk.*, 76 Iowa, 629; *Brinkman v. Hunter*, 73 Mo., 172. Although the precise state of facts in this case has not been judicially passed upon, it may be held that the two checks for \$550 would sufficiently conform to the terms of the acceptance of a check for \$550 and the acceptor would be bound. (*Inquiry from Okla., March, 1919.*)

Letters "O. K." as certification

52. *Opinion:* The letters "O. K." placed on check with signature of certifying officer constitute a certification equally as if "good" were written, and if placed upon an overdraft, contrary to provisions of the National Bank Act, would subject officer to criminal penalty. U. S. Rev. Stat., Sec. 5208. *Commercial Bk. v. Fleming*, 14 New Bruns. 36. (*Inquiry from Ark., Oct., 1913. Jl.*)

53. The letters "O. K." were placed on a check by the Vice-President of the drawee bank over his signature, there being no funds on deposit at the time to meet the check. The understanding was that the

maker of the check would deposit sufficient funds. Payment was refused. *Opinion:* The "O. K." of the Vice-President would constitute a certification provided the officer had power or authority to certify. Where the check was certified without funds, the bank is liable to the bonafide payee for value. *Baxter v. Ellis*, 111 N. C. 124. *Morgantown Mfg. Co. v. Ohio R. etc., Ry. Co.*, 121 N. C. 514. *Penn. Tobacco v. Leman*, 109 Ga. 428. *Davis Paint Co. v. Metzger Oil Co.*, 90 Ill. App. 117. *Indianapolis, etc., Ry. Co. v. Sands*, 133 Ind. 433. *Citizens' Bk. v. Farwell*, 56 Fed. 570, 571. *Barnet v. Smith*, 10 Fost. 256. *Muth v. St. Louis Tr. Co.*, 88 Mo. App. 596. *Civ. Code of Cal. Sec. 3254*, 3193. *Bowen v. Needles Nat. Bk.*, 94 Fed. (Cal.) 925. *Union Tr. Co. v. Preston Nat. Bk.*, 136 Mich. 460. *First Nat. Bk. v. Union Tr. Co.*, 158 Mich. 94. *Sackett v. Johnson*, 54 Cal. 107, 109. (*Inquiry from Cal., April, 1911, Jl.*)

Certification "good if presented within six months"

54. A bank certification stamp bears the clause "good if presented within six months." Upon the supposition that the bank after the expiration of the six months repaid the funds to its depositor who claimed he had lost the certified check, and later the check was presented by a holder in due course, the bank inquires, first, as to the legal effect of such a clause and, second, would the insertion of the clause afford it better protection than if it was omitted. *Opinion:* In the absence of judicial interpretation, the contract would probably be construed not as relieving the bank entirely from its promise to pay after six months, but as permitting the bank, if the check is afterwards presented, to plead any equities which it might have in defense of payment. *Davenport v. Palmer*, 152 App. Div. (N. Y.) 761, 763. *French v. Lafayette Ins. Co. Fed. Cas. No. 5102 aff'd.*, 59 U. S. 404. *Miller v. St. Ins. Co.* 74 S. W. (Neb.) 416. *Dechter v. Nat. Council, etc.*, 153 N. W. (Minn.) 742. *Ilse v. Aetna Indemnity Co.*, 125 Pac. (Wash.) 780. *Watertown Nat. Bk., v. Bagley*, 119 N. Y. S. 192. *N. Y. Code Civ. Proc. Sec. 414*. *Neg. Inst. A., Secs. 188, 139, 141* (Comsr's. dft.). (*Inquiry from N. Y., March, 1919, Jl.*)

55. A bank uses a certification stamp which reads "good if presented within five days" with a place and date of certification. It has adopted this form as protection against

a possible form of fraud wherein the depositor after issuing his check to a confederate who procures its certification, claims forgery and obtains the amount from the bank, after which the check is negotiated to a bona fide holder. The bank asks whether such conditional form of certification is valid and whether it could refuse payment if the check was presented after five days. *Opinion:* Such form of certification is valid and would seem to have utility in affording the desired protection. In a case where the bank credited the money to the depositor after the expiration of the period of certification, it would be relieved from liability and whatever recourse the bona fide holder would have would be solely against the drawer. *Neg. Inst. A., Secs. 187, 188, 141, 142* (Comsr's. dft.). (*Inquiry from Pa., Feb., 1915, Jl.*)

Lost certified check—Indemnity

56. A bank inquires as to what procedure it should take where a depositor had a check certified which he mailed to payee who never received it, and depositor requests return of money. *Opinion:* The bank should require an indemnifying bond before paying the money to the depositor, as there is the possibility the payee may have received the check, or may hereafter receive it and indorse and negotiate it. As to the length of time the check might be outstanding as an enforceable obligation, the point has not been passed upon in New Jersey, so the question is uncertain. Certified checks would probably come under the same rule as certificates of deposit, and a number of courts have held that, in these, the statute of limitations does not begin to run against one payable on demand until demand made, while other courts hold the statute begins to run from the date of the certificate. (*Inquiry from N. J., October, 1915.*)

57. A bank certified the check of its depositor in favor of an attorney who acted as bondsman for the depositor. The check was lost and has remained outstanding for ten years, and at the same time the deposit is not released. *Opinion:* The certified check is not outlawed in Pennsylvania until six years after payment has been demanded and the bank before paying the amount of the deposit represented by the lost certified check is entitled to satisfactory indemnity, or conclusive proof of its destruction. *In re Gardners Estate*, 228 Pa. 282. (*Inquiry from Pa., Jan., 1915, Jl.*)

Outstanding certified checks

58. A bank certified a check payable to a corporation at the request of its customer. The check has been outstanding five years and never presented. *Opinion:* In Pennsylvania, the statute of limitations begins to run against the holder from the date of the bank's refusal to pay. The bank remains liable to pay the check until the statute comes to its relief. (*Inquiry from Pa., Jan., 1913, Jl.*)

59. The provision of the Negotiable Instruments Law that, where an instrument is payable on demand, presentation must be made within a reasonable time after its issue, has reference only to charging parties contingently liable. A bank remains liable on an outstanding certified check until the statute of limitations comes to its relief, and such statute does not begin to run until payment of the check has been demanded and refused. *Girard Bk. v. Bk.*, 39 Pa. 92. *McGough v. Jamison*, 107 Pa. 336. *Finkbone's Appeal*, 86 Pa. 368. *Jackson, etc., Co. v. Bk.*, 199 Ill. 151. *Hunt v. Divine*, 37 Ill. 137. (*Inquiry from Pa., Jan., 1913, Jl.*)

60. A check to the drawer's order was certified for the drawer. The drawer delivered the check without indorsement to a third person at an auction sale before he began bidding. Through some misunderstanding the dealings fell through. On presentment of the check by the holder, payment was refused by the drawee because it lacked the payee's indorsement. The check remains outstanding and the drawer wants the use of his money. *Opinion:* The drawee bank is not liable to the holder of the check, as one of the conditions of certification upon which the bank's obligations to pay depends, is that the check shall be indorsed by the drawer, who is also payee. To release his money, the drawer may bring replevin to recover the check, or he may give the bank satisfactory indemnity against the possibility that the check may thereafter be presented properly indorsed. *Lynch v. First Nat. Bk.*, 107 N. Y. 179. *Haas v. Altieri*, 21 N. Y. S. 950. *Barnett v. Selling*, 70 N. Y. 492. *Nicholas v. Mase*, 94 N. Y. 160. (*Inquiry from Mont., Sept., 1914, Jl.*)

Rule of twenty-four hours for acceptance

61. The section of Negotiable Instruments Law allowing drawee twenty-four hours after presentment in which to decide whether or not he will accept, does not

apply to sight drafts which, under the law, are payable on demand, and collecting bank is not obliged to hold twenty-four hours for convenience of drawee. Possible doubt created by law can be cured by amendment. *Daniel on Neg Inst.*, Secs. 449, 454. *Wisner v. First Nat. Bk. of Galitzen*—Supreme Court of Pa., 1908. *First Nat. Bk. of Omaha v. Whitmore*, 177 Fed. 397. *Neg. Inst. A.*, Secs. 136, 137 (Comsr's dft.). (*Inquiry from Conn., Aug., 1910, Jl.*)

62. The rule allowing the drawee twenty-four hours to decide whether to accept is not applicable to checks or demand drafts, but only to drafts legally presentable for acceptance. *Neg. Inst. A.*, Secs. 136, 137 (Comsr's dft.). *Levine v. St. Bk.*, 141 N. Y. S. 596. *Siminoff v. Goodman Bk.*, 121 Pac. (Cal.) 939. *Reeves v. First Nat. Bk. of Oakland*, 129 Pac. (Cal.) 800. *Winkler v. Citizens' St. Bk.*, 131 Pac. (Kan.) 597. (*Inquiry from Kan., Dec., 1913, Jl.*)

63. The drawee of a bill of exchange is entitled to twenty-four hours after presentment in which to decide whether he will accept, and is entitled to have the bill left with him for that period; but in the absence of agreement, drawee is not entitled to documents of title attached to the draft, prior to acceptance, and a collecting agent, unless expressly instructed, should withhold the attached documents upon leaving the draft with the drawee for acceptance. *Connelly v. McKean*, 64 Pa. 113. *Montgomery Co. Bk. v. Albany City Bk.*, 8 Barb. (N. Y.) 396. *Ingram v. Foster*, 2 J. P. Smith 242. *Westbury v. Chicago Lumber, etc., Co.*, 117 Wis. 589. *Neg. Inst. A.*, Secs. 136, 137 (Comsr's dft.). (*Inquiry from Miss., Apr., 1917, Jl.*)

64. The rule allowing a drawee twenty-four hours to determine whether or not he will accept does not apply to checks or drafts payable on demand, but only to drafts legally presentable to the drawee for acceptance. Checks and demand drafts therefore should be immediately protested if payment is refused. In Texas a sight draft carries grace and is presentable for acceptance. *First Nat. Bk. v. Whitmore*, 177 Fed. 397. *Contra, Wisner v. Bk.*, 220 Pa. 21. (*Inquiry from Tex., Mar., 1912, Jl.*)

Note: The Negotiable Instruments Law, which abolishes grace, was enacted in Texas in March, 1919, and thereunder, an instrument drawn payable at sight is payable on demand.

Certified check holder not a preferred creditor

65. The holders of checks certified by a national bank which becomes insolvent are not preferred over other creditors; nor does the Wisconsin Banking Law give such preference to the holders of certified checks of insolvent state banks. Iowa Code, Sec. 1877. (*Inquiry from Wis., June, 1912. Jl.*)

Alteration of date of certified check

66. A depositor of a bank gave a check payable to bearer, dated in January, 1919, which was presented for certification bearing such date. After check had been certified, the drawer gave a stop-payment order on check. When the check was presented through the clearings, the date "19", designating the year, had a line through it, and "20" placed above it. Payment was refused and check returned on account of the palpable alteration. In the interim the bank was enjoined from paying the check. What should be the attitude of the bank in the premises? *Opinion:* Where a check payable to bearer is certified for the holder, and the date is subsequently altered without the consent of the bank, refusal of payment by the bank is justified, for such alteration is material and avoids the check except as to holders in due course, who can enforce payment according to its original tenor. But where the alteration, as in this case, is apparent on the face of the check, there can be no subsequent holder in due course thereof who can enforce payment. The bank having, in addition, been enjoined from paying the check, its proper attitude is to await a court order or judgment in a suit between the rival claimants to the deposit represented by the check, determining who is entitled to the fund. *Elias v. Whitney*, 98 N. Y. Suppl. 667; Secs. 52, 124, 125 Neg. Inst. Law. (*Inquiry from Iowa, July, 1920, Jl.*)

Check raised after certification

67. A bank asks whether it would be liable in paying a check which has been raised after certification. *Opinion:* Where a bank pays a certified check which has been raised after certification, the bank has the right of recovery under the rule that money paid under mistake of fact is recoverable, provided the position of the holder by reason of receiving such payment will not be changed for the worse as a result of such mistake. *Nat. Bank of Commerce v.*

Nat. Mech. B. Assn., 55 N. Y. 211. (*Inquiry from N. Y., Sept., 1920.*)

Careless certification of check subsequently raised

68. A Chicago bank certified for its customer his check for \$15 made payable to "Cash." Six days later, accompanied by a relative residing in a Montana town who was a customer of the local bank, the maker of the check presented same, which he had, after certification, raised to \$1500, to the local bank, which cashed it for him. No erasures were made on the check, and it appeared to have been drawn with the intention of raising it, as blank spaces were left apparently for that purpose. The certifying bank did not protect the check in any manner, but the maker perforated same with figures "\$1500\$," with a cheap machine or by means of a pin and red ink. Certification was made with a stamp on same date as the check, "Accepted Aug. 14, 1919. When properly indorsed _____ State Bank, per _____." The check, when presented to local bank, bore the indorsement of the maker, another party giving a Chicago address, and the local bank's customer, who added her indorsement at the window. The check was subsequently dishonored by the drawee bank. Local bank desires opinion as to whether it can recover from drawee bank. *Opinion:* Where the drawer of a check for \$15 prepares the same, with blank spaces after the amount, so as to permit of the insertion of an increased amount without detection, and the bank certifies the check in that condition, and the drawer thereafter raises the amount to \$1500, and the check, bearing certain indorsements, is negotiated to a bank for the increased amount, the certifying bank is liable under the law of Illinois for the full amount to the innocent purchaser (*Merritt v. Boyden*, 191 Ill. 136. *Yocum v. Smith*, 63 Ill. 312) although there is a conflict of authority in other jurisdictions. (*Pro: Helwege v. Hibernia Bank*, 28 La. Ann. 520. *Godchaux v. Union Nat. Bank*, 28 La. Ann. 516. *Isnard v. Torres*, 10 La. Ann. 103. *Contra: Nat. Exch. Bank v. Lester*, 194 N. Y. 461. *Duquet v. La-Banque Nationale*, 46 Quebec Super. 31.) (*Inquiry from Ill., March, 1920, Jl.*)

Raised certified check—Use of misleading protectograph stamp by certifying bank

69. A check for \$102 was certified

by bank A which by error stamped it with a protectograph "Not over \$400." The check was afterwards raised and cash obtained for it from B. The inquiry is as to A's liability and as to whether or not it was in any way obligated to use the protectograph when certifying. *Opinion:* A bank is under no obligation to use a protectograph when certifying checks. The general rule is that where a check is raised after certification the bank is not liable to a holder for the increased amount. If by mistake the check is paid, the bank may recover the excess unless the position of the holder has been changed for the worse in consequence of the bank's mistake. In the present case, in addition to the mistake of the bank in paying the increased amount after certifying for a smaller amount, the bank negligently invited the fraud by stamping an increased amount over the true amount, and the effect of such stamp would be to mislead the innocent purchaser into assuming that the increased amount was the true amount. Whether bank A would be liable in this case would depend upon what a court might decide, as the question brings up a point that does not appear to have been judicially passed upon. (*Inquiry from Ohio, June, 1915.*)

Protest for non-certification

70. Jones gives his note to Brown drawn on bank A. Brown deposits in bank B,—that bank indorses and sends to bank C which makes presentation to bank A by messenger, but fails to indorse the note. Bank A refuses certification and sends word back by bank C's messenger, that the note is good and will be paid when properly indorsed. Bank C threatens to protest the note. *Opinion:* Bank A is entitled to indorsement by the presenting bank C before paying the note and protest for non-payment would not be justified. There could be no protest for non-certification because A bank is not obliged to certify, only to pay. (*Inquiry from N. J., March, 1917.*)

Revocation of mistaken certification of stopped check

71. On Jan. 2, 1919, payment was stopped on a certain check of a depositor of a bank. Several weeks later it was presented by an agent of a reputable manufacturing company who requested that it be certified. The agent stated that he was not going to negotiate the check until after a settlement of a dispute regarding certain

goods. The bank through a mistake certified the check and upon discovery of the error the next day, wired the company not to use the check. The company failed to reply and the bank now seeks redress. *Opinion:* Where a bank through mistake certifies a check upon which payment has previously been stopped and the check remains in the hands of the payee at the time he receives notice of revocation of the certification and no change of circumstances nor harm nor injury to the payee has resulted, the bank is not liable to the payee upon its certification. If the payee thereafter wrongfully negotiates the check so as to make the bank liable thereon to an innocent purchaser for value, the bank would have recourse upon the payee for money received to his use. *Nat. Exch. Bk. v. Zinn & Co., 78 Atl. (Md.) 1026. Daniel on Neg. Inst., Sec. 1608. Rankin v. Colonial Bk., 64 N. Y. S. 32. Baldinger & Kupperman Mfg. Co. v. Mfrs.' Citizens Tr. Co., 156 N. Y. S. 445. Cook v. St. Nat. Bk., 52 N. Y. 115. (Inquiry from Conn., May, 1919, Jl.)*

Certification of raised check

72. In a decision in New York it was held that a bank certifying a check which had been raised, was entitled to recover the amount from a bank which had cashed the certified check for a forger and received payment from the certifying bank. The court held the latter bank was entitled to recover under the general rule that money paid under mistake of fact is recoverable; that certification does no more than affirm the genuineness of the signature of the drawer and that he has funds to meet it, but does not warrant the genuineness of the body of the check; and that the certifying bank was not guilty of negligence in not having detected the alteration, by which it was claimed the bank advancing value on the check was misled. A New York banker has questioned the soundness of this decision. *Opinion:* It seems unjust that an innocent purchaser of a check certified for one thousand dollars should have to repay nine hundred dollars thereof where the check was originally for one hundred dollars, but it would be equally, if not more unjust, if the certifying bank had to suffer. The bank has no means of knowledge in its possession to detect the alteration, and to hold it liable on every certified raised check would impose a serious burden. *Nat. Reserve Bk. v. Corn Exchange Bk., 157 N. Y. S. 316. Marine Nat. Bk. v. Nat. City Bk., 59 N. Y. 67.*

Security Bk. v. Nat. Bk., 67 N. Y. 458. Continental Nat. Bk. v. Tradesmen's Bk., 173 N. Y. 272. (*Inquiry from N. Y., May, 1916, Jl.*)

Inclusion of raised amount in certification

73. The inquiry is made as to whether or not a bank would be liable if, instead of merely certifying a raised check and making no mention of the amount, it included the raised amount in its certification? *Opinion:* The majority of decisions hold that a bank which certifies a raised check does not warrant the amount but only affirms the genuineness of the signature and that the drawer has funds on deposit. It might be contended that there is no difference in principle between a certification which simply recites that the check is good, and one which recites that the check is good for a stated amount, where the amount recited in the certification corresponds with the amount for which the check purports to be drawn, and that, therefore, the bank should not be liable in the one case any more than in the other. On the other hand it might be contended that expressly stating the amount in the certification amounted to a positive affirmation that the bank had investigated the correctness of the amount and by its certification promised to pay to a bona fide holder such amount. The point has never been decided, but as the question remains uncertain, it would seem that a bank might be inviting a liability which would not otherwise exist according to the majority of decisions, and it would, therefore, be better to omit specifying the amount in the certification. (*Inquiry from Ohio, Aug., 1916.*)

Stamp including amount certified not advantageous

74. The certification stamp used by a bank is as follows:

"Good when properly indorsed
\$1,500 and 00 cents
Jan. 14, 1918

Do not destroy this check
.....Teller"

The wisdom of including the amount in the stamp is questioned. *Opinion:* Certification of check without re-stating the amount in the certification is, of course, valid and in the past has been the common practice. A bank is not bound to know more than its drawer's signature and the sufficiency of his funds; it is not bound to know correctness of the amount of a check and, in a case where it cer-

tifies a check raised from \$15 to \$1,500, it would probably be an unwise practice to include such amount in its certification stamp for it might be estopped from questioning the amount as against a holder in due course, whereas upon an ordinary certification it would not be liable for the raised amount. Metropolitan Nat. Bk. v. Marchants' Nat. Bk., 55 N. E. (Ill.) 360. Parke v. Roser, 67 Ind. 500. Marine Nat. Bk. v. Nat. City Bk., 59 N. Y. 67. Continental Nat. Bk. v. Tradesmen's Nat. Bk., 65 N. E. (N. Y.) 1108. Louisiana Nat. Bk. v. Citizens' Bk., 28 La. Ann. 189. Security Bk. v. Nat. Bk. of Republic, 67 N. Y. 458. (*Inquiry from Pa., Feb., 1918, Jl.*)

Effect of remittance stamp

75. A customer issues checks upon which has been stamped "The First State Bank of B will remit for this check in Eastern exchange, without charge" and questions whether the use of this stamp would make the bank liable as upon certification or simply convey the information that the check will be paid at par. *Opinion:* The remittance stamp having been placed on the checks before they were issued would not have the effect of a certification. A possible question might arise whether the stamp affected the negotiability of the check and the words "if desired," if added would remove any doubt thereon. First Nat. Bk. v. Slette, 67 Minn. 425. Contrary case, Security Tr. Co. v. Des Moines County, 198 Fed. 331. (*Inquiry from Minn., May, 1913, Jl.*)

Stopping payment of certified checks

76. Drawee bank promising by wire to pay customer's check is liable to holder and drawer cannot thereafter stop payment, but similar promise over telephone is not binding, because acceptance must be in writing and drawer's right to stop payment continues. (*Inquiry from Ala., Nov., 1914, Jl.*)

77. A gives B a check for \$100, and B procures its certification. Shortly afterward A orders the bank to stop payment. Inasmuch as the check is the obligation of the bank as soon as certified, the bank asks whether it is under any legal obligation to A. *Opinion:* The stopping of payment is optional with the bank and it is under no obligation to obey the drawer who has no right to order payment stopped. In no event should payment be stopped upon the request of the drawer unless he can show

that he has been defrauded by the payee and sufficiently indemnifies the bank. (*Inquiry from Ill., Feb., 1916.*)

78. A bank is not compelled to refuse payment of a certified check merely upon request of the drawer who says that he has been defrauded and that he would not be liable to the holder, even though the drawer offered security to the bank; at the same time the bank might accept the security and comply with the request of the drawer. (*Inquiry from N. Y., Dec., 1913.*)

79. If a certified check gets into the hands of an innocent holder the certifying bank is compelled to pay. If it remains in the hands of a payee who has procured it by fraud, the decisions are divided as to the rights of the bank refusing payment. There are decisions to the effect that the bank can interpose fraud upon the drawer as a defense to the check in the hands of the payee, where the check has been certified for the drawer, but not where it has been certified for the holder; and there are contrary decisions that the check, whether certified for the drawer or for the holder, is enforceable by even a fraudulent payee, and that equities of the drawer cannot be interposed by the bank in defense. See, for example, *Carnegie Trust Co. v. First Natl. Bank*, 141 N. Y. Supp. 745; *Times Sq. Auto Co. v. Rutherford Nat. Bank*, 73 Atl. (N. J.) 479; *Blake v. Hamilton Dime Sav. Bank Co.*, 79 Ohio State 189; *Meriden Nat. Bank v. First Nat. Bank*, 7 Ind. App. 322. (*Inquiry from Conn., Feb., 1915*)

Stopping payment of checks certified for drawer

80. Two checks for \$1,000 and \$1,775, respectively, were presented by the maker for certification. Learning that he had been defrauded, the maker requested the bank to stop payment on the two checks. The bank's contention is that it cannot comply with the request because in any case it guarantees payment and is liable to an innocent holder. *Opinion:* It is doubtful whether the maker of a check which he has procured to be certified has the right upon tendering full indemnity against loss, to stop payment; at the same time it is to the interest of the bank to protect its customer as far as possible. If full indemnity is offered to the bank to protect it against loss incurred for refusing payment of these certified checks, it seems proper to refuse payment upon presentment,

marking the checks "payment stopped" to prevent their further negotiation. This would give an opportunity to ascertain whether the holder was an innocent purchaser and if he did not have an enforceable title and received no value from the bank in which he deposited the items, there would be a good defense. If he had an enforceable title the bank would have to pay the amount, protest fees and interest but would be indemnified by the maker's bond. (*Inquiry from N. J., Nov., 1917.*)

81. A bank certified a check for the drawer and the payee procured it from the drawer by fraud. Can the bank interpose such fraud upon the drawer in defense of payment? *Opinion:* In the present case the holder of this check had no right to use it, but should have returned it to the drawer. Instead of so doing, the holder deposited it in bank for collection, and the certifying bank, at request of the drawer, refused to pay it, and the check was protested. It appears under the circumstances the refusal to pay was rightful. Of course the presenting bank properly protested the check, and the certifying bank would undoubtedly be held liable to an innocent purchaser of the check. If, however, no value was given for the check by the bank in which it was first deposited, so as to constitute that bank an innocent purchaser, then the question would arise whether, in any event, the certifying bank could defend payment if sued thereon. According to a New Jersey case, *Times Square Automobile Co. v. Rutherford Nat. Bk.*, 73 Atl. 479, it was held that, where a bank certifies a check for the drawer, and the payee has procured it from the drawer by fraud, the bank can interpose such fraud upon the drawer in defense of payment. According to other cases, it could not. But whether or not the certifying bank would be held ultimately liable, it seems its action in refusing payment was rightful as it would give the drawer an opportunity to start some proceedings enjoining collection of the check in the event it was not in the hands of a holder in due course. (*Inquiry from Del., Feb., 1919.*)

82. A check to drawer's order was certified for the drawer, who indorsed it to B. B cashed the item at the D bank. The drawer upon learning that B was guilty of fraud, stopped payment, and the certifying bank refused to pay the D bank. *Opinion:* D bank paid value to B for the certified check without notice of the fraud and as a

holder in due course can recover from the certifying bank. Had B presented the check to the drawee some (but not all) authorities hold that the certifying bank could refuse payment and plead in defense the fraud upon its depositor. (*Inquire from Okla., June, 1914, Jl.*)

Stopping payment of check certified without authority

83. A bank officer authorized to certify checks, has no authority to certify checks drawn by himself (Claffin v. Farmers Bank, 25 N. Y. 293) and, the check carrying notice of invalidity on its face, the bank would have the right to refuse payment against any holder. (*Inquiry from Pa., May, 1918.*)

Certification of stopped check by mistake—Right of replevin for recovery of stopped certified checks

84. A check was issued in December and payment stopped in January. In March it was certified through error. The certifying bank immediately wired the payee not to use the check. The check not having been presented, and the account being held under dispute, the bank asks how it can proceed to compel the holder to surrender the check. *Opinion:* Assuming the payee has no enforceable right or title to the check which was certified through error after payment had been stopped, the proper procedure would be an action of replevin against him to obtain possession of the instrument. An action of replevin lies for recovery of such an instrument. See, for example, Smith v. Eals, 46 N. W. (Ia.) 1110, holding that the acceptor of a bill of exchange which has subsequently been rendered void by a material alteration may maintain an action of replevin therefor against the holder. Whether or not there could be coupled with this action an injunction restraining the payee from negotiating the check is a question for the local attorney to decide. (*Inquiry from, Conn., May, 1919.*)

Certification by telegraph

85. The drawee of a bill telephones to a telegraph agent to wire acceptance. *Opinion:* The acceptance is valid and binding as being an acceptance in writing by the drawee by the hand of his agent. Rambo v. Bk. 88 Kan. 257. Ballard v. Home Nat. Bk., 91 Kan. 97. Bk. v. Garretson, 51 Fed. 168. Bk. v. Bk., 114 Mo. App. 663. Geylin v. De Villeroi, 2 Houst. (Del.) 311. Hirsch v. Beverly, 125 Ga. 657. Trundy v.

Farrar, 32 Me. 225. Cocke v. Campbell, 13 Ala. 286. Kirklin v. Atlas Sav. etc., Assoc., 107 Ga. 313. Phelps v. Sullivan, 140 Mass. 36. Worrall v. Munn, 5 N. Y. 229. Central Tr. Co. v. Bridges, 57 Fed. 753. Webb v. Browning, 14 Mo. 354. Piercy v. Hedrick, 2 W. Va. 458. Welch v. Hoover, 29 Fed. Cas. No. 17368. Fountain v. Bookstaver, 141 Ill. 461. Long v. Colburn, 11 Mass. 97. Bk. of North America v. Embury, 21 How. Pr. (N. Y.) 14. (*Inquiry from Kan., Jan. 1915, Jl.*)

86. A bank cashing a check upon another bank on faith of a telegram by the drawee that it will pay the check can hold the latter as an acceptor. (*Inquiry from Okla., Oct., 1908, Jl.*)

87. In reply to a request to pay a certain check, the drawee bank telegraphed "Signature being genuine, will pay John Smith's check for two hundred dollars." *Opinion:* The drawee bank would be liable and an acceptor under the Negotiable Instruments Law to one, who on faith of the telegraphic promise, purchased the check for value. First Nat. Bk. v. Commercial Sav. Bk., 87 Pac. (Kan.) 746. Kohn v. Walton, 46 Ohio St. 195. Bk. v. Garretson, 51 Fed. 168. Coffman v. Campbell, 87 Ill. 98. (*Inquiry from Okla., Dec., 1910, Jl.*)

88. After the drawee bank has wired the holder that it will pay a specified check, it is too late for the drawer to stop payment. The telegraphic promise by the drawee to pay binds it as an acceptor of the check. But where the drawee promises to pay the check over the telephone, it is not bound, the acceptance not being in writing, except in Texas where an oral promise to pay will bind the bank. Henrietta Nat. Bk. v. St. Nat. Bk., 80 Tex. 648. Elliott v. First St. Bk., 152 S. W. (Tex.) 808. Van Buskirk v. St. Bk. of Rocky Ford, 83 Pac. (Cal.) 778. Home Nat. Bk. v. First St. Bk., 133 S. W. (Tex.) 935. (*Inquiry from Texas, May, 1917, Jl.*)

Note: The Negotiable Instruments Law requiring acceptances to be in writing was passed in Texas in March, 1919.

89. A bank received a wire, "Will you pay John Doe's check for one hundred dollars?" and replied by wire "Yes, we will pay John Doe's check for one hundred dollars." Payment of the check was stopped. *Opinion:* The drawee bank was bound to pay the amount of the check to one who purchased it on faith of the telegraphic promise.

The bank accepting the check by wire had the right to charge the amount to the drawer's account the same as in the case of a check, certified over the counter, and the drawer cannot thereafter stop payment. *Bk. v. Garretson*, 51 Fed. 168. *Coffman v. Campbell*, 87 Ill. 98. (*Inquiry from Tex., Sept., 1912.*)

Certification by telephone

90. A bank answered an inquiry over the telephone that certain specified checks drawn on it were good, but before presentment the drawer stopped payment. *Opinion:* The bank was not liable to the holder of the checks. (*Inquiry from Ala., Dec., 1912, Jl.*)

91 The drawee of a check answering the holder's inquiry concerning John Doe's check for \$170 replied over the telephone "Yes, John Doe is good for \$170." Before the check is presented, the maker stops payment. *Opinion:* The certification over the telephone is not valid under the Negotiable Instruments Law which requires an acceptance to be in writing. *Van Buskirk v. St. Bk. of Rocky Ford*, 35 Colo. 142, (leading case) *Neg. Inst. Act.* 132. (Commsr's. dft.). (*Inquiry from Conn., Nov., 1910, Jl.*)

92. A bank certified its customer's check over the telephone and subsequently the account was attached by a creditor of the customer, who claimed that the certification was invalid. *Opinion:* The certification not being in writing, was not legal and binding under the Negotiable Instruments Law. (*Inquiry from Mo., Jan., 1911, Jl.*)

93. A promise over the telephone to pay a check is not binding as an acceptance, not being in writing. Notwithstanding a verbal promise over the telephone to pay, the bank is bound to pay another check, first presented, which would reduce the balance below the amount necessary to pay the first stated check. (*Inquiry from N. J., April, 1911, Jl.*)

94. A bank has been in the habit of accepting checks of its customers over the telephone. It immediately charges the customer's account with the item and credits the "certified checks" account, treating it as though it had been certified over the counter. *Opinion:* A promise to pay a check over the telephone not being in writing is not valid nor binding as an acceptance. (*Inquiry from Okla., Dec., 1911, Jl.*)

95. The certification of a check by telephone is not valid under the Negotiable Instruments Law of Ohio, because not in writing. (*Inquiry from Ohio, Dec., 1909, Jl.*)

96. A drawee bank receiving an inquiry over the telephone whether the check of Mr. A. . . . is good and will be paid replies in the affirmative, and afterwards refuses to pay the check because payment has been stopped. *Opinion:* Oral promise over telephone or otherwise by a drawee of check to pay same not binding because acceptance must be in writing—Nor can bank in absence of fraud be held liable to holder who has cashed check on faith of promise on equitable principle of estoppel, as this principle inapplicable in face of positive statutory requirement of written acceptance. (The courts of Pennsylvania would probably follow this rule.) (*Inquiry from Pa., Mar., 1914, Jl.*)

97. A gave B his check. B took it to a bank in another town which asked the drawee over the telephone "Is check of A good?" The drawee replied that check was good if signature was genuine. Before presentment A stopped payment. The purchasing bank threatens suit unless check and protest fees are paid. *Opinion:* An oral promise over the telephone by the drawee to pay a check is not binding under the Negotiable Instruments Law because the acceptance must be in writing. *Van Buskirk v. St. Bk. of Rocky Ford*, 35 Colo. 142. *Rambo v. First St. Bk. of Argentine*, 128 Pac. (Kan.) 182. *Ballen & Friedman v. Bk. of Krenlin*, 130 Pac. (Okla.) 539. (*Inquiry from Tenn., Feb., 1915, Jl.*)

98. A gave B his check for \$500 upon which was indorsed by B the condition that the check was given "when contract to be drawn is satisfactory to both parties." B cashed the check at his bank, but only after the bank received the oral promise of the drawee over the telephone. Failing to agree upon a satisfactory contract, A stopped payment on the check. The facts show that B's bank did not give the drawee the information on back of the check. Is the drawee bound by its oral promise? *Opinion:* In Texas an oral promise to pay a check will bind the bank but the check must conform to the terms of the promise, and where a bank promises to pay a check for \$500 and the check as presented is coupled with a condition making it payable only if a future drawn contract is satisfactory, the check

does not conform to the promise and the bank is not bound. *Lindley v. First Nat. Bk.*, 76 Iowa 629. *Gates v. Parker*, 43 Me. 544. *Murdock v. Mills*, 11 Mete. (Mass.) 5. *St. Bk. v. Citizens Nat. Bk.*, 114 Mo. App. 663. *Ulster Co. Bk. v. McFarlan*, 5 Hill (N. Y.) 432. *Brinkman v. Hunter*, 73 Mo. 172. (*Inquiry from Tex.*, July, 1917, *Jl.*)

Note: Under the Negotiable Instruments Law passed in Texas, in March, 1919, an acceptance must be written.

99. A bought an ice plant from B for \$900, but discovered that certain parts of the machinery amounting in value to \$80 were missing. A delivered to B two checks in payment, one for \$820 and another for \$80. In the \$80 check, he stated that the sum was for the parts of the machinery he did not get. The bank at the request of B promised over the telephone to pay the checks. Before presentment A notified the bank not to pay the \$80 check. *Opinion*: The bank is not legally bound to pay the check because a telephone promise is not binding as an acceptance, and where payment is subsequently stopped the bank should not pay. (*Inquiry from W. Va.*, Jan., 1909, *Jl.*)

Revocation of certification by wire

100. A check was certified by wire for the holder thereof. The drawer of the check under a claim of fraud of the payee stops payment. The holder who is not a holder in due course, brings suit against the certifying bank and the bank acting as stakeholder, takes the position that the drawer may interplead and set up the defense of fraud. *Opinion*: The certification is not on the check but is a promise to pay the check upon which one who advances value on faith thereof would be protected; but where, as is alleged, the holder is not a holder in due course, and the promise is procured by fraud or without consideration, it might be contended, with success, that such promise is revocable. *Barthgate v. Exchange Bk.* 205 S. W. 875. *McKnight v. Parsons*, 136 Iowa, 390. *Boldinger et al. Mfg. Co. v. Trust Co.*, 93 Misc. 94, 156 N. Y. 145. (*Inquiry from Mo.*, Feb., 1919.)

Overcertification of check by national bank

101. A national bank asks if it is unlawful for it to certify a check when the funds on deposit are sufficient. *Opinion*: It is not unlawful for an national bank to certify a check drawn against sufficient funds. The

only provision of the National Bank Act is one that prohibits and punishes overcertification. See Revised Statutes of U. S., Section 5208, which makes it unlawful for any officer, clerk or agent of a national bank to certify a check unless the drawer has on deposit at the time of certification an amount of money equal to the amount specified in the check. (*Inquiry from Pa.*, June, 1917.)

Right to ultimate possession of paid certified check

102. A bank asks as to whom a certified check belongs after presentment and payment, whether to the customer to whose account the amount was charged when the check was certified, or to the bank. *Opinion*: It is the custom of banks to deliver paid certified checks to the customer as paid vouchers, the same as ordinary checks. The customer has a right to ultimate possession. (*Inquiry from N. C.* Sept., 1920.)

103. A bank asks whether a depositor can legally demand and compel a bank to return his certified check when paid. *Opinion*: A depositor has the ultimate right of property in his checks which the bank has paid. But the bank has a temporary right to the possession of paid checks as its evidence of having paid their amounts. After the account is settled and agreed to, the ultimate right to the check is in the depositor. (*Inquiry from Okla.*, May, 1918.)

104. A customer brings to a bank a draft for \$1,900 and draws a check against it which he has certified. He does not use it and returns the same to the issuing bank and receives back the draft for which the certified check was issued. The cashier to whom the certified check is returned, cancels the same, but, instead of leaving it on file with the bank, takes it with him when he goes to another institution. Who is entitled to the check? *Opinion*: The bank in whose name the certified check was issued is entitled to it. It does not belong to the former cashier nor does it belong to the customer for he gave no value for it. It would only be in case the bank received value for the draft so that the customer gave value for the certified check that he would be entitled to it instead of the bank. In any event the bank could not be held liable on the check. It could not get into the hands of an innocent purchaser because the word "cancelled" on it would constitute notice. (*Inquiry from S. C.*, April, 1919.)

Right to possession of unused certified check

105. The customer of a bank drew a check of \$250 in favor of the state treasurer, which was certified by the bank's assistant cashier. A month later the check, never having been used, nor endorsed was returned to the bank by the customer with a request that the bank send him a draft for the amount. The request was refused and the customer demanded the return of the check. *Opinion:* The customer and not the bank has a better right to the check, which should be returned after cancellation of the certification. *Pickle v. Muse*, 88 Tenn. 383. (*Inquiry from Ida.*, Mar., 1912. *Jl.*)

Certification of check "Not payable through an express company."

106. On the presentation of a check with the provision "Not payable through an express company," it is asked, would the paying bank have the right to certify the item in the usual manner, or should the certification contain a similar restriction? *Opinion:* The bank might certify either with or without adding to its certification "Not payable through an express company" as in either event the certification would be according to the terms of the check, namely, that it was not payable when presented through an express company. The effect of such certification would be to release the drawer, and the holder of the check would have to look to the bank for payment by presenting same through an agency other than an express company. (*Inquiry from Va.*, April, 1917.)

Certification of check containing memorandum such as "in full of accounts," etc.

107. A bank certifies checks bearing notations on the back such as "in full of account to date," "in payment for rent to Feb. 1st," "for 1911-1912 taxes," etc., and asks if its certification under such conditions would involve the bank in any way. *Opinion:* The certification of checks bearing added conditions or marginal memoranda of some sort might in certain cases involve the certifying bank with additional burdens and responsibilities where the memoranda has been tampered with between certification and payment. (*Inquiry from Cal.*, July, 1914.)

Certification of check payable on condition

108. A bank certified a check for a customer and the understanding was and so stated on the check that it was only to be used in case of forfeit. Later when the check was presented, the certifying bank, upon the advice of the maker, refused payment because the condition was not complied with. *Opinion:* Such check would be a non-negotiable order on the bank to pay and the certification would be likewise conditional. The bank would be liable only in the event the maker fails to carry out the transaction, in which event the amount was payable as a forfeit. (*Inquiry from Pa.*, Dec., 1915.)

Injunction against bank paying certified check

109. A and B are husband and wife. A had an account with his bank and closed the same, taking certified checks payable to the order of himself for the amount. B has brought action against A and has obtained a court order enjoining the bank from paying the certified checks and restraining A from presenting them for payment or negotiating them. The bank asks what would be its liability notwithstanding the injunction, if the checks were presented. *Opinion:* A decree of the court enjoining the bank from making payment should be obeyed, but as there is a possibility that, despite this injunction or before it was issued, A has negotiated the checks, it would seem that the bank should have the order modified so as either to permit it to pay the checks if presented by a bona fide transferee or else require that B give to the bank a satisfactory bond of indemnity to save it harmless from liability in refusing payment to a bona fide holder. There is very little authority on this subject, but see *Grobe v. Roup*, 28 S. E. (W. Va.) 699 and *Petty v. Dunlap Hardware Co.*, 25 S. E. (Ga.) 697. (*Inquiry from Ohio*, April, 1915.)

Check certified for holder—Right of holder of unindorsed check to recover from certifying bank where drawer has equities against holder

110. A corporation, which is customer of a bank, made a check payable to its own order and without indorsing it delivered it to the present holder who had it

certified. There is a dispute between the customer and the holder. The customer states that it will not indorse the check and desires that the bank cancel the certification and credit its account, offering an indemnity bond to save the bank harmless. The present holder claims to hold the check for value given. The bank asks how to proceed. *Opinion:* It has been held that where the payee of a check transfers it without indorsement and the transferee has it certified, the latter holds the check subject to defenses, but if there is no defense to the check, the holder can recover against the bank. See *Meuer v. Phenix Nat. Bank*, 42 Misc. (N. Y.) 341, affirmed in 183 N. Y. 511. Unless the parties can adjust the matter between themselves, it might be the proper procedure for the bank to recredit the amount to the customer upon receipt of a sufficient bond of indemnity to protect the bank should it be held ultimately liable. (*Inquiry from N. Y., Jan., 1918.*)

**Authority of bank officer to represent
or guaranty genuineness of certified
check of another bank**

111. A merchant sold \$500 worth of merchandise, taking in payment a certified

check drawn on a bank in another city. However, before parting with the goods the merchant went to his bank and asked the advice of the cashier as to the genuineness of the check. The cashier examined the check, saying that he was familiar with the certification, and advised the depositor that he was safe in parting with his goods, and that he would let him have cash for the check. After the sale the check was deposited by the merchant who was allowed to withdraw \$500. The check and certification proved to be a forgery, and the bank wants to recover from its depositor. *Opinion:* It is doubtful whether a decision upon this precise state of facts exists. The question would be whether the cashier had authority to bind his bank by such a representation so as to constitute an estoppel. In *Security Bank v. National Bank*, 67 N. Y. 458, a teller who certified a raised check said to the holder, "You need not have the slightest doubt about that check; it is correct in every particular." This statement was held not to bind the bank. It is doubtful whether the cashier's representation in this case will bind the bank. For other authorities see *Continental Nat. Bk. v. Tradesmen's Bank*, 173 N. Y. 272; *Clews v. Bank of N. Y.* 114 N. Y. 70, (*Inquiry from Md., June, 1918.*)

ACCEPTANCES—BANKERS

**Difference between bankers and trade
acceptance**

112. What is the difference between a banker's and a trade acceptance? *Opinion:* A trade acceptance is a draft or bill of exchange drawn by the seller on the purchaser of goods sold and accepted by such purchaser. A banker's acceptance is a draft or bill of exchange of which the acceptor is a bank or trust company or person or corporation lawfully engaged in the business of granting bankers' acceptance credits. (*Inquiry from N. Y., Jan., 1917.*)

Liability of drawer to holder

113. When a draft or bill of exchange is accepted by a bank, is the drawer relieved from liability thereon? *Opinion:* Where a bill of exchange is drawn upon a bank, payable at a future date, and is accepted, the bank becomes principal debtor thereon, but the drawer remains liable to the holder, provided the necessary steps on dishonor be duly taken. The statutory rule applicable to checks that where

the holder procures it to be certified, the drawer and all indorsers are discharged is based on the reason that the check is payable in money on demand and if the holder chooses to take payment in a certified check instead of money, the drawer is discharged. But this rule does not apply to a bill of exchange drawn on a bank payable at a future day. *Times Square Auto Co., v. Rutherford Nat. Bank*, (N. J.) 73 Atl. 479; *Haddock etc. Co. v. Haddock*, 192 N. Y. 499; *In Re Stevens*, 74 Vt. 408. (*Inquiry from N. Y., April, 1920, Jl.*)

114. Where a bill is drawn under a confirmed bankers credit, has the holder recourse to the drawer in the event of its non-payment by the acceptor? *Opinion:* The question is covered by Section 61 of the Negotiable Instruments Act which provides "The drawer by drawing the instrument . . . engages that on due presentment the instrument will be accepted or paid, or both, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he

will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it." It is therefore clear that the drawer engages that the draft will be accepted and that if dishonored and the necessary proceedings taken he will pay the amount. (*Inquiry from N. Y., June, 1919.*)

Addition of words "without recourse"

115. May the drawer of a bill under a confirmed bankers credit relieve himself from liability to the holder by the addition of the words: "without recourse?" Would this affect the negotiability of the bill or its sale to a third party? *Opinion:* The words "without recourse" would relieve the drawer from liability for non-payment. It would not affect the negotiability of the bill but whether it would affect its sale to a third party is another question. The bill would be weakened in that the third party would have no recourse upon the drawer, but where the accepting bank is of sound financial standing, this should not materially weaken the marketability of the bill. (*Inquiry from N. Y., June, 1919.*)

**Liability of drawer to acceptor. (a)
where purchaser arranges credit (b)
where drawer arranges credit**

116. A shipper of goods to Europe has arranged with an acceptance corporation to pay drafts covering the invoices to the consignee with cash or a bankers acceptance. In case the consignee is unable to pay his obligations to the acceptance corporation when they fall due, is the consignor in any way liable? *Opinion:* The shipper's liability on the draft drawn by him under a bank credit would depend upon whether he were drawing on a bank under a confirmed credit furnished by the consignee, or whether the shipper were obtaining credit from the bank, under an arrangement whereby the shipper would draw on the bank and lodge with the bank as security his documentary export bills for collection.

In the first instance the shipper draws against a credit provided by the purchaser and there is no recourse by the accepting bank against the drawer in the event the purchaser fails to make good his obligations to the bank. The insertion in the draft of the words "without recourse" is not necessary.

In the second case the credit is arranged by the shipper and the draft is accepted for his accommodation. In such a case the acceptor would have recourse against the

drawer. *Christian v. Keen*, 80 Va. 369 has a certain analogy. It holds that where an acceptance is for the drawer's accommodation the acceptor does not thereby become entitled to sue the drawer upon the bill; but when he has paid the bill, and not before, he may recover back the amount from the drawer in an action for money had and received. (*Inquiry from N. Y., Mar., 1920.*)

Insolvency of acceptor

117. A bank accepts a ninety-day bill drawn by one of its customers against a letter of credit arrangement and covering importation of goods. The accepting bank negotiates the bill but does not place the proceeds to the credit of its customer. (1) Should the accepting bank fail, could the drawer defend against liability on the ground that he did not receive the benefit of the funds and that the purchaser was not a holder for value. (2) Would the drawer have a prior claim against the accepting bank on the ground that the proceeds were received for a specific purpose and the acceptor had no right to use the funds for any other purpose. *Opinion:* (1) The purchaser before maturity would be a holder in due course of a negotiable instrument with right to enforce payment from the drawer free from defenses or equities between prior parties. Where the liability of the drawer was preserved by due protest and notice, it would become absolute and he could not plead in defense that he never received the money from the accepting bank. (2) If the funds had been placed to the drawer's credit as per arrangement, the accepting bank would have become debtor and upon its failure, the drawer would have no preference; but where the acceptor received funds for the specific purpose of placing to the credit of the drawer and never did so, there might be ground for a contention that the funds were held as trustee and the acceptor never became debtor so that if at the time of failure, the proceeds could be traced and identified, the drawer might claim in full as a trust fund. If, however, before the failure the funds had been so dissipated that their identity was lost and they could not be traced or identified in original or substituted form, the priority of claim would be gone. (*Inquiry from N. Y., June, 1919.*)

Revocation of acceptance made through error

118. A bank which had accepted a draft requested the bank presenting it for accept-

ance to return it for cancellation of the acceptance made through error. No advice had been sent to any of the interested parties with regard to the acceptance. May the collecting bank return the draft, if the collection is restored to its status prior to the acceptance of the draft? *Opinion:* Where a check or draft has been certified by mistake, the certifying bank has the right to revoke its certification, provided no rights of other parties have intervened. *Dillaway v. Northwestern Nat. Bank*, 82 Ill. App. 71; *Mt. Morris Bank v. 23rd Ward Bank*, 70 N. Y. Supp. 78 (certified note); *Ranking v. Colonial Bank*, 64 N. Y. Supp. 32. So also the acceptance of a draft through mistake may be revoked provided no change of circumstances has occurred which would render it inequitable. This principle applies where as here the draft is still in the hands of the bank which held it when it was accepted and it is notified so speedily that the rights of third parties have not intervened. (*Inquiry from Cal., June, 1918.*)

Right of state banks and trust companies to accept

119. Do the laws of Michigan give the state banks and trust companies the right to accept? *Opinion:* By act approved May 10, 1917 (No. 299 Laws 1917) the Michigan legislature amended Section 4 of the Banking Law which contains grant of powers to banks (commercial and savings) by adding the following power: "Eighth, To accept

for payment at a future date, not to exceed six months, drafts drawn by its patrons, but no banks shall accept such drafts in the aggregate to an amount exceeding fifty per cent of its capital and undivided surplus." No corresponding grant of power to trust companies is found. (*Inquiry from Mich., Aug. 1919.*)

Investment in bankers' acceptances by New York savings bank

120. Has a New York savings bank the right to buy bankers' acceptance that does not bear the indorsement of a Federal Reserve member bank? *Opinion:* Under Sec. 239 of New York Banking Law, a savings bank may invest in bankers' acceptances of banks, national banks or trust companies incorporated under the laws of New York, or under Federal law, and having their principal place of business in the state, where such acceptances are of the kind and maturities made eligible by law for rediscount with Federal reserve banks, although not indorsed by a member bank, which indorsement is required to authorize a Federal reserve bank to discount such acceptances. While such indorsement is a prerequisite for rediscount by a Federal Reserve Bank, it is not made a condition of eligibility by the New York law for investment by a savings bank. If the acceptance is of the described kind and maturity, it is eligible for investment. Sec. 239 N. Y. Bank. Law, 1918. Sec. 13 Fed. Reserve Act. (*Inquiry from N. Y., April, 1920, Jl.*)

ACCEPTANCES—TRADE

Forms

121. The following standard form has been approved as negotiable and valid:

TRADE ACCEPTANCE

FORM APPROVED BY THE
AMERICAN TRADE ACCEPTANCE COUNCIL
EMBRACING COMMITTEES OF
CHAMBER OF COMMERCE OF THE U. S. A.
AMERICAN BANKERS' ASSOCIATION
NATIONAL ASSOCIATION OF CREDIT MEN

No. _____	_____ 192	(CITY OF DRAWER)	(DATE)
To _____	(NAME OF DRAWEE)	(ADDRESS OF DRAWEE)	
On _____	(DATE OF MATURITY)	Pay to the order of _____	(NAME OF PAYEE)
		Dollars, (\$ _____)	
The obligation of the acceptor hereof arises out of the purchase of goods from the drawer. The drawee may accept this bill payable at any bank, banker or trust company in the United States which he may designate.			
Accepted at _____	on _____ 192	(CITY)	(DATE)
Payable at _____	(NAME OF BANK)	(SIGNATURE OF ACCEPTOR)	
By _____		(SIGNATURE OF DRAWER)	

Form designed for physicians

122. A corporation dealing in physicians' supplies is trying to devise a form of trade acceptance which it can induce its physician customers to sign at the time they ask for credit extension. The corporation states it is almost impossible to secure a physician's signature on a note or the regular trade acceptance and it suggests the following

"Invoice acceptance.

Notice to Customers: We allow one half the cash discount to customers immediately signing our invoice acceptances. 7% interest after 30 days.

Dated: Chicago, Illinois—192

To

Dear Sir: Please pay to John Doe, Cashier, or to his order the sum of _____dollars, on _____192 at _____Bank, with interest at the rate of _____ per cent from _____ 192 until paid, with exchange, and with all costs of collection and with _____ days of grace, in payment of goods purchased from us under our order number _____ invoice number _____.

Yours very truly,

A Co., by John Smith, President."

Accepted: At _____

On _____192

Is this a proper and legal form? *Opinion:* The only provision that might possibly affect the negotiability of the acceptance is "with all costs of collection" and if there was added thereto the words "if not paid at maturity" the instrument would be negotiable. The Negotiable Instruments Law expressly provides that "the sum payable is a sum certain within the meaning of this Act although it is to be paid (1) with interest or . . . (4) with exchange, whether at a fixed rate or the current rate; or (5) with costs of collection or an attorney's fee, in case payment shall not be made at maturity." This covers the provisions in the form as to interest and exchange but if the provision "with all costs of collection" should be construed as covering costs incurred in presenting the check, this might be held to render the amount uncertain and the acceptance non-negotiable unless the words "if not paid at maturity" were added. The provision for days of grace and the statement of the con-

sideration do not affect negotiability. While the form is not quite as formal as the approved standard form of trade acceptance, there is no objection to it on the ground of non-negotiability except in the particular referred to. (*Inquiry from Ill., June, 1918.*)

"The drawee may accept this bill payable at any bank, banker or trust company in the United States which he may designate"

123. The following form of trade acceptance is suggested.

To _____ 192—

_____ after date, pay to order of ourselves _____ Dollars \$ _____

The obligation of the acceptor hereof arises out of the purchase of goods from the drawer.

Accepted _____)

Payable at _____) By _____

No _____ Due _____ 192—

Opinion: The form is negotiable and will meet the requirements of the Federal Reserve Act. The American Trade Acceptance Council has adopted a standard form, substantially the same as that suggested, with the added clause: "The drawee may accept this bill payable at any bank, banker or trust company in the United States which he may designate." The necessity of the last stated clause is to meet the rule of law that an acceptance made payable at another town than that of the acceptor is a qualified acceptance, varying the terms of the bill as drawn and discharging prior non-consenting parties. This necessity does not exist where the draft is made payable to "ourselves" and after acceptance is returned to and is negotiated by the drawer, because the latter thereby consents to the variation, but does apply when a draft is issued payable to a payee other than the drawer, for if this was negotiated and then accepted payable at a bank in another city, the prior non-consenting parties would be discharged by operation of the principle above referred to. *Walker v. Bk., 13 Barb. (N. Y.) 636. Niagara Bk. v. Fairman Co., 31 Barb. (N.Y.) 403. (Inquiry from Va., Nov., 1917, Jl.)*

Change in place of payment by acceptor

124. What is the effect of making an acceptance of a draft payable at a bank in another city than that of the drawee?

Opinion: It would seem (although a contrary contention has been urged) that notwithstanding the provision of the Negotiable Instruments Act that "an acceptance to pay at a particular place is a general acceptance unless it expressly states that the bill is to be paid there only and not elsewhere," an acceptance payable at a bank in another city is a qualified acceptance which discharges the drawer and indorsers from liability unless they have authorized or subsequently assented to the same. Under the English common law, where a bill was accepted at a particular place, it was a qualified acceptance rendering presentment at that place necessary as a condition precedent to action against the acceptor, whereas if the acceptance mentioned no particular place of payment, i.e. was payable generally, it was a general acceptance and the acceptor could be sued without presentment at that place. This rule was changed by statute (1 and 2 Geo. IV) which provided that an acceptance payable at a particular place should be deemed a general acceptance unless expressed to be payable "there only and not otherwise or elsewhere." The American judicial rule has always been in accord with the English statutory rule and the provision of the Negotiable Instrument Act which is similar to the English statute, is simply a codification of the American common law rule. It cannot be reasonably interpreted as abrogating the further rule, laid down in a number of American cases, that while an acceptance payable at a particular bank or place in the same town or city at which the drawee is addressed generally, is not a qualified acceptance, yet if the drawee, addressed generally, makes his acceptance payable at a bank or place in another town or city, it is a qualified acceptance. Otherwise, a drawee addressed generally in New York, might accept payable at a place in a distant part of the world, which would be a clear variation of the effect of the bill as drawn, and the non-consenting drawer, notwithstanding, still remain liable. (*Inquiry from N. Y., Nov., 1915.*)

Use of word "ourselves"

125. Should the printed form for trade acceptances include the word "ourselves" after the phrase: "pay to the order of," instead of leaving the space blank and writing in the name of the drawer? *Opinion:* This is, of course, optional. In view of the fact that most all trade acceptances are made payable to the seller's order,

it might be desirable to print the word "ourselves," instead of leaving the payee blank. (*Inquiry from N. Y., Dec. 1917.*)

Note stamped "this is a trade acceptance"

126. Will a Federal Reserve Bank consider an ordinary note stamped "This is a Trade Acceptance" as such an acceptance? *Opinion:* The instrument is a note and not a draft and the mere calling it a trade acceptance does not change its character. The Federal Reserve Board in Regulation A Series of 1916 and Series of 1917, covering rediscounts under section 13 of the Federal Reserve Act, defines promissory notes, drafts, bills of exchange and trade acceptances. A promissory note is "an unconditional promise in writing signed by the maker to pay" etc. A draft or bill of exchange is defined as "an unconditional order in writing addressed by one person to another, requiring the person to whom it is addressed to pay" etc. and a trade acceptance is "a draft or bill of exchange drawn by the seller on the purchaser of goods sold and accepted by such purchaser." (*Inquiry from N. Y., May 1918.*)

Legal effect of trade acceptance and note

127. Does a trade acceptance have any legal advantages over a plain note which has on it the same names as maker and indorser, which a trade acceptance has as drawer and acceptor? *Opinion:* The only difference is one of form. The legal effect of the instruments is substantially the same. Both the acceptance and the note contain a promise to make payment at maturity to the payee who is liable as indorser if the promise is not fulfilled. (*Inquiry from Ky., July, 1920.*)

128. Has the indorser of an acceptance the same liability as the indorser of a note? *Opinion:* If the buyer accepting a trade acceptance dishonors it at maturity, he is primarily liable thereon and the seller is liable as indorser, the same as if he had indorsed the buyer's note payable to his order, assuming he is duly charged with liability. (*Inquiry from Wis., Oct., 1917.*)

Date of trade acceptance

129. Is a trade acceptance which bears the date of July 1, which has been accepted July 10 and which reads "thirty days after date," due August 1 or August

10? It is our understanding that, although the date on a negotiable instrument is of importance, the instrument takes effect upon delivery, which we should think would be the date of acceptance. *Opinion:* Where a bill dated July 1, payable thirty days after date, is accepted July 10, the bill is payable thirty days after its date and not thirty days after date of the acceptance, because such acceptance is a signification by the drawee of his assent to the order of the drawer, which calls for payment thirty days after date of the bill. (*Inquiry from S. D., Oct., 1920, Jl.*)

Necessity and desirability of dating acceptance

130. Where a draft is made payable at a fixed period after the date of the instrument is it necessary and advisable that the acceptor date his acceptance? *Opinion:* There is no legal necessity for adding the date. The Negotiable Instruments Act requires that "the acceptance must be in writing and signed by the drawee." There is no requirement that the acceptance be dated, even in the case of bills payable a certain number of days after sight, although there is a practical necessity for dating the latter class of acceptance. There seems to be no practical advantage in dating the acceptance of a draft payable at a fixed period after date, unless there be some mercantile reason for so doing, which is not readily apparent. (*Inquiry from N. Y., April, 1919.*)

Ante-dating of acceptance

131. A trade acceptance dated April 23rd, calling for payment on July 23rd, was accepted under date of April 17th. What effect has this acceptance prior to the date of the instrument? *Opinion:* The ante-dating of the acceptance is valid under the express provision of the Negotiable Instruments Act, where the ante-dating is not done for an illegal or fraudulent purpose.

Under either the Negotiable Instruments Law or the law merchant, there is apparently no question but that the acceptance is valid where made by an individual and that it would be a promise to pay the bill at maturity according to its terms. But there is a question whether, in case an acceptance is made by a person in a representative capacity, it would charge with notice the holder to whom negotiated and put him on inquiry

as to the authority of the representative to bind his principal by dating the acceptance prior to the date of the draft. On this particular question no cases have been discovered. It has been held that the certification of a post-dated check before the day of its date is without authority and puts the holder on inquiry. An abundance of caution, in case the antedating of a trade acceptance is that of a corporation or by an agent, might dictate inquiry of the principal as to whether the same was authorized. If authorized, the acceptance is perfectly valid. (*Inquiry from Conn., July, 1920.*)

"After March 7th, 1919, pay to order of," etc.

132. A trade acceptance payable at a bank reads: "After March 7th, 1919, pay to the order of John Doe," etc. If presented for payment after such date, say March 30, is it the duty of the bank to pay or is the bank put on inquiry by reason of the lapse of time? Are such acceptances payable on demand at any time after the date named? Would it be better to say: "On demand after March 7th, 1919, pay," etc.? *Opinion:* Where a draft payable ninety days after date is accepted payable at a bank and is presented after maturity, opinions differ as to the authority of the bank to pay the overdue acceptance without express instructions, and our opinion has been previously expressed that it is safer to construe the authority as limited to the precise date of maturity. But the present form of draft is different, being an order to pay after a stated date and is probably designed to remove the doubt in the first stated case. Such form, when accepted payable at bank, may reasonably be construed as authorizing the bank to pay at any reasonable time after the date stated, the same as it would a check. The words "on demand" would not add anything to the order. (*Inquiry from Wash., March, 1918.*)

Signatures

Completing signature of drawer after acceptance not a material alteration

133. It has been the custom among merchants to send out trade acceptances with only a printed signature of the drawer, as, for example, "Smith Manufacturing Company," underneath which is a blank line starting with the word "By." After the acceptor has signed and mailed the instru-

ment back to the drawer there is added, in pen and ink, after the word "By", the words "John Smith, Treasurer." The purpose of the foregoing is to protect the instrument should it be lost in the mail or otherwise fall into improper hands. The question is raised whether there has been a material alteration which would entitle the acceptor to repudiate his obligation. *Opinion:* The completion of the drawer's signature after the instrument has been returned, accepted, would not be a material alteration within the meaning of the law. There is no change in the number or relations of the parties, and no change in the legal effect of the instrument, and, furthermore, the execution of the instrument by the acceptor, with the blank unfilled, would constitute an implied authority to the drawer to fill in the blank with his completed signature upon return of the instrument to him. *Decatur First Nat. Bk. v. Johnston*, 97 Ala. 655. *People v. Gorham*, 9 Cal. App. 341. *Moody v. Hoelkeld*, 13 Ga. 55. (*Inquiry from N.Y., Jan., 1918, Jl.*)

Corporation signature and indorsement by "Cashier"

134. A trade acceptance is signed "M & Co., John Smith, Cashier" to their own order and is also indorsed in the same way. Is this a proper indorsement? It has been accepted by the drawee payable at bank. May the bank at which the acceptance is payable demand an official indorsement, even though the indorsement has been guaranteed by another bank? *Opinion:* Whether M. & Co. is a firm or a corporation, the cashier has not by virtue of such office implied power to make or indorse negotiable paper. The rule is not the same as in the case of the cashier of a bank. Presumably the cashier of M. & Co., has been given authority to sign and indorse commercial paper. If so authorized, the signature is legal and valid and the bank at which the acceptance is payable cannot demand an official indorsement but would have the right to inquire as to the authority of the indorser. The Negotiable Instruments Act provides that "the signature of any party may be made by a duly authorized agent. No particular form of appointment is necessary for this purpose; and the authority of the agent may be established as in other cases of agency."

In view of the guaranty of the indorsement by a responsible bank, the acceptance

may be safely paid without making specific inquiry into the authority of the cashier. (*Inquiry from Pa., July, 1920.*)

Proper form of signature of corporation

135. A trade acceptance is accepted in the following form: "The A. Co., John Doe," without the affixation of an title such as "President" or "Treasurer." Is the acceptance legal? *Opinion:* It is not strictly essential to the validity of the signature of a corporation to commercial paper that the name or official title of the signing officer be affixed. In the event of suit to enforce the paper it would, of course, be incumbent upon the holder to prove that the name of the corporation was signed by a person having authority to do so. The designation of the official title would make the signature more complete in its indication of the relation which the signing official bears to the company and, probably, where the acceptance is to be rediscounted with the Federal Reserve Bank, such designation would make the instrument more acceptable. But in every case the enforceability of the paper depends on the authority of the signing officer.

The acceptance is legal if John Doe has authority to bind the A. Co. (*Inquiry from Ill., Aug., 1918.*)

Rate of interest on trade acceptances

136. Is a trade acceptance usurious, where it is drawn in a state where the rate of interest is permissible, upon a drawee in another state, where it is accepted and made payable, in which state such a rate of interest is usurious? *Opinion:* Ordinarily the validity of an acceptance is governed by the law of the state where the contract of acceptance is made and where it is made payable. *Hall v. Cordell*, 142 U. S. 116; *New York, etc., Bank v. Gobson*, 5 Duer (N. Y.) 574.

But in a contract such as this, between parties in different states, the problem of determining which law governs in deciding whether the contract is usurious is largely determined by the intent of the parties, if entertained in good faith and not for the purpose of evading the usury laws of another state.

In the present case the credit was extended by parties in a state where the rate was legal and it is fair to presume that the contract as to this interest was made with

reference to the law of such state, especially in view of the fact that, while the acceptance was executed and made payable in another state, the final consummation of the contract was by its delivery to the payee in the state of his residence, where the credit was extended. See *Staples v. Nott*, 128 N. Y. 403. *Eccles v. Herrick*, 15 Colo. App. 350. *Opdyke v. Merwin*, 13 Hun (N. Y.) 401. *McKay v. Balknap Savings Bank*, 27 Colo. 50. *Georgia State Bank v. Lewin*, 45 Barb. (N. Y.) 340. *McGarry v. Nicklin*, 110 Ala. 559.

The rate of interest will probably be held legal. (*Inquiry from Colo., Feb., 1919.*)

Effect of acceptance indorsed on back of bill

137. An acceptance by the drawee indorsed on the back of the bill, instead of being written across the face, while unusual, is valid at common law. Under the Negotiable Instruments Act, however, the holder is entitled to acceptance "on the bill," presumably on its face, but if the holder takes the indorsed acceptance, the instrument is valid and negotiable. *Daniel Neg. Inst.*, Sec. 498. *Haines v. Nance*, 52 Ill. App. 406. *Block v. Wilkerson*, 42 Ark. 253. (*Inquiry from Pa., June, 1919, Jl.*)

Trade acceptance propaganda not in restraint of trade

138. Various trade associations have adopted or are about to adopt resolutions recommending to their members, in effect, that trade acceptances be substituted for open accounts and that uniform terms of credit based upon trade acceptances be adopted. The question is asked whether co-operation along the lines covered by the resolutions is in contravention of the Sherman Anti-Trust Law. *Opinion:* Sec. 1, Act July 2, 1890, provides that "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor," etc. No violation of the foregoing would result. The action contemplated by the trade associations would tend to promote rather than restrain interstate trade. It, of course, is not con-

templated that members or others not adopting the scheme should be boycotted and refused all manner of credit, which would present a different situation. *Hopkins v. U. S.*, 171 U. S. 578. *Loewe v. Lamlor*, 208 U. S. 274. *Swift v. U. S.*, 196 U. S. 375. (*Inquiry from N. Y.*, Nov., 1917, *Jl.*)

Consideration

Trade acceptance for monthly balance of open account

139. A wholesaler sells to a retailer a number of small bills of goods. At the end of the month he attaches a statement of the amount due to a draft on the retailer, who accepts the draft and the wholesaler arranges with his bank for the discount of the paper. Is this the customary trade acceptance? The retailer might buy some little bill of goods every day for the month and sell the purchased article long before the draft from the wholesaler was presented for acceptance. *Opinion*: A trade acceptance has been defined as "a bill of exchange drawn by the seller on the purchaser of goods sold and accepted by such purchaser." The Federal Reserve Board has recently ruled that a bill drawn for a balance due on open account of long standing which is accepted by the debtor, might constitute a trade acceptance, but only those trade acceptances which are drawn contemporaneously or within a reasonable time after the shipment or delivery of goods sold can be treated as bills of exchange drawn against actually existing values. The time must be so reasonable as to justify the assumption that the goods are in existence in the hands of the drawee in their original form or in the form of proceeds of sale. It would seem that a bill drawn at the end of each month covering sales for the month would be within a reasonable time. (*Inquiry from Wis.*, Oct., 1917.)

Trade acceptance based on manufacture and installation of elevator supplies

140. May a trade acceptance be used by a concern which manufacturers and installs the articles manufactured, such as elevator supplies? *Opinion*: A trade acceptance as defined by the regulations of the Federal Reserve Board is "a draft or bill of exchange drawn by the seller on the purchaser of goods sold and accepted by

such purchaser." The Federal Reserve Board has held that the definition includes a draft for the compensation for advertising space and a draft "for the purchase price of electrical and mechanical goods, which include the cost of installation." (*Inquiry from N. J.*, Sept., 1918.)

Negotiability

Trade acceptance not conditional or qualified

141. Is a trade acceptance a conditional and qualified acceptance of a bill of exchange? *Opinion*: The Negotiable Instruments Act provides: "A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn." Unless the acceptor upon a trade acceptance varies the terms of the order of the drawer, the acceptance is not qualified. (*Inquiry from N. Y.*, Mar., 1920.)

142. The following is written across the face of the paper by the acceptor: "The obligation of the acceptor hereof arises out of the purchase of goods from the drawer." Does this phrase indicate that its payment is contingent upon the consummation of the contract between himself and the drawer? *Opinion*: This phrase written across the face of the acceptance does not make the promise of the acceptor conditional or contingent upon the consummation of the contract between the acceptor and the drawer. It is simply a statement of the transaction which gives rise to the instrument. The Negotiable Instruments Act provides that "an unqualified order or promise to pay is unconditional within the meaning of this Act though coupled with . . . a statement of the transaction which gives rise to the instrument." (*Inquiry from N. Y.*, Mar., 1920.)

143. When a trade acceptance is not paid when due, the acceptor is liable for the principal and interest. The drawer is also liable, provided the necessary steps upon dishonor are taken. Under the provisions of the California statute a trade acceptance is a negotiable instrument. *Ragsdale v. Gresham*, 141 Ala. 308. *Daniel Neg. Inst.*, Sec. 532. *Kerr's Civ. Code Cal.*, Secs. 3177, 3116. *Musson v. Lake*, 4 How. (U. S.) 262. *Allen v. Kemble*, 6 Moore P. C. 314. (*Inquiry from Cal.*, Dec., 1916, *Jl.*)

Note: The Negotiable Instruments Act has since been passed in California, and

under this, the ordinary form of trade acceptance is negotiable.

Effect on negotiability of clause "subject to discount of ——— per cent if paid on or before ———."

144. Is the negotiability of a trade acceptance affected by the insertion of the following clause: "subject to a discount of ——— per cent if paid on or before ———." *Opinion:* The case of *Farmers' Loan and Trust Co. v. Planck*, 152 N. W. (Nebr.) holds that such a clause does not affect the negotiability of commercial paper under the Negotiable Instruments Act. The court says: "The authorities upon this point are in conflict. In the following cases it is held that such a note is non-negotiable: *Fralick v. Norton*, 2 Mich. 130, 55 Am. Dec. 56. *Story v. Lamb*, 52 Mich. 525, 18 N. W. 248. *Way v. Smith*, 111 Mass. 523. *National Bank of Commerce v. Feeney*, 9 S. D. 550, 70 N. W. 874, 46 L. R. A. 732. *Farmers' Loan & Trust Co. v. McCoy & Spivey Bros.*, 32 Okla. 277, 122 Pac. 125, 40 L. R. A. (N. S.) 177." After discussing these cases the court continues: "The doctrine thus stated is in conflict with some of the Nebraska decisions and with the Negotiable Instruments Law. *Kirkwood v. First Nat. Bank*, 40 Neb. 484, 58 N. W. 1016, 24 L. R. A. 444, 42 Am. St. Rep. 683. *Stark v. Olsen*, 44 Neb. 646, 63 N. S. 37. *Fisher v. O'Hanlon*, 93 Neb. 529, 141 N. W. 157. Rev. St. 1913, Secs. 5320, 5322." The court also cites support of its decision *Loring v. Anderson*, 95 Minn. 101, 103 N. W. 722. *Harrison v. Hunter* (Tex. Civ. App.) 168 S. W. 1036.

The better opinion is that the clause in question does not render the instrument indefinite as to amount or time of payment and hence does not affect its negotiability. (*Inquiry from N. Y., Jan., 1918.*)

"5 per cent. discount will be allowed if this acceptance is taken up within 30 days from date"

145. A business house uses the regular form of trade acceptance and prints on the face of the acceptance the following words: "5 per cent. discount will be allowed if this acceptance is taken up within thirty days from date." The business house holds the acceptance until the thirty-day period has expired. If the buyer sends them the money they allow him 5 per cent. discount, cancel the trade acceptance and re-

turn it to him. If he does not pay in thirty days, they offer the trade acceptance to the bank for discount. At the time the acceptance is thus offered, the discount clause means nothing, for the discount period has expired. The bank, however, desires to be sure that the negotiability of the acceptance has not been destroyed by the added words. *Opinion:* A Minnesota case holds that a provision of this character does not affect negotiability, it being stated that it did not make the instrument uncertain as to amount. On the other hand, a decision in North Dakota holds that such a provision renders an instrument non-negotiable. Although the courts take different views on the proposition, the Minnesota court seems to hold the better view. *Loring v. Anderson*, 95 Minn. 101. *Nat. Bk. of Com. v. Feeney*, 12 N. Dak. 156. (*Inquiry from Minn., July, 1918, Jl.*)

Addition of phrase "maturity being in conformity with original terms of purchase"

146. A question arises as to the advisability of adding to the body of trade acceptances after the words "The obligation of the acceptor arises out of the purchase of goods from the drawer" the following "maturity being in conformity with original terms of purchase." *Opinion:* The addition of the phrase suggested will not affect the negotiability of the instrument. The advisability of such addition is a matter for business men who deal in trade acceptances. It is probably designed to indicate that the instrument is not drawn for a long-outstanding debt for purchased goods. (*Inquiry from N. Y., Sept., 1919.*)

Addition of words "with Chicago or New York exchange"

147. A firm in Chicago has prepared a form of trade acceptance, using the standard form, but changing it to read: "Accepted (date.) Payable at (designated bank or trust company) with Chicago or New York exchange." A bank desires to know whether the addition of the words "with Chicago or New York exchange" will destroy the negotiability of the acceptance. *Opinion:* The insertion of the words will not affect negotiability. The Negotiable Instruments Act expressly provides: "Sec. 2. The sum payable is a sum certain within the meaning of the act, although it is to be paid x x x 4, with exchange, whether at a fixed rate or at the current rate x x x ." (*Inquiry from Ill., July, 1918, Jl.*)

Insertion of waiver of exemption and attorney's fee clauses does not affect negotiability

148. Is there any reason why the usual waiver of homestead exemption, as well as provision for attorney's fees, should not be placed on trade acceptances? *Opinion:* The clauses waiving homestead exemption and agreeing to pay costs of collection, including attorney's fees, in case the instrument is not paid at maturity would not affect the negotiability of a trade acceptance any more than that of a promissory note. While their inclusion is perfectly legal, the advisability of such use is a question for those dealing in trade acceptances. (*Inquiry from Va., July, 1919.*)

Provision for costs of collection

149. Does a provision in a trade acceptance for the payment of costs of collection in case payment shall not be made at maturity affect its negotiability? *Opinion:* Negotiability is not affected. Neg. Inst. (*Inquiry from N.Y., June, 1918.*)

Provision for payment of interest after maturity

150. Does a provision for the payment of interest after maturity affect the negotiability of a trade acceptance? *Opinion:* Negotiability is not affected. Merrill v. Hurley, 62 N. W. (S. D.) 598. Towne v. Rice, 122 Mass. 67. Kirkwood v. First Nat. Bank, 40 Neb. 484. (*Inquiry from N. Y., June, 1918.*)

Effect of interest clause

151. May a trade acceptance be drawn so as to carry interest. *Opinion:* The provision for the payment of interest will not nullify a trade acceptance nor affect its negotiability. The Negotiable Instruments Act expressly provides that the sum payable is a sum certain within the meaning of the act, although it is to be paid with interest. (*Inquiry from Wis., Aug., 1919.*)

Provision that title to goods remain in the seller until instrument paid

152. Does a provision in a trade acceptance that the title to the goods shall remain in the seller until the instrument is paid affect its negotiability? *Opinion:* Negotiability is not affected. Chicago Railway Equipment Co. v. Merchants Nat. Bank,

136 U. S. 268. Mott v. Havana Nat. Bank, 22 Hun (N. Y.) 354. (*Inquiry from N. Y., June, 1918.*)

"Per invoice of" as affecting negotiability

153. May a trade acceptance form include the phrase "per invoice of" without affecting its negotiability? *Opinion:* One of the requisites of negotiability is that the order or promise to pay must be unconditional. The Negotiable Instruments Act provides: "An unqualified order or promise to pay is unconditional within the meaning of this act, though coupled with: 1. An indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited with the amount; or 2. A statement of the transaction which gives rise to the instrument." Newberry v. Wentworth, 218 Mass. 30, holds that the words "as per terms of contract" added to a note do not destroy its negotiability. Also in Waterbury-Wallace Co. v. Ivey, 163 N. Y. Tupp 719, a note promised to pay the amount and interest "as per contract" and the maker contended that the reference to the contract must be construed as a promise to pay in accordance with the terms of that contract, which by reference to it is made part of the note, and that the contract showed that the note was to be paid on a condition; but the court held that in determining whether the reference to the contract destroyed negotiability of the note, examination would be confined to the note itself; that it was a mere reference to the transaction out of which the note grew, and the note was negotiable. The case would be different, the court said, if the language was "subject to" the contract. In Snelling State Bank v. Clasen, 157 N. W. (Minn.) 643, the words "as per contract," written over an indorser's signature, were held not to affect negotiability but, the court said, "the purchaser cannot overlook them and then claim that he had no notice of what an observance of them and fair inquiry would disclose." If such words put the purchaser on inquiry, the instrument cannot be deemed fully negotiable. In Lowery v. Steward, 25 N. Y. 239 a draft ordered payment "on a/c 24 bales of cotton shipped to you as per bill of lading by steamer Colorado enclosed to you in letter." It was held to be non-negotiable. While the words "per invoice of" would be held by the majority of courts not to affect negotiability but simply a statement of the transaction giving rise to the instrument, there is sufficient

possibility that such words might, by some courts, be construed as making the invoice part of the draft and the promise to pay only in accordance with the terms thereof, so as to destroy negotiability. It would be better, therefore, to use some such phrase as "in payment of invoice No——" which would clearly indicate simply a statement of the transaction which gave rise to the instrument. (*Inquiry from Mass., March, 1918.*)

"In settlement of invoice No.——"

154. What form may be used in a trade acceptance to indicate that the acceptance covers a particular invoice or invoices without qualifying the acceptance? *Opinion:* The phrase "in settlement of invoice number——" will not affect negotiability and sufficiently identifies the invoice for which payment is made. (*Inquiry from N. Y., Jan., 1918.*)

Insertion of invoice number

155. Does the placing of an invoice number on a trade acceptance render it any the less eligible for discount? *Opinion:* Care must be taken that nothing is put in the draft which effects its negotiability. If a clause referring to an invoice was put on a draft in such form as to indicate that the draft was payable only out of the proceeds of the invoice or that the order or promise to pay was subject to the invoices this would destroy its negotiability. The invoice clause can be so worded that it will not affect negotiability. For example "In payment of invoice number——." If the invoice number, without more, is placed on the draft, this would doubtless be construed simply as an indication of the transaction which gave rise to the instrument and would not affect negotiability. (*Inquiry from N. Y., Dec. 1917.*)

Marginal statement of consideration does not affect negotiability

156. Underneath a trade acceptance, on the bottom margin, are the words: "100 Ex Adams pep 50 50.00" designed to show the exact invoice for which the acceptance is given. Does this affect negotiability? *Opinion:* Negotiability is not affected. At most the marginal notation indicates a statement of the consideration. (*Inquiry from N. Y., Jan., 1918.*)

Negotiability as dependent on fulfillment of contract of sale

157. Does the failure of the seller (drawer) to fulfill his contract with the acceptor destroy its negotiability? *Opinion:* Failure of the drawer to fulfill his contract does not destroy the negotiability of a trade acceptance. (*Inquiry from N. Y., March, 1920.*)

158. Does not the holder of trade acceptance paper take the same with notice that its negotiability is contingent upon the consummation of the contract between the drawer and the acceptor? *Opinion:* No such notice is imputed to the holder. If there is anything in the acceptance which would make its payment conditional, then it would be non-negotiable; but in the standard form of trade acceptance there is nothing conditional in the order or in the promise of the acceptor. (*Inquiry from N. Y., March, 1920.*)

Negotiation

Negotiation of trade acceptance by acceptor

159. The ordinary course of a trade acceptance is to have it accepted by the buyer, returned, and if negotiated at all subsequently, such negotiation would be by the seller or drawer. Is there any reason in law or in the rulings of the Federal Reserve Board which would prohibit an arrangement by which the drawer would draw and the acceptor would accept and the acceptor would negotiate the bill himself and pay cash to the drawer but leave the drawer contingently liable upon the acceptance created? *Opinion:* A trade acceptance has been defined by the Federal Reserve Board as a draft or bill of exchange drawn by the seller on the purchaser of goods sold and accepted by such purchaser. Where the bill is drawn for goods sold and accepted by the purchaser so as to constitute a trade acceptance and is made payable to the drawer, it requires his indorsement to be further negotiated. But assuming it is indorsed by the payee there is no apparent reason why it would not be legal for the acceptor to negotiate the acceptance. There must, of course, be "delivery" of a negotiable instrument, but it would seem that where the acceptor receives the bill drawn and indorsed by the seller and places thereupon his acceptance, there may be constructive delivery without the return of the paper to the payee so that the acceptor would vir-

tually hold the instrument as by re-delivery from the payee; and if this be so, it would seem that the acceptance can be negotiated by the acceptor, the drawer remaining contingently liable. In the hands of a holder, in due course a valid delivery is conclusively presumed.

There is a possibility that the Federal Reserve Board might raise some objection to the practice in the event it was sought to rediscount such paper. (*Inquiry from N. Y., Jan., 1919.*)

Ten per cent. loan limit

160. Section 5200 of the United States Revised Statutes limits the total liability to any national bank of any one person, etc., for money borrowed to one-tenth of the unimpaired capital and surplus, the total not to exceed thirty per cent. of the capital, but provides that "the discount of bills of exchange drawn in good faith against actually existing values, . . . shall not be considered as money borrowed." Section 13 of the Federal Reserve Act, authorizing Federal Reserve banks to discount, for member banks, notes, drafts and bills of exchange arising out of actual commercial transactions, provides that "the aggregate of such notes, drafts and bills bearing the signature or indorsement of any one borrower . . . rediscounted for any one bank shall at no time exceed ten per centum of the unimpaired capital and surplus of said bank; but this restriction shall not apply to the discount of bills of exchange drawn in good faith against actually existing values." Section 9 of the Federal Reserve Act contains a similar provision with respect to the rediscounting of paper discounted with state banks and trust companies, members of the federal reserve system. Are trade acceptances to be included in determining the ten per cent. limitations? *Opinion:* Trade acceptances are bills of exchange drawn in good faith against actually existing values, accepted by the buyer of goods, and are not within the ten per cent. limitation. See opinion of Counsel of Federal Reserve Board, November, 27, 1916. (*Inquiry from N. Y., April, 1918.*)

Discount of fraudulent trade acceptance
—*Criminal liability*

161. A trade acceptance was presented to a bank for discount, the drawer representing that it was for a merchandise transaction. This trade acceptance proved

to have been given in exchange to the drawee for another one of like amount. Rather it was a plain case of kiting. Has there been a crime committed? *Opinion:* It seems that the person negotiating the trade acceptance obtained money under false pretenses and is therefore punishable under the Ohio statute (Sec. 7076 Ohio Rev. St. 1898). The drawer represented that the trade acceptance was based upon a merchandise transaction, when it was not (the false pretense), thereby inducing the bank to discount the paper, which it would have declined to do had it been apprised of the true nature of the transaction. It would seem that all the constituent elements of the statutory crime are present: namely, the intent to defraud, actual fraud, false pretenses used to perpetrate the fraud, and the fraud accomplished by means of the false pretenses used for the purpose. See *Winnett v. State*, 18 Ohio Cir. Ct. 515, enumerating these constituent elements of the statutory offense. See also, *In re Fitzpatrick*, 21 Ohio Cir. Ct. 519. (*Inquiry from Ohio, Nov., 1920.*)

Trade acceptance discounted for acceptor
(*buyer*)

162. The seller and the buyer of goods arrange that the buyer shall have the acceptance discounted with his own local bank. In such a case should the seller draw the bill to his own order and send it indorsed with the invoice to the buyer, who would then accept it and present it for discount? If the seller should draw the bill to the order of the local bank and send it to the buyer with the invoice, the buyer accepting same on receipt and presenting it for discount, would the seller be responsible on the bill, being drawer, in the event of the acceptor's not paying same? *Opinion:* In the case suggested presumably the proceeds of discount would be forwarded by buyer to seller, otherwise the buyer would not only get the goods but also the trade acceptance, upon which to obtain the money from his local bank. The trade acceptance could either be drawn by the seller to his own order and indorsed in blank by him, or it could be drawn to the order of the local bank and forwarded to the buyer with the invoice. Upon acceptance and discount by the local bank for the buyer, the drawer would be liable, in either case, to the local bank should the acceptor fail to pay the acceptance at maturity. (*Inquiry from Mass., March, 1918.*)

Rights of holder

163. What defenses are open to an acceptor of a trade acceptance as against an innocent purchaser for value before maturity? *Opinion:* Such a purchaser is technically termed in the Negotiable Instruments Act, a holder in due course. The Act provides that "a holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon." This provision applies to the holder in due course of a negotiable trade acceptance. The liability of the acceptor is virtually the same as that of the maker of a promissory note. The acceptor cannot interpose a defense against a holder in due course which he may have against the drawer. (*Inquiry from N. Y., Sept., 1919.*)

164. Is a trade acceptance a negotiable instrument? Does a holder in due course take free from defenses as against the seller? *Opinion:* There is no question but that the ordinary form of trade acceptance is a negotiable instrument and in the hands of a holder in due course is enforceable against the acceptor, free from any defense, because of fraud, defect of goods, etc. (*Inquiry from N. Y., Sept., 1919.*)

165. Is a bank, or other holder, that purchases trade acceptance paper from the drawer an innocent holder in the sense in which that term is used in ordinary bills of exchange? *Opinion:* The purchaser of a negotiable trade acceptance is a holder in due course the same as in the case of ordinary bills of exchange. (*Inquiry from N. Y., March, 1920.*)

Effect on mechanic's lien rights

166. A material man who has taken a trade acceptance from a contractor and negotiated it at a bank, finds that he ought to enforce the lien right in order to protect himself against loss. May he enforce his lien immediately by repurchasing the acceptance and offering to return it to the contractor? *Opinion:* Where the material man repurchases the acceptance he has the right to enforce the mechanic's lien but this right is suspended until maturity of the acceptance unless, of course, there was fraud in the transaction which might give him the right to annul the contract of acceptance and proceed immediately. However, the

material man can perfect his lien before maturity. That is to say, he can file a mechanic's lien but the beginning of suit to enforce the lien is suspended until the acceptance is due. (*Inquiry from Ill., Jan., 1918.*)

167. The question has arisen as to the status of the material man who takes a trade acceptance to cover shipment made to a contractor for use in construction work. Does he thereby lose any mechanic's lien right which he would have had under the open book account system? Does he become a money creditor in place of a creditor for material? *Opinion:* The material man who takes a trade acceptance for material supplied does not thereby lose mechanic's lien right which he otherwise might have. The right to enforce the lien would, however, be suspended until maturity of the acceptance and a pre-requisite to such right of enforcement would be a tender of the return of the trade acceptance as a condition precedent. If he has negotiated same and cannot return it, the mechanic's lien right would not be enforceable. *Hines v. Chicago Bldg., etc., Co.*, 115 Ala. 637. *Eddy v. Loyd*, 90 Ark. 340. *Waterbury Lumber, etc., Co.*, 87 Conn. 316. *Belmont Farm v. Dobbs Hardware Co.*, 124 Ga. 827. *Edwards v. Derrickson*, 28 N. J. L. 39. *Donovan v. Frazier*, 44 N. Y. S. 533. *American Car & Foundry Co. v. Alexandria Water Co.*, 221 Pa. 529. *Doane v. Clinton*, 2 Utah 417. *Meek v. Parker*, 63 Ark. 367. *Lentz v. Eimermann*, 119 Wis. 492. (*Inquiry from N. Y., Feb., 1918, Ill.*)

Seller's right of replevin

168. The seller of goods receiving a trade acceptance asks if he is in any worse position so far as his right of replevin goes than the seller of goods who simply charges the purchase price to the purchaser on an open account. *Opinion:* In any case where goods have been sold and delivered, and an action of replevin would lie on behalf of the seller because of some breach of contract or fraud entitling him to annul the contract and seize the goods as still his property, the only difference between the position of the seller who takes a trade acceptance and one who has charged the amount in open account, would seem to be this: In an action of replevin where a trade acceptance has been taken and the seller seeks to rescind the contract, a prerequisite would be a tender of the return of the instrument as a condition precedent to the right of recovery. Implement

Co. v. Ellis, 125 Mo. App. 692. (*Inquiry from N. Y., Dec., 1917, Jl.*)

Suit on original indebtedness where acceptance not paid

169. Where an acceptance is not paid at maturity may a suit be brought on the original indebtedness? *Opinion:* The general rule, recognized by the majority of the authorities, is that where privity of contract exists, the holder of a note may waive his right to proceed thereon and declare for the original consideration. In the absence of a contrary agreement, the common law rule of England, adopted in most of the states, is that a draft, acceptance, or note of the debtor is not a payment or an extinguishment of the original demand. *Matteson v. Ellsworth*, 33 Wis. 488. *Dougal v. Cowles*, 5 Day (Conn.) 511. *Stewart Paper Mfg. Co. v. Rau*, 92 Ga. 511. Under these authorities, if an acceptance is not paid, the original creditor may, if he still holds the paper, sue on the original indebtedness.

But in two or three states including Indiana, the taking of a bill or note by the creditor for an existing debt is a payment of the debt unless it is otherwise agreed, and the burden of proving such an agreement is on the creditor. *Roberts v. Vonnegut*, 104 N. E. (Ind.) 321. *Knight v. Kerfoot*, 102 N. E. (Ind.) 983. Under the Indiana rule, suit would have to be brought on the acceptance, rather than upon the open account or the original indebtedness. (*Inquiry from Ind., July, 1918.*)

Effect on original contract

170. May a trade acceptance be considered a definite settlement of account or is it merely an evidence of indebtedness that does not change special clauses in contracts pertaining to the retention of title until paid, etc.? *Opinion:* The majority rule is that the taking of a draft, note, or acceptance of a debtor is not an absolute payment or extinguishment of the original demand, but only conditional payment, in the absence of an agreement between the parties that it is to be received as absolute payment. The minority rule is that it constitutes an absolute payment unless otherwise agreed between the parties, with the burden of proving such an agreement upon the creditor. Where a bill or note has not been accepted as absolute payment the fact that the creditor has transferred it to a third person does not, of itself, bar an action upon the original indebtedness or

show that the paper was accepted as absolute payment unless the bill or note is outstanding in the hands of a third person at the time the action on the original indebtedness is commenced. Applying these rules to the question stated a contract that title shall remain in the seller until the acceptance be paid, is evidence that the trade acceptance was not received as absolute payment, and if not paid the seller would have his enforceable rights on the original indebtedness, assuming that at the time action was commenced the instrument was in his possession. (*Inquiry from N. Y., June, 1918.*)

Liability of parties

Liability of drawer

171. What is the liability of the drawer of a trade acceptance which is drawn "to the order of ourselves" and indorsed by such drawer? *Opinion:* The drawer is liable both as drawer and indorser in the event of non-payment of the acceptance; that is to say, his contract is that he will himself pay the amount if due demand be made at maturity and the necessary steps be taken to preserve his liability where payment is refused, i.e., protest and notice. Protest, as distinguished from notice of dishonor would not be requisite, although customary, unless the instrument was a foreign bill of exchange. (*Inquiry from S. C., Aug., 1919.*)

172. Where a trade acceptance is signed before delivery of the goods, has the acceptor a legal defense for such causes as misrepresentation, failure of consideration, etc.? *Opinion:* Such defenses are available as against the drawer, but not as against an innocent purchaser before maturity. (*Inquiry from N. Y., Sept., 1918.*)

Liability of Acceptor—Defense that goods not delivered

173. A person giving an order for machinery pays in advance by means of a trade acceptance. Is such acceptor in case the contract is not fulfilled liable to a purchaser (1) who had knowledge of the facts but who bought before any breach of the contract, or to one (2) who had no knowledge of the facts? *Opinion:* An executory agreement, such as an agreement to sell goods is a sufficient consideration to support the promise to pay negotiable paper and it is generally held that a person who acquires such paper with knowledge that it is based on an executory consideration but without

knowledge of the breach of the executory agreement acquires an enforceable title as a holder in due course. But if at the time he acquires it he has knowledge of such breach, it is subject to such defense in his hands. In the case stated (1) the purchaser for value with knowledge that it was based on an executory agreement but without knowledge of the breach thereof could enforce payment from the acceptor but (2) in the case of the purchaser who had knowledge at the time of the purchase of the breach of contract and that the goods had not been delivered, the acceptor could set up as against him the defense of non-delivery. (*Inquiry from Iowa, July, 1918.*)

Non-liability of payor bank to holder

174. What rights does a bank holding a trade acceptance payable at another bank, have against the payor bank, when it refuses to pay on date of maturity although sufficient funds are on deposit, and later, through the insolvency of the acceptor, the bank holding the acceptance suffers a loss by reason of the bank making subsequent payments on other checks or acceptances? *Opinion:* An acceptance payable at a bank is similar to a check in that it is an order on the bank to pay the same for the account of the acceptor. But if the bank wrongfully refuses payment, equally as in the case of a check, the holder has no right of action against the bank because there is no privity of contract between the two and his sole recourse is against the acceptor and prior parties. The Negotiable Instruments Act expressly provides that "A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer, with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the check." (*Inquiry from Ohio, April, 1919.*)

Non-liability of payor bank to indorsers

175. Does the failure of a bank to charge a trade acceptance presented after maturity to the account of the acceptor render it liable to the indorsers in the event of the failure of the acceptor to pay when presented at his office? *Opinion:* It is a condition of the liability of indorsers upon a trade acceptance that the instrument be duly presented at maturity. If not so presented they are discharged. No liability in any event runs from bank to the indorsers of a trade acceptance growing out of its refusal to pay. (*Inquiry from N. Y., Nov. 1918.*)

Presentment and collection acceptor's bank as collecting agent for holder

176. Where an acceptance is made payable at a bank on a certain date and sufficient funds are on deposit to meet the said acceptance and the bank does not charge the acceptance to the account of the acceptor, and then the acceptor fails, does the holder have a right of action because of the negligence of the said bank in not paying the acceptance? *Opinion:* Where the holder forwards the paper directly to the bank at which it is made payable for collection, aside from the duty of the bank to the acceptor to pay and charge up the acceptance at maturity against his account, such bank would owe a duty as collecting agent of the holder to collect the acceptance at maturity. Under the facts stated the bank would probably be liable for neglect of duty to the holder for any loss resulting. (*Inquiry from Ohio, March, 1919.*)

Duty of collecting bank in obtaining acceptance

177. What is the liability of a collecting bank in surrendering documents and obtaining the signature of the buyer to a trade acceptance? More particularly what is the liability where the documents and the unsigned acceptance are put in through a window? *Opinion:* The test of the liability of the bank is whether it has used due care under the circumstances. Due care is measured by what a prudent man would do with his own property under like circumstances. Where the drawee has a window at which it is customary for drafts and documents to be presented and the person in charge of the window signs the acceptance in the name of the drawee and the documents are surrendered, due care is probably exercised even though the agent is unauthorized. The drawee would doubtless be held liable in such case for placing such person in a position of apparent authority. Much, of course, would depend upon the precise circumstances surrounding the transaction. (*Inquiry from N. Y., April, 1917.*)

*Duty of collecting bank to make protest—
Liability*

178. Bank A sends a trade acceptance out of the state to bank B, with instructions to secure acceptance if possible, otherwise to protest the item if not paid at maturity. Bank B failed to protest at maturity, but shortly after sent word to

bank A that settlement would be made in a few days. Bank A inquires as to its procedure. *Opinion:* A trade acceptance is subject to protest if not paid at maturity, as is also an unaccepted draft, and it was the duty of bank B to cause protest to be made pursuant to instructions, and failing in this duty it is liable for the resultant damage, if any. If the acceptance has been collected and not remitted for, or there has been negligence in failing to protest same for non-payment, which has resulted in loss, there would be a right of action by bank A against bank B, and this would seem to be the correct procedure. (*Inquiry from Wis., May, 1920.*)

Payment at maturity

Duty of payor bank to charge the acceptor's account

179. The question has arisen whether, when a trade acceptance is made payable at a bank, the bank has the right to charge the amount up against the acceptor's account upon presentment at maturity, without express instructions from the maker of the acceptance, the same as it would charge up a customer's check upon payment. *Opinion:* Section 87 of the Negotiable Instruments Act provides: "Where the instrument is made payable at a bank, it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon." Under this provision the bank would not only be authorized, but it would be its duty, where the acceptor's funds were sufficient, to pay the acceptance upon presentment at maturity without express instructions from the maker to that end. This provision is omitted in Illinois, Nebraska and South Dakota which leaves the contrary rule to operate; in Kansas, the section was originally enacted but was repealed by Chapter 94 Laws 1915; in Minnesota the word "not" is interpolated so that the section reads "shall not be equivalent, etc."; and therefore in these states some express instructions from the customer would be necessary before the bank could pay his acceptance, unless the bank itself owned the acceptance, in which case it would be chargeable to the customer's account by way of set-off. In Missouri the section stands and the bank is obliged to pay but its authority is limited to the date of maturity only. Texas passed the Negotiable Instruments Act with Section 87 left intact. Georgia is the only state in the Union which has not passed the act and it remains a question

there whether an instrument payable at a bank is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon. Neg. Inst. Law (Commsr's dft.) Sec. 87. Kan. Laws 1915, Ch. 94. See 10 A.B.A.Jl. 461. It then appears that under the Negotiable Instruments Law a bank has not only the right, but is under duty when in sufficient funds to charge the acceptance presented at maturity to its customer's account and this rule will apply in every state except as limited in those states above enumerated. (*Inquiry from Ill., Neb., S. D., Kan., Minn., Mo., Tex., Ga., July, 1919.*)

180. Is it the right and duty of a bank at which a trade acceptance is payable to pay it and charge it to the customer's account if sufficient, without notice to him when presented at maturity? *Opinion:* Under the provision of the Negotiable Instruments Act that where an instrument is made payable at a bank it is equivalent to an order to the bank to pay the same, the bank may and should pay a trade acceptance when presented at maturity without specific instructions from the acceptor. (*Inquiry from Wash., May, 1918.*)

181. A trade acceptance on which there is a clause reading "Value received and charge same to account of acceptor" is made payable at a Texas Bank. May the bank refuse to pay the acceptance in the absence of any definite instruction from the acceptor? *Opinion:* The Negotiable Instruments law is not in force in Texas. (It was later adopted). The decisions under the common law as to right of a bank to pay paper made payable at the bank without express instructions from the customer are in conflict, and the Texas courts do not appear to have passed on the question. However, the clause "value received and charge same to account of acceptor" should apparently be construed as an express instruction to the bank that it should pay the acceptance without looking for more specific instructions. (*Inquiry from Texas, Aug., 1918.*)

Note: The Negotiable Instruments law passed in Texas in March, 1919, would render an express instruction unnecessary.

Suggestions as to amending Neg. Insts. Act.

182. A request comes from Nebraska as to how best to amend the law so as to provide that trade acceptances made payable at a bank by the acceptor can be charged

direct to the account of the "acceptor" by the bank. *Opinion:* Section 87 of the Negotiable Instruments Act provides: "Where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon." This section has been omitted in the Nebraska statute. The best procedure is to have introduced a bill in the Nebraska legislature amending the Negotiable Instruments Act by inserting the section above quoted. It would properly fit in the law following section 86 and should probably be designated as section 86 (a) in view of the fact that section 87 of the Nebraska Negotiable Instruments Law is section 88 of the Uniform Law. (*Inquiry from Neb., Sept., 1918.*)

Acceptance payable at bank—Form of direction to bank to pay.

183. The following is suggested as a form of direction to a bank to pay a trade acceptance: "The bank named herein is hereby directed to pay this item at maturity without notice or further instructions from the acceptor and is authorized to charge the acceptance against the account of the undersigned." Is this form suitable? *Opinion:* The proposed form would change the legal effect in those states which have modified Section 87 of the Negotiable Instruments Act and would render it obligatory on the acceptor's bank to pay the acceptance when presented at maturity. No legal necessity for the use of such a form exists in states wherein Section 87 is in force since by that section the making of an instrument payable at a bank is equivalent to an order to the bank to pay, but the form may serve a useful purpose in making it clear to payor banks that it is their duty to pay. (*Inquiry from N. Y., Nov., 1919.*)

184. To facilitate the prompt handling of trade acceptances the suggestion is made that acceptors of bills of exchange should have printed on such bills a definite authorization and direction which would obviate the necessity of banks calling up their customers to get specific authorization on each bill as it is received. The proposed form is as follows: "Above named bank is hereby authorized and directed to pay and charge this acceptance to the account of the undersigned upon presentation for payment at maturity or thereafter without further notice." Is this proper notice and is there anything in it to conflict with the Negotiable Instruments Act or commercial law?

Opinion: The proposed form, over the signature of the acceptor, would afford authority to and make it the obligation of the bank to pay the acceptance upon presentation at or after maturity. In most of the states under the Negotiable Instruments Act the bank at which an acceptance is made payable is not only authorized but obliged to pay and charge it up when presented at maturity; but there are a few states where this is not so and express authorization is necessary; and furthermore where the acceptance is not presented until after maturity there is doubt as to the bank's authority to pay. In view of this, the printing of the proposed provision is desirable and it cannot be seen that it would in any way affect the negotiability of the instrument. (*Inquiry from N. Y., Aug., 1919.*)

Liability of bank to holder for failure to pay customer's acceptance made payable at bank

185. A trade acceptance is presented through a clearing house on the day of maturity to the bank at which it is made payable. Although the Negotiable Instruments Act is in full force in the state the bank declines to pay without specific instructions from the acceptor, although the funds are sufficient to make the payment. At the close of business the balance has been reduced to an amount insufficient for this purpose. Can the bank be held responsible for not having charged the acceptance to the customer's account when received in the morning clearing? Should it have set aside a sufficient amount of the deposit to take care of the acceptance pending instructions and have refused payment of the checks presented later in the day rather than pay those checks and protest the acceptance?

Opinion: While the bank should have charged the customer's account with the amount of the acceptance in regular course and refused payment of the checks, later presented, still it is not responsible for its failure so to do as it is answerable solely to its customer for dishonoring his paper and injuring his credit and in the present case the dishonor was caused by the customer himself by drawing out the funds on later presented checks. There would be no liability of the bank to the owner of the acceptance unless, instead of returning it unpaid it holds the instrument so long as to make its retention an acceptance binding on it. (*Inquiry from N. Y., Jan., 1920.*)

Right of bank to return acceptance "not good" before 3 o'clock on day of maturity

186. Has a Clearing house bank the right to return a time note or acceptance made payable at the bank before closing time on the day of maturity because "not good?" *Opinion:* The maker of a time note or the acceptor of a time draft has until the close of banking hours on the day of maturity to deposit the money to cover the instrument, and is not in default until that time; consequently the bank would not have the right to return it dishonored or "not good" before three o'clock. See German American Bank of Rochester v. Milliman, 31 Misc. Rep. 87, 65 N. Y. Supp. 242, a carefully reasoned case decided by the county court of Monroe county, in which the authorities are reviewed. (*Inquiry from Ill., July, 1918.*)

Payment after maturity

Bank's authority to pay overdue acceptance

187. Where a note or trade acceptance maturing at a fixed or determinable future time is made payable at the maker's bank and is not presented for payment until after the due date, opinions differ as to the authority of the bank to pay without express instructions from its customer. An Australian decision that the bank's authority to pay continues after maturity until countermanded, is not regarded as controlling in this country. The precise point has never been decided in this country. It would be desirable to pass an amendment of the Negotiable Instruments Law which would provide a definite rule on this point. Such an amendment has been passed in Missouri as follows: "Where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon, but where the instrument is made payable at a fixed or determinable future time, the order to the bank is limited to the date of maturity only." Or it might prove more advantageous for the amendment to provide that a bank may pay overdue acceptances and notes within a reasonable time after maturity. *Wine v. Bk. of New South Wales*, 4 Australian Jur. Rep. 78. (*Inquiry from Wash., April, 1918.*)

188. May a bank charge a past due trade acceptance to a customer's account? *Opinion:* An opinion rendered by Counsel for the Federal Reserve Bank of San Francisco to the effect that a bank has the authority in question is not entirely

convincing that it is perfectly safe to make such payment. That payment after maturity shall be made in due course as provided in the Negotiable Instruments Act it must be without notice of the holder's defect of title. It would seem that the fact that a negotiable instrument is overdue when presented would affect the title of the holder. (*Inquiry from Wash., May, 1918.*)

189. Is a bank authorized under the Negotiable Instruments Act to charge a past due acceptance, payable at the bank, to the customer's account? *Opinion:* The right is doubtful, except where the acceptance is owned by the bank itself when, of course, it would have the right to apply the customer's deposit to its payment. (*Inquiry from Wash., March, 1918.*)

190. A makes his trade acceptance payable at a bank and at maturity makes payment to the holder but allows the latter to retain the acceptance. The holder in defraud of A, presents the acceptance to the bank after maturity and receives payment and it is charged to A's account. Should the bank have required an express instruction from the maker before making payment? *Opinion:* The safest course for the bank would have been to have asked an express instruction from the maker before payment of the trade acceptance. If it had been asked, the bank would have learned that the acceptance had been paid by the acceptor. It is a serious question, still undecided by the courts, whether the authority of the bank to pay continues after maturity and whether the fact that the trade acceptance is overdue when presented at the bank is not sufficient to put the bank upon inquiry of the acceptor before making payment. *Neg. Inst. Act Cal., Civ. Code, Sec. 3168, 3169, 3200. 8 Corpus Juris, 329, 330. Fairfield Nat. Bk. v. Hammer, (Conn.) 95 Atl. 31. Austin v. First Nat. Bk., 147 S. W. 35, 150 S. W. 8. (Inquiry from N. Y., June, 1918, Jl.)*

Protest

Necessity of protest

191. If a trade acceptance made payable at a bank is not paid when due, should it be protested. *Opinion:* Protest should be made; although strictly it is only legally necessary where the instrument is a foreign bill of exchange. But it is customary to make protest in all cases as a convenient means of proving dishonor. (*Inquiry from Ark., Nov., 1918.*)

Stopping payment

192. Is a trade acceptance, even after complete execution, like a check, subject to a stop payment order. *Opinion:* Where the acceptor makes his acceptance payable at a bank, he has the right to countermand the order to pay, the same as in the case of his check. (*Inquiry from N. Y., Sept., 1918.*)

Taxation

Stamp tax

193. A drawer sends out a trade acceptance with his signature printed, and after it is returned accepted, the document is then completed by the signature of the drawer. When and by whom should the tax stamps be affixed? *Opinion:* This precise point is covered by the ruling of the Commissioner of Internal Revenue that "trade acceptances which are issued with signature of the drawer printed thereon to prevent unauthorized negotiations, and are only signed after acceptance by the drawee, are subject to the tax when actually signed by the drawer, who is required to pay the tax and affix and cancel stamp thereon." (*Inquiry from N. Y., Dec., 1917.*)

194. Are tax stamps required on trade acceptances? *Opinion:* The commissioner of internal revenue has ruled that trade

acceptances are taxable as drafts payable otherwise than at sight or demand. (*Inquiry from N. Y., Dec., 1917.*)

Who shall affix?

195. As between the buyer and the seller who should pay for revenue stamps on trade acceptances? *Opinion:* Apparently the question has never been settled by the courts. Article 39 of Stamp Tax Regulations provides that trade acceptances are taxable in the same manner as ordinary time drafts; Article 34 provides that a time draft is subject to tax concurrently with its acceptance or delivery and Article 35 provides that "The drawee, payee or indorsee should see that the tax is paid before or at the time of acceptance or delivery. The question of who shall pay for the stamp is a matter for adjustment between the parties."

Probably if a trade acceptance was negotiated by the drawer before presentation to the drawee, it would be incumbent upon the drawer to affix the stamp; but where the trade acceptance is made by the seller to his own order and is presented to the drawee for acceptance, the instrument is not completely made until acceptance and delivery; hence it would seem to be incumbent upon the drawee to affix the stamp, the same as if he were making a promissory note. (*Inquiry from N. Y., May, 1920.*)

ACCOMMODATION PAPER

Accommodation and commercial paper distinguished

196. A firm sold a certain amount of its furniture to P for the purpose of joining with him in the formation of a new partnership, and for which they received P's notes secured by a deed of trust on real estate. The firm indorsed the notes and discounted them with a bank. The bank examiner claimed that the firm signed as accommodation indorsers, and that the notes were accommodation paper and were subject to the statutory restrictions on money borrowed by a single firm. *Opinion:* The notes should be considered commercial or business paper, within the meaning of the Virginia statute excepting such paper from restrictions on money borrowed, and not speculative or accommodation paper. Virginia Code, Sec. 1164. Second Nat. Bk. of Oswego v. Burt, 93 N. Y. 233. (*Inquiry from Va., Jan., 1912.*)

Liability of accommodation maker

Liability to indorsee of note

197. In extending credit to a co-operative company, it appeared that various individuals of the company had given accommodation notes to the company. Could such notes be collected by a bank which accepted same with full knowledge that they were given without consideration in order to assist the company in obtaining credit thereon as collateral? *Opinion:* It has been held that the accommodation maker cannot set up as a defense that it was given without consideration for this would defeat the very purpose for which it was made. Greenway v. W. D. Orthwein Grain Co., 85 Fed. 536. Consol. L. Co. v. Fidelity etc. Co., 161 Cal. 397. Mayer v. Thomas, 97 Ga. 772, holding that there is a sufficient consideration for the signature of an accommodation maker where it accomplishes the purpose for which he

signed the note, that is, the payment of its value by the discounting bank to the indorser who was the party accommodated. *Heintz v. Cohn*, 29 Ill. 308. *Kansas L. S. C. Co. v. Haston*, 68 Kan. 749. *Dunn v. Weston*, 71 Me. 270. *Cloud First Nat. Bk. v. Lang*, 94 Minn. 261. (*Inquiry from Colo., Nov., 1917.*)

198. Certain members of a local chamber of commerce as individuals were accommodation makers of a note for \$700, payable to a bank, the consideration therefor having been advanced by the bank to the board of trustees of the municipality. It was orally understood between the trustees and the makers of the note that the board would provide for payment, but failed to do so. Can the accommodation makers be held liable to the bank, or can they interpose the defense that they personally received no consideration? *Opinion:* The bank can recover from the accommodation makers, as the consideration moving to the municipality was sufficient to support their promise. Accommodation paper has often been defined as a loan of the maker's credit without restriction as to the manner of its use. *Dunbar v. Smith*, 66 Ala. 490. *Mayer v. Thomas*, 97 Ga. 772. *Emery v. Hobson*, 62 Me. 578. *Black River Sav. Bank v. Edwards*, 10 Gray (Mass.) 387. *Steers v. Holmes*, 79 Mich. 430. *Meggett v. Baum*, 57 Miss. 22. *Palmer v. Field*, 76 Hun. (N. Y.) 229. *Lord v. Ocean Bank*, 20 Pa. St. 384. *Farrar v. Gregg*, 1 Rich. (S. C.) 378. *Marr v. Johnson*, 9 Yerg. (Tenn.) 1. *Arnold v. Sprahue*, 34 Vt. 402. *Violett v. Patton*, 5 Cranch (U. S.) 49. *Central Bank v. Ford* (Tex. 1913) 152 S. W. 700). (*Inquiry from Cal., April, 1915.*)

199. A corporation engaged in buying grain borrowed \$3,000, being the limit of its bills payable under its articles of incorporation. Some of its stockholders who are also a majority of directors give an additional note of \$3,000 and the proceeds go to the credit of the corporation and are used in its business. A bank inquires whether the stockholders who have jointly signed this note can claim they received no consideration therefor as a good defense for the note. *Opinion:* The Negotiable Instruments Act provides that an accommodation maker "is liable on the instrument to a holder for value notwithstanding such holder at the time of taking such instrument knew him to be an accommodation party." The following authorities are pertinent. The holder for value of accommodation

paper may recover on it against the accommodation maker, though he knew it to be such paper. (*Fox v. State* (Ark. 1913) 145 S. W. 228. *Metcalf v. Draper*, 98 Ill. App. 399. *Bankers Iowa St. Bk. v. Mason Hand Lathe Co.*, 121 Iowa 570. *Maffatt v. Greene*, 149 Mo. 48. *Nat. Bk. v. White*, 46 N. Y. Suppl. 555. *Nat. Bank of Com. v. Sancho Packing Co.*, 186 Fed. 257). Credit given to the accommodation party is sufficient consideration to bind the accommodation maker or indorser. (*Bank of Morgan City v. Herwig*, 121 La. 513. *First Nat. Bk. v. Lang*, 94 Minn. 261). While it is true that accommodation paper must always be supported by a consideration, yet the accommodation party is bound by the beneficial consideration moving to the party accommodated, even if no other passes. (*Bank of Morgan City v. Herwig*, 121 La. 513. *First Nat. Bk. v. Lang*, 94 Minn. 261.) The payee of this note being a holder for value is entitled to recover thereon against the accommodation makers. (*Inquiry from Neb., June, 1915.*)

200. The holder of a note, where the surety signs as co-maker, asks whether such surety has defenses other than the actual maker. *Opinion:* Where a surety signs as a co-maker he is liable as primary debtor without demand, protest or notice, and cannot defend for omission of those steps as could an indorser. Assuming that the holder knows him to be surety, certain acts of the holder would discharge him. For example, if the note was diverted from the agreed purpose for which the surety signed and this was known to the holder; or where the holder parted with security for the debt, for, upon making payment, the surety would be entitled to such security. It was formerly the law, that a binding extension of time by the holder to the principal releases the surety, but this doctrine has been abrogated by the Negotiable Instruments Act as to the accommodations maker, although it still applies to the accommodation indorser. (*Inquiry from Wis., Aug., 1915.*)

Liability of accommodation indorser

201. A bank submits a form of note containing numerous agreements owing to which there might be some question as to its negotiability. One of the notes is indorsed by a firm, and the question is asked whether the indorser is liable as the firm derived no benefit therefrom. *Opinion:* Assuming the note to be negotiable so as to

come within the provisions of the Negotiable Instruments Act (Sec. 29), and assuming the indorsement was made by authority of the partnership, the indorser would be liable upon due demand and non-payment at maturity. It seems, however, that where, as in the instant case, the loan is made on the security of the name of an accommodation indorser, rather than upon collateral, it would be better to use the plain negotiable form of note. Under the circumstances it would be well to have the firm sign as surety maker, as then it would be bound as an original promisor. (*Inquiry from Ark., April, 1917.*)

Liability on note pledged as collateral

202. A bank made a loan of \$7,500.00 to John Doe and took his note for same. As collateral security it received a certain promissory note of Doe for \$9,000.00 indorsed by Richard Roe who sent it to the bank contemporaneously with a letter in substance as follows: "I herewith send you note made by John Doe for \$9,000.00. You are to hold this note which is indorsed by me over to you, as a security for a loan of \$7,500.00 which Doe desires to borrow from you." Signed "Richard Roe." The \$7,500.00 was reduced to \$5,050.00, and in the meantime the \$9,000.00 note had matured and was protested. Subsequently the note by Doe for \$7,500.00 was increased to \$9,000.00, the increase representing the consolidation of other notes owing to the bank by Doe. The inquiry is as to Roe's liability. *Opinion:* Roe cannot be held for more than \$5,050.00, the unpaid portion of the \$7,500.00 note of Doe. Roe's contract as accommodation indorser of the \$9,000.00 note, was to pay such note if Doe did not, but it was qualified by a contemporaneous writing, coupled with delivery of the note, to the effect that it was indorsed over to the bank by Roe to secure a specific loan of \$7,500.00 to Doe. The loan was made and subsequently reduced to \$5,050.00. Roe can successfully maintain that his obligation as indorser was limited to such specific loan, and that the reduction of indebtedness reduced his liability to \$5,050.00, and that such liability was not revived or increased by the consolidation of other later loans which increased the amount due on the collateral note of Doe to \$9,000.00. It is familiar law that the surety's liability is restricted to the strict terms of the debt, and if part of the debt is paid off this releases him pro tanto. See

Natl. Park Bank v. Koehler, 204 N. Y. 174, 97 N. E. 468. (*Inquiry from D. C., June, 1915.*)

Liability on certificate of deposit

203. A party has a certificate of deposit (time deposit) on a bank, and not liking its condition the directors tell him that if he will let his certificate remain, they will indorse it as individuals. Is their indorsement binding upon them? *Opinion:* Directors of a bank who as individuals indorse the bank's time certificate of deposit would be liable thereon as indorsers. To preserve their liability, demand of payment on the day of maturity would be required, and in the event of non-payment, notice of dishonor to the indorsers would be requisite. The indorsers, however, might waive demand, protest and notice. Directors so indorsing would be accommodation indorsers and in event of nonpayment, liable to each other in the order in which their names appeared upon the back of the certificate, unless they agreed among themselves to share the liability. (*Inquiry from Ga., Jan., 1919.*)

Does accommodation indorser of check warrant amount to drawee?

204. A raised check bearing an accommodation indorsement was presented to a bank and cashed. In the regular course of business it came to the drawee bank which paid it and charged it to the customer's account. The liability of the accommodation indorser to the bank which cashed the check and of the latter to the drawee bank is conceded. But the question is asked whether an accommodation indorser warrants the amount of the check to the drawee. *Opinion:* Where the payee presents a raised check directly to the bank upon which it is drawn and the drawee pays the same upon the strength of an accommodation indorsement, the question of the liability of the accommodation indorser to the drawee is somewhat doubtful. There is no basis for an action for money had and received as the accommodation indorser has not received the money. The only liability would be on the ground of express or implied warranty. Under the Negotiable Instruments Act (Sec. 66) the warranty of genuineness of an indorser runs only to a holder in due course and the drawee does not come within the definition of that term. Under another provision of the same act (Sec. 29) an accommodation

indorser is made liable on the indorsement to a holder for value, but the drawee does not come within the definition of a holder for value. The Negotiable Instruments Act, therefore, would seem to provide no warranty by an accommodation indorser to a drawee.

A decision upholding such liability to the drawee (*Smith v. State Bank*, 104 N. Y. Supp. 750) has been questioned. *Brannon* Neg. Inst. page 39.

The United States Supreme court in *U. S. v. National Exchange Bank*, 214 U. S. 319 has held that an indorser (in this case not an accommodation indorser) who received payment from the drawee of a check bearing a prior forged indorsement is liable to the drawee upon a warranty of genuineness implied by the presentation and collection of the check, irrespective of any express warranty, and it is possible that, although technically under the Negotiable Instruments Act an accommodation indorser is not a warrantor of genuineness to the drawee, he might be held liable as an implied warrantor where, by his indorsement he has enabled the payee of a raised check to obtain the money wrongfully from the drawee. (*Inquiry from Iowa., July, 1914, Jl.*)

205. What is the liability of an accommodation indorser where he places his name on the back of a note payable to a bank. *Opinion:* The person so signing is liable to the bank as indorser equally as where a note is made payable to an individual who indorses same to the bank. The Negotiable Instruments Act provides: Sec. 55,—“An accommodation party is one who has signed the instrument as maker, drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party.” It also provides: Sec. 114. “Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as indorser”—1. “If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties. 2. If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer. 3. If he signs for the accommodation of the payee, he is

liable to all parties subsequent to the payee.” (*Inquiry from N. Y., April, 1912.*)

206. Under the Negotiable Instruments Act an accommodation indorser is liable on a note to a holder in due course, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party. Neg. Inst. A. Sec. 29 (Comsr's. dft.). (*Inquiry from N. Y., March, 1911, Jl.*)

Liability on renewal note with other indorsers' names off

207. In the renewal of a note indorsed by A. B. and C., can A and B as indorsers be left off the note by the holding bank without the consent of C and C be still held? *Opinion:* If C indorsed the renewal on the understanding or implied condition that bank would also procure the indorsement of A and B, this would be a defense by him to the note in the hands of the bank, although if the bank had negotiated the note before maturity to a bona fide holder, C would probably be liable. Accommodation indorsers are liable on the note in the order in which their names appear, unless they agree between themselves that they shall be equally liable. Under such an agreement C if he paid original note, could look to the others for contribution, or if there was no such agreement C as last indorser could hold prior indorsers for whole amount. It would be to C's detriment to have the indorsements of A and B left off the renewal and without his consent the bank could not hold C. See *26 Ward Bank v. Stearns*, 148 N. Y. 515, 42 N. E. 1050. *Enterprise Brewing Co. v. Canning*, Mass. 96 N. E. 673. *Williams v. Peoples Bank*, Ga. 72 S. E. 177. (*Inquiry from Del., March, 1914.*)

Renewal of note containing two accommodation indorsers by taking signature of one only

208. A bank accepted a renewal of a note of A and wife containing two accommodation indorsers named Morris and Sanders respectively, by taking renewal with the indorsement of Morris only. Is Morris relieved from liability? *Opinion:* So far as appears from the note, the indorsers, Morris and Sanders, were liable thereon in the order that their names appeared; hence the taking of a renewal by the bank with the indorsement of Morris only would not relieve him from liability. If there was an agreement between the two, to knowledge of the bank, that they were to be liable jointly, and if

Morris' indorsement of the renewal was on condition that Sanders should also indorse, a different question would be presented. (*Inquiry from Tenn., Nov., 1920.*)

Liability of accommodation indorsers as between themselves

209. A requested S to indorse his check, to enable him to have same cashed. S indorsed the check, but afterwards requested the bank not to cash same. Later A obtained the indorsement of Z, and then negotiated the check to the bank. Z was obliged to take the check up and seeks to hold A as prior indorser. *Opinion:* Accommodation indorsers are liable in the order in which they indorse unless they have agreed otherwise between themselves. In making his indorsement Z had the right to consider the liability of the prior indorser and having indorsed in good faith, can hold S upon his indorsement. (*Inquiry from Mich., Jan., 1916.*)

210. B and C indorse a note in the order named for the accommodation of A, and C is compelled to pay the note. C seeks to hold B liable for the full amount of the note. *Opinion:* C can hold B liable for the full amount unless there has been some specific agreement between the accommodation indorsers that they shall only be ratably liable. The Negotiable Instruments Act of New York provides "As respects one another, indorsers are liable *prima facie* in the order in which they indorse, but evidence is admissible to show that as between or among themselves they have agreed otherwise." Neg. Inst. A., Sec. 68 (Comsr's. dft.). *Easterly v. Barber*, 66 N. Y. 433. *Egbert v. Hanson*, 34 Misc. (N. Y.) 596. *In re McCord*, 174 Fed. 73. *McCarty v. Roots*, 62 U. S. 432. *Kelly v. Burroughs*, 102 N. Y. 93. (*Inquiry from N. Y., June, 1918, Jl.*)

211. A note of a corporation having three indorsers was protested for non-payment in 1909, and since that time interest thereon has been paid by the corporation but nothing has been paid thereon by the indorsers except that one of the indorsers made partial payments in reduction of the principal, the last of which was in January, 1913. What are the liabilities of the parties? *Opinion:* The right of action of the holder of the note accrued against all parties when the note was protested in January, 1909, and due notice was given the indorsers. The note is barred by the Statute of Limitations (six years in Pennsylvania) as to all indorsers and

the sole remaining liability is that of the corporation maker. Interest paid by the corporation maker and not by the indorsers operates to suspend the running of the statute as to it, but partial payment made by one of several joint debtors without the acquiescence, consent or ratification of the other joint debtors will not operate to suspend the running of the statute as to him. Any action for contribution which the indorser who made partial payment may have had against the company indorsers has likewise been barred by the statute. *Stew. Purdon Dig.* (13th ed.), Sec. 36, p. 2294. *Clad's Estate*, 214 Pa. 141. *Wright v. Jordan*, 181 Pa. 100. *Underwood v. Patrick*, 94 Fed. 468. *Knight v. Clements*, 45 Ala. 89. *Waughop v. Bartlett*, 165 Ill. 124. *Bottles v. Miller*, 112 Ind. 584. *Shoemaker v. Benedict*, 11 N. Y. 176. *Lazarus v. Fuller*, 89 Pa. 331. *Bush v. Stowell*, 71 Pa. 208. *Clark v. Burn*, 86 Pa. 502. *Coleman v. Forbes*, 22 Pa. 156. *Levy v. Cadet*, 17 S. & R. 126. *Searight v. Craighead*, 1 Pa. 135. *Houser v. Irwin*, 3 W. & S. 347. *Schoneman v. Fegley*, 7 Barr. 433. *Bixler v. Billet*, 14 York Leg. Rec. 20. *Schofield v. Twining*, 127 Fed. 490. (*Inquiry from Pa., Mar., 1919, Jl.*)

212. A made a negotiable note payable to the order of B, bearing three indorsements of B, C and D in the order named, who indorsed for accommodation. D paid the note and demanded full payment from the previous indorsers; B and C will only contribute one-third. *Opinion:* The accommodation indorsers are liable for the full amount in the order in which they indorse unless as between or among themselves they have agreed otherwise. *Hogue v. Davis*, 8 Gratt. 4. *Slagle v. Rust*, 4 Gratt. 274. *Reinhardt v. Schall*, 69 Md. 356. *Farwell v. Ensign*, 66 Mich. 600. *Ross v. Espy*, 66 Pa. 481. (*Inquiry from Va., Nov., 1909, Jl.*)

Liability in order of indorsement unless they agree otherwise

213. A note was executed by a construction company by its president, and indorsed by each of its stockholders, also by each member of a firm. Is the last indorser equally liable with the first, or must recourse be had in the order in which they appear? *Opinion:* The liability of indorsers is fixed by Sec. 68 of the Negotiable Instruments Act, which provides: "As respects one another indorsers are liable in the order in which they indorse; but evidence is admissible to show that as between or among themselves they have agreed other-

wise, Joint payees or joint indorsers who indorse are deemed to indorse jointly and severally." This applies to accommodation indorsers as well as to others. Unless there is proof of a special agreement that they shall share equally in the liability, the last indorser can look to the prior indorsers for the full amount and so on up to the first indorser who would, if the maker defaulted, be solely liable for the full amount. See, also, *Wilson v. Hendee*, 74 N. J. Law, 640. *Weeks v. Parsons*, 179 Mass. 570. (*Inquiry from W. Va., Feb., 1919.*)

Liability of accommodation indorsers on corporation note

214. A corporation discounted its note payable at a bank. The note was indorsed for accommodation by several of the directors of the company and signed "X Company, by C. H. Jones." The company failed before maturity. *Opinion*: The accommodation indorsers were liable on the note provided demand and due notice of dishonor were given them. The fact that the indorsers were directors of the bankrupt company does not dispense with these steps. The possession by the bank of the note at maturity constituted sufficient demand. C. H. Jones's signature imports a corporate, not a personal obligation. *Neg. Inst. A., Sec. 29 (Comsr's dft.)*. *Moore v. Alexander*, 63 App. Div. (N. Y.) 100. (*Inquiry from Mich., March 1911, Jl.*)

Result where indorser had claim against maker corporation

215. A bank states that it frequently buys commercial paper of a corporation, indorsed by one or more of its officers whose statement shows money due by the corporation to the indorser of the note. The bank asks what would be the status of the indorser's claim, as affecting the claim of anyone holding its paper, in case the corporation became financially embarrassed. *Opinion*: It seems under the authorities that in the case stated, the officer indorsing the corporation note would have a claim against the insolvent concern for money owing him which would rank equally with that of the bank holding the corporation's note; but independently of this, the accommodation indorser would be liable to the bank for the full amount of the note. *Yeaton v. Alexandria Bank*, 5 Cranch (U. S.) 49. *Wolf v. Brakebill*, 32 Cal. App. 300. *Polhemus v. Prudential etc.*, 74 N. J. L. 570. *Laubach v. Purcell*, 35 N. J. L. 434.

Schepp v. Carpenter, 51 N. Y. 602. *Nalitzky v. Williams*, 237 Fed. 802. (*Inquiry from N. J., March, 1919.*)

216. A corporation in the hands of a receiver issued its promissory note, indorsed for accommodation by several responsible persons. The note was issued pursuant to a court order, but the legality of said order was questioned by the bank about to purchase the same. *Opinion*: The bank should not purchase the note until it has ascertained whether the note is void or illegal. Accommodation indorsers are liable on a corporation note, although the corporation because of incapacity is not liable, but if the note is void for illegality, this defense is open to the accommodation indorsers. *Gunnis, Barrett & Co. v. Weighley*, 114 Pa. 191. *Taylor v. Dansby*, 42 Mich. 82. *Lee v. Yandell*, 69 Tex. 36. *Moledon v. Leflore*, 62 Ark. 387. *Randolph Com. Paper, Sec. 915*, citing 1 *Pars. Notes and Bk.* 244. *Daniel on Neg. Inst.*, Sec. 1306 a. *Osborn v. Robbins*, 36 N. Y. 365. *Neg. Inst. A. of Pa.*, Sec. 64. *Leonard v. Draper*, 187 Mass. 536, 73 N. E. 644. *Bruck v. Lambeck*, 118 N. Y. S. 494. *Burke v. Smith*, 75 Atl. (Md.) 114. (*Inquiry from Pa., Sept., 1912., Jl.*)

Application of payment by accommodation indorsers

217. A person borrowed \$16,000.00 from a bank for which he gave his note signed also by a surety. Another of maker's notes for \$1,000.00 for which the bank held other security becoming due, the maker informed the bank that he would be able to pay about \$1,500.00 shortly. A day or two after, the surety on the \$1,600.00 note sent the bank a draft for \$1,000.00 with instructions to "Credit on note of Smith —," the principal. The bank assuming that principal had raised the money from surety, and that surety was simply sending it to insure its going right, applied it to the \$1,000.00 note. On being informed of this, both principal and surety objected. *Opinion*: The surety, of course, had the right to have the money applied on the note whereon he was surety, if such was his intention. If he forwarded money belonging to the principal, the bank might possibly maintain that it was forwarded with the intention of applying on the \$1,000.00 note, but if he forwarded his own money the bank would be obliged to allow him credit therefor on the note on which he was surety. It could not be applied upon a debt for which he was not liable at all. See *Citizens Bk. v.*

Carey 2 Ind. T. 84, 48 S. W. 1012., (*Inquiry from Iowa., June, 1915.*)

Corporation as accommodation maker and indorser

218. A local corporation is operated by an Ohio corporation. The former borrows money with the indorsement of the latter. Would the corporation indorser become liable in case of the maker's default? *Opinion:* The cases are generally agreed that a corporation has no legal power to make or indorse commercial paper for accommodation. *Piser v. Serota & Gens*, 182 Ill. App. 390. *Blake v. Domestic Mfg. Co.* (N. J. Chy. 1897) 38 Atl. 241. *Natl. Pk. Bk. v. Am. M. W. Co. v. German Amer. M. W. etc. Co.* 116 N. Y. 281. *In re Romadka Bros. Co.*, 216 Fed. 113. If the indorsement in question is an accommodation indorsement and the Ohio corporation received no benefit therefrom, its indorsement would not be binding except as to a bona fide holder without notice of the accommodation character of the indorsement. (*Inquiry from Mo., Sept., 1918.*)

219. A corporation indorsed notes for the accommodation of third persons or corporations, growing out of real estate and building transactions. Can the corporation, in the absence of express power conferred in its charter, become liable upon commercial paper for the mere accommodation of third parties? *Opinion:* Judicial authority is nearly unanimous to the effect that a corporation has not power to make, indorse or accept, or otherwise become liable upon negotiable paper for the mere accommodation of another person or corporation (*In re Romadka Co.*, 216 Fed. 113. *Smith v. Land etc. Co.*, 213 Fed. 56. *Ice Co. v. Bank etc. Co.*, 12 Ga. App. 818. *Piser v. Serota*, 182 Ill. app. 390. *Blake v. Domestic Mfg. Co.* (N. J. Ch. 1897) 38 Atl. 241. *Jacobus v. Mantel Co.*, 211 N. Y. 154, 105 N. E. 210. *Bank v. Jones*, 141 N. Y. Suppl. 304. *Cayahoga etc. Co. v. Lewis*, 4 Ohio Dec. 17. *McCaleb v. Power Co.* (Tex. Civ. App.) 173 S. W. 1191). The foregoing also applies even though a consideration is paid therefor (*Nat. Park Bank v. German Am. Mut. Warehouse etc. Co.*, 116 N. Y. 281., (*Inquiry from N. J., May, 1920.*)

220. As a general proposition no corporation in any state, in the absence of statutory authority, has power to make or indorse paper for accommodation. Such paper is valid and enforceable only in the hands of

a holder taking the same before maturity, in good faith and without notice. *Davis v. Old Colony R. Co.*, 131 Mass. 258. *Berry v. Yates*, 24 Barb. (N. Y.) 199. *Culver v. Reno Real Est. Co.*, 91 Pa. 367. *El. Co. v. Memphis, etc.*, R. Co., 85 Tenn. 703. *Madison, etc., Plank Road Co. v. Watertown, etc., Plank R. Co.*, 7 Wis. 59. *Crewer, etc., United Min. Co. v. Willyams*, 14 Wkly. Rep. 1003. *Johansen v. Chaplin*, 6 Montreal Q. B., 111. *Blake v. Domestic Mfg. Co.*, 38 Atl. (N. J.) 241. *Nat. Bk. of Republic v. Young*, 41 N. J. Eq. 531. 1 *Daniel on Neg. Inst.*, Secs., 382, 386. *Green's Brice's Ultra Vires*, 255, 272. *Lucas v. Pitney*, 27 N. J. L. 221. *Nat. Park Bk. v. German American Mut. Warehouse etc., Co.*, 116 N. Y. 281. *Owen & Co. v. Storms & Co.*, 78 N. J. L. 154. *Knapp & Co. v. Tidewater Coal Co.*, 81 Atl. (N. J.) 1063. *Nat. Bk. v. Sixth Nat. Bk.*, 212 Pa. 238. (*Inquiry from N. J., Sept., 1915, Jl.*)

221. There are two corporations, one of which owns the majority of stock in the other. The corporation owning the majority of stock is indorsing for the other. Is this an accommodation? Would this come under the law avoiding accommodation indorsements by corporations, or would the interest involved indicate that it had received some benefit and therefore bind it? *Opinion:* The general rule is that a corporation cannot bind itself as accommodation indorser for another corporation or person. The case might be different if the indorsing corporation received some consideration or benefit. It is doubtful that the fact that the indorsing corporation is part owner of the other one, would take it out of the rule that a corporation has no power to indorse for accommodation of another, unless specially authorized by its charter. See 10 Cyc. 1109. (*Inquiry from N. Y., Aug., 1917.*)

Accommodation indorsement by bank of banker's acceptance

222. Can a bank under the law lend its indorsement to a banker's acceptance? *Opinion:* While a bank can bind itself by indorsement of its own paper, it cannot be an accommodation indorser, and where a bank, by agreement with a broker, buys paper in the morning and indorses it back in the afternoon for a commission, such transaction is of accommodation character and ultra vires, and a purchaser with notice cannot hold a bank on such indorsement. (*Johnson v. Charlottesville*

Nat. Bank, 3 Hughes [U. S.] 657. Bowen v. Needles Nat. Bank, 87 Fed. 430.) Such paper, however, is enforceable against the indorser by a holder in due course. (Credit Co. v. Howe Machine Co., 54 Conn. 387. Sturdevant Bros. v. Farmers, etc., Bank [Neb.] 95 N. W. 819. Vallett v. Parker, 6 Wend. [N. Y.] 615. Safford v. Wyckoff, 4 Hill [N. Y.] 442. See also First Nat. Bank v. Munroe [Ga.] 69 S. E. 1123.) Paper bearing accommodation bank indorsements being susceptible of marketability, the hidden vice being unknown to purchasers, the only remedy is through action by supervising authorities. (*Inquiry from N. Y., Dec., 1920, Jl.*)

Accommodation guarantor of payment

223. A bank submitted the following form of guaranty: "For value received I, or we, guarantee payment of the within note and hereby waive protest, demand and notice of non-payment thereof." Is this form of any value in the case of a note signed by two parties but not indorsed? *Opinion:* A contract of one who indorses a note in the words above quoted, and who receives no consideration or benefit from the loan made to the maker, is that of guarantor of payment. Northern State Bk. v. Bellamy, 125 N. W. (N. D.) 888. He is bound as guarantor and not as indorser. Noble v. Beeman etc., 131 Pac. (Ore.) 1006. (*Inquiry from Wis., March, 1919.*)

Accommodation indorsement as a valuable consideration

224. Thomas Doe secured the indorsement of Clark Doe on the former's note and had it discounted for his own benefit. At the same time Thomas Doe executed a similar note which he delivered to Clark Doe as security for his said indorsement. Is Clark Doe a bona fide holder of the security note? *Opinion:* It would seem that the indorsement and surrender to Thomas Doe of note number one was a good and sufficient consideration to support note number two, which was evidently given for the purpose of indemnifying Clark Doe for his accommodation indorsement on note number one. It has been held that, upon an exchange of promissory notes, each note is a valid consideration for the other and is fully available in the hands of the holder. Rice v. Grange, 131 N. Y. 149. State Bk. v. Smith, 155 N. Y. 185. Newman v. Frost, 52 N. Y. 422. Milins v. Kauffman, 104 App. Div. 442. Williams v. Banks, 11 Md. 198. (*Inquiry from Pa., Jan., 1917.*)

Protest

Not necessary to hold accommodation maker

225. A promissory note payable to order of and at bank A, is signed by Richard Roe and John Doe, the latter getting no benefit. Can Doe be held liable if no protest was made. *Opinion:* If, instead of signing on the face of the note underneath the name of Roe, Doe had placed his signature on back before delivery, he would then be liable as indorser, and demand and notice of dishonor at maturity would be necessary to procure his liability. Strict formal protest would not be necessary because the note is not a foreign bill of exchange. But Doe is not an indorser of the note but a maker, and is liable thereon, although a mere accommodation maker, without any necessity for demand and notice of dishonor. The Negotiable Instruments Act expressly provides that "presentment for payment is not necessary in order to charge the person primarily liable on the instrument," and it further provides that "the person 'primarily' liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same." It has been held that an accommodation maker is a person primarily liable, even though he add the word "surety" to his signature, or the fact that he signed for accommodation is otherwise known to the holder. (*Inquiry from Minn., Aug., 1914.*)

226. A promissory note whereby "We, or either of us promise to pay" bank A is signed by John Doe and Richard Roe, the latter acting as accommodation maker. Bank A desires to ascertain its duty as to Richard Roe. *Opinion:* Under the Negotiable Instruments Act, Richard Roe is primarily liable to pay this note, equally as is John Doe. The law does not require notice to him before the note is due, nor is any demand of payment, protest or notice of dishonor, at maturity necessary to preserve his liability, nor will a delay of the holder to proceed against John Doe, the principal, discharge Richard Roe the surety, from liability. Should Richard Roe, however, indorse a note for accommodation of the maker, he would then be entitled to due demand at maturity, and immediate notice of dishonor, and failure of these steps would discharge him from liability. (*Inquiry from Neb., Dec., 1915.*)

227. A note is signed by John Doe, John Smith and John Roe, the latter two

receiving no benefit whatever from the note. Should the note be protested if not paid? *Opinion*: All parties are primarily liable under the Negotiable Instruments Act. There is no necessity for protest if not paid when due. *Rouse v. Wooten*, 140 N. C. 557. Smith and Row would be equally liable thereon with Doe and it would not be necessary to first exhaust the remedy against Doe before proceeding against them. (*Inquiry from W. Va., Feb., 1917.*)

Accommodation signature or indorsement after delivery

228. An accommodation indorser signing a note after delivery, and after the consideration has passed between the parties, is not liable, unless there is a new consideration. But no new consideration is required where the note is indorsed pursuant to an agreement made prior to delivery. *Eitel v. Farr*, 165 S. W. (Mo.) 1191. (*Inquiry from Ala., July, 1914, Jl.*)

Accommodation maker subsequent to delivery

229. H made application to bank for loan of \$10,000. Bank agreed to make loan on condition that A sign the note with H. However, A not being available on date loan was consummated, the money was delivered to H on note signed by H alone. Two days later the note was signed by A, at the solicitation of H and the president of the bank. A now claims that he is not liable on note for want of consideration. Is this a good defense on part of A? *Opinion*: A party signing a note as accommodation maker after the note has been executed and delivered and the consideration has passed, is not liable thereon unless there is a new consideration. (*Briggs v. Downing*, 48 Iowa 550. *Eitel v. Farr* [Mo.] 165 S. W. 1191. *Messenger v. Vaughan*, 45 Mo. App. 15). But where signature is obtained pursuant to a previous promise made by the original maker, the act will relate back to the inception of the first contract, and the accommodation maker will be bound, even though he was not a party to, or had knowledge of the promise at the time it was made, provided he had knowledge thereof at the time of signing. (*Montgomery County v. Auehley*, 92 Mo. 126.) If, however, the subsequent signature is procured in ignorance by the signer of the original promise, no liability will attach. In this case, while A was not a party to the agreement when made, his subsequent signature was with knowledge and in

pursuance of the prior agreement and he is therefore liable on the note. (*Inquiry from Iowa, Dec., 1920, Jl.*)

Subsequent accommodation indorsement in pursuance of prior arrangement

230. A asked a bank for a loan and offered B for indorser. The bank took A's signature on the note, advanced him money with the understanding that B should, and he did, afterwards indorse the note. Can B be held liable in case A defaults? *Opinion*: B can be held. The case is different where there has been no arrangement made at the time the advance is made. In such a case a subsequent indorsement by B of a note previously executed and delivered by A upon which money was advanced at the time of execution, would not be binding on B for want of consideration. The rule is well stated in *Eitel v. Farr*, 165 S. W. (Mo.) 1191, which holds: One who signs a note after it has been executed and delivered and the consideration has passed between the parties incurs no liability unless there be a new consideration; but where a note is so signed pursuant to a promise or agreement made in advance of delivery, the act relates back to the inception of the first contract and no consideration is required. (*Inquiry from Iowa, Jan., 1919.*)

231. A bank makes a loan to A for \$500 upon his note, with the understanding and agreement that B would sign later as accommodation indorser. B afterwards comes to the bank and signs the note. *Opinion*: One who signs a note as accommodation indorser after its delivery and the passing of consideration is not liable, without a new consideration, unless such indorsement is made pursuant to an agreement in advance of delivery. In this case B is liable if his subsequent indorsement was in pursuance of the prior agreement. *Montgomery Co. v. Ouchley*, 92 Mo. 126. *Eitel v. Farr*, 165 S. W. (Mo.) 1191. *Messenger v. Vaughan*, 45 Mo. App. 15. (*Inquiry from Kansas, July, 1916, Jl.*)

232. A bank holds a note. After it had acquired title and parted with full consideration, and before the maturity of the note, a stranger to the note and to all transactions connected therewith prior to its issue, indorsed the same at bank's solicitation. Is such indorser bound, or would such an indorser be bound if the note was past due, and he had indorsed same because the

bank had agreed to carry the note for a while if he did? *Opinion*: In the first case the indorser is not bound. See Opinion 233. In the second case the indorser would be bound provided the agreement of the bank was binding on it to extend the time of payment for a definite period. See Strone v. Sheffield, 144 N. Y. 392. Colver v. Wheeler, 11 Ohio Civ. Ct. Rep. 604. (*Inquiry from Mich., Oct., 1915.*)

233. A bank discounted a three months' note of a corporation, indorsed individually by two officers of the corporation. After the expiration of one month, the bank, wishing further protection, requested the signature of an additional indorser. *Opinion*: The additional indorser by indorsing for accommodation could not be held liable, as there would be no consideration to support his indorsement. Stoudenmire v. Ware, 48 Ala. 589. Tousey v. Taw, 19 Ind. 212. Bingham v. Kimball, 17 Ind. 396. Turtle v. Sargent, 63 Minn. 211. Security Bk. v. Bell, 32 Minn. 409. Wren v. Hoffman, 41 Miss. 616. Frick Co. v. Hoff, 128 N. W. (S. Dak.) 495. (*Inquiry from N. Y., May, 1913, Jl.*)

Liability of additional surety on note

234. A loans B \$10,000, and C signs the note as surety. When the note matures, A becomes dissatisfied with the security for the loan, and demands that D be procured as an additional surety before he will renew the note. Would D, the last signer, be liable on the note? *Opinion*: Where, after a note is signed and delivered by principal maker and surety, the holder becomes dissatisfied, and the maker procures a third person to sign as additional surety, but not in pursuance of an original promise at the time the note is given, the contract of the additional surety is without consideration and unenforceable. But where the note is matured and the additional surety signs to procure the holder to renew it, the renewal of the note is a consideration for the additional signature, and the surety is liable thereon. Ellis v. Clark, 110 Mass. 389. (*Inquiry from Okla., Sept., 1920, Jl.*)

235. A signed a promissory note in favor of a bank, which discounted it for him. The understanding with A was that B would also sign as surety, but B was not present at the time. Later B did sign as surety. On A's failure to pay, payment is sought to be enforced against B. *Opinion*: B's signature is without consideration and not binding

unless made in pursuance of a promise made in advance of discount. Frick Co. v. Hoff (N. Dak.) 128 N. W. 495. Lackey v. Boruff (Ind.) 53 N. E. 412. Paul v. Stackhouse, 38 Pa. 302. Eitel v. Farr (Mo.) 165 S. W. 1191. (*Inquiry from Texas, Aug., 1915, Jl.*)

Release by extension of time of payment

236. A bank asks whether an extension of time may be had as to makers of notes and indorsers. *Opinion*: A majority of cases hold that under the Negotiable Instruments Act an extension of time granted the principal maker, does not release a non-consenting surety-maker, but that an indorser who guarantees payment is discharged by an extension of time without his consent. It has, however, been held in Iowa that, where the question arises between the parties, such as between the payee and an accommodation surety-maker, the Act is not applicable for the reason that the payee in such a case is not regarded as a holder in due course, and hence an extension of time by the payee to the principal debtor without the consent of the accommodation joint maker will release the latter. Fullerton L. Co. v. Snouffer, 139 Iowa, 176. (*Inquiry from Iowa, July, 1918.*)

237. A bank sends a copy of a past due note which was signed by John Doe as maker and John Smith and Richard Roe as sureties. The bank desires a renewal but is unable to secure the signatures of John Smith and Richard Roe as sureties. The bank desires to know whether, if it takes a renewal note from John Doe with the understanding from him alone that the old note be held as collateral, the sureties upon the old note would be liable for the payment of the new note. *Opinion*: The taking of the new note from the maker, in place of the old note might operate to discharge the sureties; but it has been held that where an old note has been retained as collateral security for a new one and there is no postponement of the remedy against the sureties, they will remain liable. See Chattanooga Sav. Bk. v. Lumby, 185 Ill. App. 110. (*Inquiry from Iowa, June, 1918.*)

238. A borrows \$1,000.00 from bank on negotiable note, and B and C sign jointly with him as sureties. At maturity the bank accepts renewal note signed by A and B only, and releases C. At the time B signed the renewal note he understood that C was to sign it also. Can B main-

tain an action for release on note on the ground that the bank released C without his consent. *Opinion*: At common law B would be released by the extension of time of payment without his consent, but under the Negotiable Instruments Act, being a maker, a number of cases hold that the surety maker is not discharged by an extension of time of payment but can only be discharged in one of the ways provided by the Act for the discharge of a person primarily liable. *Edmonston v. Ascough*, 43 Colo. 55. *Vanderford v. Farmers Bank*, 105 Md. 164. *Lane v. Hyder*, 163 Mo. App. 688, and other cases. But, see contra *Natl. Park Bk. v. Koehler*, 204 N. Y. 174. (*Inquiry from Kan., Oct., 1915.*)

239. A bank holds a note signed by "X. Co., D, B, and C," and there was given as collateral a savings bank book in D's name for \$1,000, accompanied by an order on the savings bank for \$1,000, signed by D. After several renewals of the note, D refused to sign another renewal, and now makes demand upon the bank for his savings bank book. The bank holds the renewal note signed by X. Co., B and C. Is the bank obliged to surrender the book? *Opinion*: A renewal of the note under the circumstances related above, without the consent of accommodation maker D, does not release D, and he still remains liable on the original note which has not been surrendered or discharged by the renewals, and the collateral of D held by the bank is not released. *Bank v. Cooper (Kan.)* 162 Pac. 1169. *Citizens Bank v. Douglass*, 178 Mo. App. 664. *Natl. Park Bank v. Koehler*, 204 N. Y. 174. *Union Trust Co. v. McGinty*, 212 Mass. 205, 98 N. E. 679. *Nortonville First Nat. Bank v. Williams*, 164 Ky. 143, 175 S. W. 10. *Vanderford v. Farmers etc. Nat. Bank*, 105 Md. 164. *Rouse v. Wooten*, 140 N. C. 557. *Richards v. Market Exch. Bank Co.*, 81 Ohio St. 348, 90 N. E. 1000. *Adams v. Ferguson*, 44 Okla. 544. *Cellars v. Lyon*, (Oreg.) 89 Pac. 126. *Graham v. Shephard*, 136 Tenn. 418, 189 S. W. 867. *Wolstenholme v. Smith*, 34 Utah 300, 97 Pac. 329. *Bradley etc. Co. v. Heyburn*, 56 Wash. 628, 106 Pac. 170. *Cowan v. Ramsey*, 15 Ariz. 533. *Rev. L. Mass. Ch. 73*, Secs. 136, 137. And see *Union Trust Co. v. McCrum*, 129 N. Y. S. 1078. *Ginsberg v. Greenberg*, 143 N. Y. S. 1017. (*Inquiry from Mass., Aug., 1920, Jl.*)

Receipt of interest in advance prima facie an extension

240. A bank holds a note for \$500 which was made a year or more ago, payable six months after date, and has twenty signers. The first signer received value, and the remaining nineteen signers were accommodation makers. The note was not paid at maturity, but the interest payments were thereafter kept up by the principal maker. The accommodation makers disclaim liability for the reason that interest payments were made and accepted after maturity. An opinion is asked whether, under the circumstances, the accommodation makers are liable. *Opinion*: The fact that the note was not paid at maturity but the interest payments were kept up by the principal maker, is not sufficient ground of defense by the other nineteen makers who signed the note for the accommodation of the principal maker and the bank has an undoubted right of action against them. It has been held in Pennsylvania that the fact that a person is an accommodation maker of a promissory note, and so known to the lender who is a holder for value, does not give the maker the rights of an indorser or surety or change his responsibility for the indebtedness from what it would be as a maker for value, and he can discharge the indebtedness evidenced by the note only as a maker for value could do, and the giving of time to the real debtor cannot avail the accommodation maker as a defense to an action on the note. *Del. Trust Co. v. Haser*, 199 Pa. St. 17, followed in *Chambers v. McLean*, 24 Pa. Super. Ct. 567. It will thus be seen that all the signers of the instrument would be regarded in Pennsylvania as primarily liable, and, therefore, not released by an extension granted the principal debtor without their knowledge or consent. See, also, Sec. 29 of Pennsylvania Act of May 16, 1901 P. L. 194. (*Inquiry from Pa., Dec., 1913.*)

241. Would the liability of an accommodation joint maker or indorser be affected if the principal extended a note by paying up the interest for a definite period in advance? *Opinion*: It has been held in several cases that an extension of time to the principal debtor without consent of the surety does not discharge an accommodation joint maker from liability as he is primarily liable and under the provisions of the Negotiable Instrument Act is not discharged by such extension. But an accommodation indorser is only secondarily

liable and would be discharged under the express provisions of the Act. (*Inquiry from S. C., Feb., 1918.*)

242. A note had been signed by two parties, one who received the money, the other acting as accommodation maker. The note being past due, the payee took a new note from the first party. Does the extension of the time of payment release the accommodation maker? *Opinion:* The doctrine of the law of suretyship that a binding extension of time by the creditor to the principal debtor releases a non-consenting surety has, according to a number of authorities, been abrogated by the Negotiable Instruments Act where the surety signs the instrument as one of the makers. This point has not been decided in South Dakota, but according to the weight of authority the accommodation maker being primarily liable would not be released. *Edmonston v. Ascough* (Col.) 95 Pac. 313. *Vanderford v. Farmers Bk.* (Md.) 66 Atl. 47. *Lane v. Hyder* (Mo.) 147 S. W. 514. *Cellers v. Meachem* (Ore.) 89 Pac. 426. *Fullerton Lumber Co. v. Snouffer*, 139 Iowa 176. (*Inquiry from S. Dak., Oct., 1918, Jl.*)

243. A bank took a renewal demand note without the consent of the accommodation maker, and the bank inquires whether such action released the latter. *Opinion:* The proposition is unquestioned that in Texas, where the rule of the Negotiable Instruments Act does not yet prevail, an extension of time by the holder of a note to the principal maker without the consent of the surety maker will release the latter from liability. But, it seems, that the taking by the bank of a demand note from the principal maker, attaching as collateral (as appears to have been done) the old note, was not such an extension of time. A demand note is due immediately and it seems clear, that at any time before the expiration of the four years statute of limitations, an action could have been brought against the surety maker, even though the bank held the demand note. Where a creditor takes a renewal of a note maturing before a collateral note, the surety on the latter is not discharged. *Healey v. Dolson*, 8 Ont. 689. See, also, *Stutts v. Strayer*, 60 Ohio St. 384, holding that the surety is not discharged by an independent contract between the principal parties, though it may be contemporaneous and relate to the same subject matter, but does not vary the contract of the surety. Also, re *Aldred's Estate*, 79 Atl. (Pa.) 143,

holding that sureties on a demand note given as collateral security to an indorser on another note of the maker are not released from liability because of renewals of the other note where there were no renewals or extensions of the note which they had indorsed. (*Inquiry from Texas, Jan., 1919.*)

Note: The Negotiable Instruments Law was passed in Texas in March, 1919. Under this law an extension of time by the holder to the principal does not release the surety.

Married women as surety or accommodation party

244. Can a wife, who indorses her husband's note simply as a matter of accommodation and without benefit to herself, avoid responsibility in case her husband fails to pay at maturity? *Opinion:* In Connecticut, prior to 1877, married women were under common law disability but, by statute passed that year, a married woman has power to make contracts with third persons as if unmarried and be held liable as accommodation indorser upon her husband's note. *Wagner v. Mutual Life Ins. Co.*, 88 Conn. 536. *Freeman's Appeal*, 68 Conn. 533. *Kilbourn v. Brown*, 56 Conn. 149. Gen. St. Conn. 1918, Ch. 281, 281, Sec. 5274. (*Inquiry from Conn., Aug., 1919, Jl.*)

245. A bank loaned money to a man on a note bearing his wife's indorsement, and the same was not paid. The bank inquires as to the possibility of recovery against both maker and indorser. *Opinion:* By statute in Connecticut a married woman may become indorser or surety for her husband, and in case of her default her separate property may be subjected to the satisfaction of the debt. Gen. Stat. Conn. (1888) Chap. 186 Sec. 2796. *Freeman's Appeal*, 68 Conn. 533. (*Inquiry from Conn., Feb., 1915.*)

246. Under the laws of Georgia, a woman cannot bind herself as surety or accommodation indorser, except that she will be held liable thereon to a bona fide holder for value without notice of the character of the indorsement. *Park's Anno. Code Ga.*, 1914, Vol. 2, Sec. 3007. *Farmers, etc., Bk. v. Eubank*, 2 Ga. App. 839. *Booth v. Merchants Bk.*, 9 Ga. App. 650. *Villa Rica Lumber Co. v. Paratain*, 92 Ga. 370. *Schofield v. Jones*, 85 Ga. 816. *Jones v. Bradwell*, 84 Ga. 309. *McDaniel v.*

Ackridge, 12 Ga. App. 79. (*Inquiry from Ga., Nov., 1916, Jl.*)

247. A married woman in Minnesota owning eighty acres of land became surety on the note of another person. *Opinion:* A married woman in Minnesota has capacity to bind herself as surety upon the note of another, and her property is liable for her debts the same as if unmarried. Rev. L. Minn. (Suppl. 1909), Ch. 72, Sec. 3607. Minn. Rev. L. 1905, Sec. 3335. N. W. Mut. L. Ins. Co. v. Allis, 23 Minn. 337. (*Inquiry from Minn., Oct., 1913, Jl.*)

248. In Missouri a married woman has power to make contracts in her own name and bind herself as surety upon her husband's note. Mo. Rev. St. 1889, Sec. 6864. Brown v. Dressler, 125 Mo. 589. McCorkle v. Goldsmith, 60 Mo. App. 475. Grandy v. Campbell, 78 Mo. App. 502. (*Inquiry from Mo., Oct., 1913, Jl.*)

249. A note dated and payable in New York, and bearing the indorsement of a married woman who was a resident of New Jersey, was presented at a New York bank for discount. *Opinion:* In New Jersey a married woman cannot bind herself as accommodation indorser or surety, unless estopped to deny liability. But the bank has the right to presume that the indorsement was made in New York, where the same is valid, and the married woman is estopped from denying that her indorsement is a New York contract. Vliet v. Eastburn, 64 N. J. L. 627. Union Nat. Bk. v. Chapman, 169 N. Y. 538. Chemical Nat. Bk. v. Kellogg, 183 N. Y. 92. (*Inquiry from N. J., Sept., 1916, Jl.*)

250. In New Jersey, a married woman cannot bind herself upon a note executed for the accommodation of another unless she or her separate estate derives a benefit therefrom. But a married woman can make a note for a loan to herself, although intending to turn the money over to her husband. In such a case a note executed by the married woman as sole maker, payable to a bank and indorsed by her husband, would be safe as an enforceable instrument, and the proceeds should be paid by the bank to the wife. Comp. St. N. J., 1910, Sec. 5, p. 3226. Vankirk v. Skillman, 34 N. J. L. 109. Peoples Nat. Bk. v. Schepflin, 73 N. J. L. 29. Perkins v. Elliott, 23 N. J. Eq. 526. Vliet v. Eastburn, 64 N. J. L. 627. Todd v. Bailey, 58 N. J. L. 10. (*Inquiry from N. J., March, 1913, Jl.*)

251. Under the law of New Jersey a married woman cannot bind herself as accommodation indorser, and the fact that the paper so indorsed is made by a corporation, of which she is a stockholder, does not make the indorsement binding upon her under the New Jersey statute. Allen v. Beebe, 63 N. J. L. 377. (*Inquiry from N. J., Jan., 1911, Jl.*)

252. A married woman depositor of a New Jersey bank requested it to cash a check for a woman friend. After first requiring its depositor whose name did not appear on check to indorse, the bank handed the money to her. The check was returned unpaid, and the bank charged it off its depositor's account. She claims she is not liable. *Opinion:* Under the laws of New Jersey, a married woman has no power to bind herself as an accommodation indorser, guarantor or surety of any other person, unless she or her separate estate benefits therefrom, directly or indirectly. Compiled Laws 1910 (N. J.) pp. 3222-6. As it seems the bank's depositor did not obtain the money for her own use, the bank cannot hold her on her accommodation indorsement. (*Inquiry from N. J., Sept., 1912.*)

253. A bank desires to learn the legal effect of a note signed by a husband and wife for a loan obtained by the husband. *Opinion:* Under the provisions of Section 7999 of the General Code of Ohio, a married woman may contract to the same extent as if she were unmarried, and would be bound on a note signed by her husband and herself for a loan obtained by the husband. (*Inquiry from Ohio, May, 1918.*)

254. A bank discounted the note of a married woman, where it contained a declaration that the funds were for her private use, chargeable against her separate estate. *Opinion:* Payment could be enforced by the bank unless it knew that the married woman was in fact a mere accommodation maker. In Pennsylvania a married woman can bind herself on a note executed for her own benefit, but not as accommodation maker for another. Manor Nat. Bk. v. Lowery (Pa.) 89 Atl. 678. Purdon's Dig. Pa. (13th Ed. 1903) p. 2451. Sibley v. Robertson, 212 Pa. 24. (*Inquiry from Ohio, May, 1914, Jl.*)

255. In Pennsylvania every restriction imposed by the common law upon the capacity of a married woman to contract

has been removed, except in two cases: (1) she cannot become accommodation indorser maker, guarantor or surety for another; and (2) she cannot, unless her husband joins, convey or mortgage her real estate. For a citation of decisions showing detailed development of the law, see Purdon's Dig. Pa. (13th Ed.) p. 2451. Abell v. Chaffee, 154 Pa. 254. Hanar v. Croney, 13 Pa. Co. Ct. 193. Peter Adams Paper Co. v. Cassard, 206 Pa. 179. Hazleton Nat. Bk. v. Klantz, 24 Pa. Super. Ct. 456. Patrick v. Smith, 165 Pa. 526. Harrisburg Nat. Bk. v. Bradshaw, 178 Pa. 180. Brooks v. Nat. Bk., 125 Pa. 394. Harper v. O'Neil 194 Pa. 141. Sibley v. Robertson, 212 Pa. 24. Wiltbank v. Tobler, 181 Pa. 103. In re Young's Est. (Pa. 1912) 83 Atl. 201. 7 Cyc. 702. Henry

v Bigley, 5 Pa. Super. Ct. 503. (*Inquiry from Pa., April, 1913. Jl.*)

256. A married woman in Pennsylvania has no power to bind herself as accommodation indorser, whether it be for the accommodation of her husband or other maker. The Enabling Act of 1893 expressly excepts contracts of this character. Rathfan v. Locher, 215 Pa. 571. (*Inquiry from Pa., Sept., 1910. Jl.*)

257. In West Virginia a married woman can bind herself as surety upon note of her husband. Dages v. Lee, 20 W. Va. 584. Camden v. Hiteshew, 23 W. Va. 236. Williamson v. Cline, 40 W. Va., 194. W. Va. Acts 1893, Chap. 3. W. Va. Code 1913, Chap. 66. (*Inquiry from W. Va., Dec., 1914. Jl.*)

ADVERTISEMENT

Advertising of capital

258. A bank with capital of \$50,000 has \$30,675 actually paid in, and wishes to advertise that its capital is \$50,000. *Opinion:* No statute in Arkansas expressly prohibits the bank from so advertising, although a certain statute providing that a false report with intent to deceive as to the condition of a bank is a criminal offense, may have application. Statutes of Ark., Sec. 1813. (*Inquiry from Ark., Nov., 1911. Jl.*)

Bank advertising when business established

259. Can a bank advertise the fact that it has been established since 1866, although the present owners did not become proprietors until 1914 when the bank was incorporated? *Opinion:* It is proper to advertise that the business was established in 1866, and incorporated in 1914. (*Inquiry from N. J., May, 1916.*)

Imprint of U. S. flag on draft

260. The placing of a representation of the flag upon a draft or certificate of deposit, disconnected from any advertisement, would not violate the Missouri statute against using the flag for advertising purposes. Rev. Stat. Mo. 1909, Chap. 36, Sec. 4884—4886 incl. (*Inquiry from Mo., June, 1917. Jl.*)

Note: In Halter v. Nebraska, 205 U. S. 34 (decided by U. S. Sup. Ct. in 1907) it was held that no privilege of American citizenship is denied by the provision of Act

Nebraska April 8, 1903, making it a misdemeanor to use representations of the National flag upon articles of merchandise for advertising purposes. The Supreme Court of Illinois in 1900, in Ruhstrat v. People, 57 N. E. 41, had previously held that the right to use or display the National flag is a privilege of a citizen of the United States, and Act Illinois, April 22, 1899, prohibiting its use for advertising purposes, thereby abridges privileges and immunities of a citizen of the United States.

Imprint of U. S. flag on bank's statement folder

261. A bank's statement folder showing its condition and used for advertising purposes contains an imprint of the likeness of the United States flag. *Opinion:* There is no Federal statute prohibiting such imprint; the extent of Federal legislation on the subject is to prohibit the use of the flag as a trade mark. While the New York statute in regard to the desecration and improper use of the United States and New York State flags expressly provides that it shall not apply to a newspaper, pamphlet or circular on which the flag is printed or painted disconnected from any advertisement, the statement folder might be deemed an advertisement of the bank's business and it would be safer to consult the District Attorney of the County before imprinting the flag on the folder. U. S. Comp. Stat. 1918. Sec. 9490. N. Y. Penal Law, Sec. 1425, Subsec. 16. People v. van De Carr, 178 N. Y. 425. (*Inquiry from N. Y., June, 1914. Jl.*)

262. Until the Massachusetts Act of 1913 prohibiting the misuse of the United States flag is judicially construed, it would be unsafe for banks in that state to imprint such flag upon their statement folders. Rev. Laws of Mass. 1913, Chap. 464 (*Inquiry from Mass., Sept., 1914. Jl.*)

263. Inquiry is made whether the imprint of the U. S. flag on a bank's statement folder is legal. *Opinion:* The Act of the Pennsylvania legislature of April 29, 1897, provides that any person "who shall * * * use said flag (American flag) for advertising any business or trade whatsoever, shall be guilty of a felony." The Act of May 23, 1907, prohibits among other things, the unlawful use of the flag or any representation thereof for advertising purposes, but provides that the Act shall not be "construed to apply to a newspaper, periodical, book, pamphlet, circular, certificate, diploma, warrant or commission of appointment to officer, ornamental picture or badges, or stationery for use in correspondence, on any of which shall be printed, painted, or placed said flag, or representation thereof, disconnected from any advertisement for the purpose of sale, barter, or trade." See 5 Purdon's Digest Supplement, pp. 2534, 5529. In view thereof, it seems, the imprint of the flag on the bank's statement folder, which is an advertisement of the bank's business, would probably come within the prohibition of the Act. (*Inquiry from Pa., June, 1917.*)

Imprint of U. S. flag on circulars

264. Two circulars are submitted bearing the imprint of U. S. flag urging planting of additional food crops. *Opinion:* It does not seem these circulars would violate the Virginia Act for it permits the imprint of the flag on circulars where disconnected with any advertisement. (*Inquiry from Va., May, 1917.*)

False advertisement by national bank

265. A bank complains and asks if the National Banking Laws permit a national bank to use advertisements reading as follows: "Uncle Sam guarantees protection to all depositors in the ————Bank." *Opinion:* It seems there is nothing in the National Bank Laws which would make criminal the publishing of an untrue advertisement by a national bank of the character described. But it is quite certain that if the matter were brought to the attention of the Comptroller of the Currency, he would probably be able to correct this practice. The publishing of an untrue advertisement such as the above indicated, might come within the provisions of Chapter 43 of the Laws of West Virginia, 1015, entitled "An Act to provide against fraudulent advertising and fixing penalties for its violation." It might be well to call this matter to the attention of the local prosecuting officer and obtain his views. (*Inquiry from W. Va., Aug., 1917.*)

ALTERED AND RAISED PAPER

Difference between forged and raised check

266. Is a check that has been raised, with signature genuine, considered forgery, or considered a raised check? *Opinion:* When a genuine check is raised, it is materially altered, and a material alteration of the amount would constitute forgery equally as if the signature were forged. Popularly, however, such a check is referred to as a raised check, while in a case of forgery of the signature it is more generally referred to as a forged check. In case of forgery of signature, the bank which pays cannot recover from a bona fide holder receiving payment. In the case, however, of a genuine check raised in amount, the payor bank has right of recovery. (*Inquiry from Ohio, Dec., 1917.*)

Responsibility of paying teller to bank

267. A check for \$5 was raised to \$250 and the name of payee erased and bearer inserted. It was paid by a teller in violation of his instructions not to pay a bearer check in excess of \$100. *Opinion:* The bank is responsible to its customer and the teller is liable to the bank. (*Inquiry from N. Y., Dec., 1908, Jl.*)

268. Where a bank paid a raised check, and there were no exceptional circumstances of negligence on the drawer's part, it cannot charge the raised amount to the customer's account. In the absence of gross or inexcusable neglect, a bank officer or minor official is not personally liable for a mistake in paying such check. *Belknap v. Nat. Bk. of North America*, 100 Mass. 380. *Union Bk. v. Knapp*, 3 Pick. (Mass.) 96, 108.

Union Bk. v. Clossey, 10 Johns. (N. Y.) 271. Bolles' "Modern Law of Banking," p. 383. (*Inquiry from Me., March, 1909, Jl.*)

Payor bank's right of recovery

269. Bank A paid \$80.00 on a check that had been raised from \$8.00 and forwarded it to the drawee bank which charged drawer's account with \$80.00. The latter requests A to reimburse him to the extent of \$72.00. *Opinion:* The general rule is that a drawee bank which pays a raised check to the holder may recover the amount paid, as money paid under mistake of fact. Redington v. Woods, 45 Cal. 406. Some courts hold that the indorsement of the holder in such case amounts to a representation and warranty that the check is genuine, upon which the drawee bank may rely. City Bank of Houston v. First Nat. Bank, 45 Tex. 203. Under the authorities A is liable to the drawee bank for the excess, namely \$72.00, and the drawee is responsible for this amount to the drawer. Probably, also, the drawer could recover directly from bank A, where the drawee has not credited him with the amount. (*Inquiry from Ala., June, 1920.*)

Bank responsible for signature but not for amount

270. A issues his check on bank B in favor of C for \$5.00. C raises the check to \$50.00 and cashes it for latter amount at a saloon. The saloon keeper D, who is a customer of bank A, indorses it, and cashes it at that bank, receiving \$50.00. B asks if it can recover from its customer D. *Opinion:* Bank B has an undoubted right to recover from D, the raised amount. It is uniformly held that when a bank has paid a check which has been raised or altered, it may recover the amount from the person to whom payment was made, although he was a holder in good faith. The bank is not responsible for the amount, the same as it is for the drawer's signature. See Redington v. Woods, 45 Cal. 406. Crocker-Woolworth Nat. Bank v. Nevada Bank, 139 Cal. 564, 73 Pac. 456, 63 L.R.A. 245, 96 Am. St. Rep. 169. (*Inquiry from Cal., June, 1914.*)

Money paid under mistake of fact is ground for recovery

271. The payee of a check drawn on bank B indorses it in blank and deposits with bank A which credits amount to his account. A indorses "Pay to any bank or banker. Previous indorsements guaran-

teed" and sends check to B where it is paid and cancelled. Later on it is discovered that the check has been altered. A paid out amount of altered check to its depositor and cannot recover from him, and asks if it is obliged to refund to B. *Opinion:* Bank A held the check under blank indorsement and was apparent owner. It is clearly liable for the money collected thereon, whether it indorsed the same to the drawee, "Pay any banker," or indorsed specifically to the drawee, or indorsed the same in blank or did not indorse at all. The ground of liability is that bank A has received money paid under mistake of fact without consideration, to which it is not entitled and which it must refund. The case would be different if the signature of the drawer was a forgery. (*Inquiry from Colo., Nov., 1917.*)

"Cash" substituted for payee's name

272. A check is altered by scratching out the payee's name and writing "cash" above it. The check is indorsed "Pay to any bank or banker, prior indorsements guaranteed." The depositor claims the alteration was not authorized. Has the payor bank recourse upon the bank to which payment was made? *Opinion:* Payment, of course, is not chargeable to the depositor where the alteration was made without his authority. The money, however, is recoverable from the bank to which payment was made, unless that bank, being an agent, has turned over the proceeds to its principal, in which event, the right of recovery would be against the latter. (*Inquiry from La., Nov., 1915.*)

Right of recovery though check poorly raised

273. A check which had been raised from \$5.00 to \$25.00 was deposited with bank A by a customer who had received it from an employee, which collected from drawee the raised amount. Shortly afterwards the drawee bank returned the check to A, supported by an affidavit from the maker, stating that the check had been raised, and asked A to remit the difference, \$20.00. The work in raising the check was poorly done. Who is responsible? *Opinion:* The drawee bank which pays a raised check has a right of recovery from the bank receiving payment. If the check has been raised from \$5.00 to \$25.00, A, which collected the check from the drawee bank, should remit the difference of \$20.00, and it has in turn recourse upon its customer. The ultimate loser would be the one who cashed the check

for the forger. If it was A's customer, he is the loser. If the employee of the customer, then he is the loser, and must refund \$20.00 to A's customer. (*Inquiry from Ill., June, 1916.*)

Amount raised and payee changed

274. Bank A presented to Bank B for payment two checks, each of which has been raised and the name of each payee changed. The checks were indorsed "All prior indorsements guaranteed," and were paid by bank B. Can bank B recover? *Opinion:* The rule is well settled that, where a bank pays a check drawn upon it which has been fraudulently and materially altered, it may recover from the bank or person who has received payment under the general rule that money paid under a mistake of fact is recoverable. See, for example, *White v. Cont'l Bk.*, 64 N. Y. 316. also, *Redington v. Woods*, 45 Cal. 406. *Cont'l Nat. Bk. v. Met. Nat. Bk.*, 107 Ill. App. 455. *Third Nat. Bk. v. Allen*, 50 Mo. 310. *Nat. Pk. Bk. v. Eldred Bk.*, 90 Hun. (N. Y.) 285. *Nat. City Bk. v. Westcott*, 26 Week, Dig. (N. Y.) 161. *Oppenheim v. West Side Bk.*, 22 Misc. Rep. (N. Y.) 722. Under the law, therefore, bank A is liable to reimburse bank B for the amount. (*Inquiry from Me., Nov., 1920.*)

275. A check upon which the payee's name was changed and the amount raised was paid by the drawee bank, A, which received it from bank B. The check bore the indorsements of the fictitious payee and of another person, and there was no evidence of alteration apparent. Who loses? *Opinion:* The rule is well established that the drawee bank which pays a check which has been raised or otherwise altered, the drawer's signature being genuine, has a right of recovery of the money paid. In this case A has a clear right of recovery from B, and the ultimate loser will be the person who cashed the check for the forger. (*Inquiry from Pa., July, 1920.*)

Raising of marginal figures only

276. A check drawn on bank A for \$210 was altered by changing the figures to read \$240, the true amount written in the body of the check being unchanged. The check was deposited in bank B which credited depositor with the raised amount, and, through regular channels collected same from bank A. About six months later the maker of the check threatened suit against bank B for the difference, \$30.

Can he recover? *Opinion:* The law is settled that, where a bank in good faith and without negligence pays to an innocent holder a check drawn upon it which has been raised, it may recover from such holder the amount of the excess paid, as money paid under mistake of fact. Under this rule bank B would be liable to bank A for the excess over the true amount of the check, or, if the maker permitted the drawee to charge the full amount to his account, B would be liable therefor to the maker. The courts hold that the drawee is under no more obligation than is the holder of the check to know that it has been raised. B's sole recourse is upon its depositor. (*Inquiry from Miss., June, 1920.*)

277. A bank which takes from the payee a check raised from \$2 to \$200, and receives the full amount thereon from another bank, is responsible to the latter for the amount, such latter bank being responsible to the drawee from whom it has collected the full amount. *Park Bk. v. Eldred Bk.*, 90 Hun (N. Y.) 285. *Neg. Inst. A., Sec. 66 (Comrs's. dft.).* (*Inquiry from Mo., April, 1910, Jl.*)

Typewritten amount raised

278. A railroad company issued a check on bank A to B for \$1.20, which was raised to \$54.20, the filling in being typewritten. B indorsed and passed it to C who in turn indorsed and gave it to D, and the latter indorsed and deposited it in bank E which collected raised amount from A. All the indorsers disclaimed any knowledge of the check being altered, and bank A demanded that the check be taken up by E. *Opinion:* A bank is authorized to pay only in conformity with the order of its depositor, and if it pays a check which has been materially altered after it has left the depositor's hands, it cannot charge the payment to the drawer, except for the amount for which the check was originally issued. But a bank which pays a raised check has a right of recovery from the one to whom paid, and, in the present case bank A which paid the check can charge but \$1.20 of the amount to the railroad company's account and has the right to recover the excess from bank E which received payment. E in turn has the right to charge such excess back to its customer who in turn has recourse on the prior indorsers. (*Inquiry from Mo., Feb., 1915.*)

279. A deposited a check calling for \$80.00 which he had cashed for the payee,

with bank B which credited his account with it and charged the \$80.00 to the account of another customer who drew the check. It was learned shortly afterwards that the check had been raised from \$8.00 to \$80.00 by the payee. The check was not protected in any way, and the bank asks if it should immediately charge it back to A? *Opinion:* A bank is authorized to pay money from the account of a depositor only in conformity with his order and if it pays a check which has been raised or materially altered after issue it cannot, as a general rule, charge the payment to the drawer. In the present case there appears to be no negligence on the part of the drawer which would make him responsible, but the bank would be entitled to recover from the party to whom payment was made. The check should be charged to the drawer for \$8.00 only, and \$72.00, representing the raised amount, should be charged back to A from whom the bank received the check. He is entitled to credit for \$8.00 only, and that is all that can be charged against the drawer of the check. (*Inquiry from N. H., March, 1915.*)

280. A bank paid its customer's check for \$80 to another customer. Ten days later it was advised that the check had been raised from \$8. *Opinion:* The drawer is not chargeable unless he had left blanks in the check which the holder was able to fill out without suspicion. In the absence of such negligence the drawer is chargeable with \$8 and the sum of \$72 representing the raised amount is properly chargeable against the other customer. *Leather Mfg. Nat. Bk. v. Morgan*, 117 U. S. 96. *Critten v. Chemical Nat. Bk.*, 171 N. Y. 219. *Redington v. Woods*, 45 Cal. 406. *Bk. of Commerce v. Union Bk.*, 3 N. Y. 326. (*Inquiry from N. H., Oct., 1915, Jl.*)

Cash for deposit stolen by messenger and raised check substituted

281. The payee of a check sent it for deposit with other checks and cash to bank A, by messenger, who raised the check and took raised amount from the cash, making out a new deposit slip to conform to alteration. The drawee bank paid the check and asks reimbursement from bank A. Upon whom does the loss fall? *Opinion:* It is uniformly held by the courts that the drawee bank which pays a raised check may recover the increased amount from the person to whom payment was made. *Bank of Commerce v. Union Bank*,

3 N. Y. 230. *National City Bank v. Westcott*, 118 N. Y. 468, 23 N. E. 900 16 Am. St. Rep. 771. And in this case the drawee has a right of recovery from bank A, but as the check had been indorsed by the payee before the messenger who took it to that bank for deposit has raised it, probably, also, bank A can recover from the payee, because the cash was stolen from the payee by his own agent before making the deposit and bank A credited the payee with an amount greater than the true amount of the checks deposited. (*Inquiry from N. Y., Nov. 1915.*)

Check filled out by payee for drawer

282. A, who owed B \$2, had him fill out a check for that amount, and then signed it. B raised the check to \$21 and cashed it for that amount with C who received cash for it from bank D. The latter collected the raised amount from the drawee bank which two weeks later discovered the fraud. Bank D, being requested immediately afterwards to do so, refused to refund the difference to the drawee bank. *Opinion:* There being no forgery of the drawer's signature, but the amount being raised, the decisions are to the effect that the drawee bank which pays the check may recover the excess from the bank receiving payment, and in this case bank D is responsible for the amount. (*Inquiry from Okla., Feb., 1915.*)

283. Bank A cashed two checks purported to be for \$50 each, and received payment from the drawee bank B. Later it was discovered that the checks had been raised from \$5.00 to \$50.00, and bank A asks whether it is liable to bank B for the difference between the original amount of the checks and the amount for which they were cashed. *Opinion:* The rule of law is that a drawee bank which pays a check that has been raised in amount has a right of recovery of the excess from the holder receiving payment and can only charge the amount of the original check to the drawer. It would seem under the facts stated there is a clear liability on the bank's part for the \$90 excess over the original amount of the two checks. Bank A's recourse is upon the person from whom it received the checks. (*Inquiry from Texas, July, 1919.*)

Alteration apparent on face of check

284. A check raised from \$6.71 to \$16.71 after passing through several indorsers' hands was sent by a collecting

bank to drawee bank which paid the raised amount. The alteration was not skillfully done, and the check was marked by a protectograph, very indistinctly "Not over ten dollars." Who is the loser? *Opinion*: The drawee which pays a raised check has a right of recovery from the person to whom paid. The drawee is no more responsible for knowing the correctness of the amount than is the holder. There is a right of recourse by the drawee, and all along down the line of indorsers, and the loser will be the indorser who first acquired the check after it had been raised. (*Inquiry from Iowa, Oct., 1915.*)

285. A customer presented for deposit to his account a check, the body of which was visibly altered. The bank refused to receive the check, taking the position that the amount should be properly authenticated by the maker or a new check issued. *Opinion*: If the check was raised, the drawee paying the same could recover the money paid. The bank would not be safe in receiving such check for collection and should send the check back, rather than forward it for payment or rejection and thus avoid correspondence and trouble. (*Inquiry from N. Y., July, 1913, Jl.*)

286. A check, the date of which was apparently altered, was presented for payment and was refused by the drawee. *Opinion*: The safer course for the collecting bank was to protest the check for non-payment, although such protest would not be necessary if it later developed that the alteration was not authorized and the instrument was not valid. *Elias v. Whitney*, 50 Misc. (N. Y.) 326. (*Inquiry from N. J., Oct., 1912, Jl.*)

287. A gave his check to B for \$3.60 who raised the amount to \$93.60 and cashed the check at C's store. It was deposited in bank D which collected from the drawee bank. Some slight evidences of alteration appear on the face of the check. Who loses? *Opinion*: The general rule is that, as between the payor bank and the persons through whose hands a forged or altered check may pass, the bank is responsible only for the genuineness of the maker's signature, and where the bank pays money by mistake on a raised or altered check, may recover it back from the person to whom it was paid, provided that the bank has not been guilty of culpable negligence in making the payment. In this case, although the check might have a somewhat

suspicious appearance, a court would probably hold that the holder who purchased the check had equal opportunity as the drawee which paid it to have seen the alteration and that if the purchaser took it to be all right the bank was equally entitled to regard it as all right, and that, therefore, the drawee bank was entitled to recover from prior parties thereon the difference between the original and the raised amount, that is to say, \$90. (*Inquiry from Ohio, Aug., 1917.*)

288. A bank paid a check, raised from \$20.90 to \$40.90. The alteration was apparent on the face of the check. *Opinion*: The drawee bank can recover the money as paid without consideration in the absence of special circumstances of negligence or laches making it liable. The fact that the alteration was plainly shown does not prevent recovery, as such fact is equally apparent to the holder. (*Inquiry from Ore., April, 1916, Jl.*)

Apparent overdraft created by payment of raised check

289. A check drawn on bank A that had been raised was cashed by bank B which collected the raised amount from A although the amount called for by the raised check overdraw the account of the latter's customer. It is asked, should not this fact have put the drawee bank on inquiry, and, under the circumstances can B be held liable? *Opinion*: The fact that the amount called for by the raised check resulted in an overdraft, would not necessarily put the drawee bank on inquiry as to the genuineness of the amount and constitute such negligence as to prevent it from recovering. Depositors not infrequently overdraw their accounts, and this would hardly seem to charge the bank with notice that the check was raised. The presenting bank is probably responsible. (*Inquiry from Kan., April, 1916.*)

290. A check was raised from \$5.50 to \$65.50, and cashed at the drawee bank. The alteration was poorly done and easily detected, and the next day the bank notified the drawer that his account was overdrawn, but the latter paid no attention to the matter for several months. Who should bear the loss? *Opinion*: The bank can only charge its depositor with \$5.50 on this check and must be the loser of the \$60.00. It has been held in numerous cases that a bank is authorized to pay only in conformity with the order of its depositor

and if it pays a check that has been materially altered after it has left the depositor's hands, it cannot charge the payment to the drawer. In this case the check was a valid order for \$5.50 only—that was all the drawer authorized and ordered the bank to pay. There are exceptional cases where a depositor has been negligent in so drawing a check as to facilitate the fraud in which he has been held responsible therefor. But such is not this case. The fact that the bank notified the drawer that his account was overdrawn and that he did not come to the bank for two months afterwards, would not charge him with responsibility. (*Inquiry from Mo., Sept., 1914.*)

Liability of drawer for careless execution

Blank spaces carelessly left

291. A drawer filled out a check in figures \$11.85, leaving the line for the written amount blank. The payee changed the figures to \$831.85 in a way not discernible except under glass and filled in the written part of the check for that amount. *Opinion:* Bank which pays check is not responsible because of drawer's negligence. *Timbel v. Garfield Nat. Bk., N. Y. Super. Ct. App. Div. Nov. 8, 1907. Tr. Co. v. Conklin, 119 N. Y. S. 367. (Inquiry from Ark., June, 1913, Jl.)*

292. Bank A cashed a raised check which was written with a protectograph. The figures were carelessly made and there was plenty of room to insert another figure. The drawee bank paid the check and cancelled it, but, discovering the fact that it had been raised, returned it to bank A with notation on it "Cancelled in error." Upon whom does the loss fall? *Opinion:* It is recognized as a general rule that the drawer or customer owes to the drawee or banker, the duty of exercising reasonable care in the issuance of his check on the banker. In *Critten v. Chemical Nat. Bank, 171 N. Y. 219, 63 N. E. 969, 57 L. R. A. 529*, the rule is stated that "While the drawer of a check may be liable where he draws the instrument in such an incomplete state as to facilitate or invite fraudulent alteration, it is not the law that he is bound so to prepare the check that nobody else can successfully tamper with it. This was a case where the question involved was the duty and liability of the drawer to his bank to which, in view of its obligation to pay the drawer's checks, a greater amount of care is due than to the general public, which is

under no obligation to purchase such checks. In the present case the figures were carelessly written, and there was plenty of room to insert another figure. If the instrument in question was drawn in such an incomplete state as to facilitate or invite fraudulent alteration, it would seem, according to the above rule, that the drawer would be liable for the raised amount. But if the filling in of another figure in the unfilled space was successfully accomplished only after skillful tampering, then he would not be liable. There are some cases which hold that the drawer of a check or the maker of a note is liable for the increased amount to an innocent purchaser where he leaves blanks unfilled or allows space to remain which facilitates an alteration by raising an amount without detection. Other cases hold that he would not be so liable, being under no duty to the general public to anticipate and provide against the commission of such crime. See *Nat. Ex. Bk. v. Lester, 194, N. Y. 461, 87 N. E. 779. (Inquiry from Mass. July, 1919.)*

293. A bank submits a copy of a raised check and asks upon whom the responsibility lies. The particulars thereof are sufficiently shown in the opinion. *Opinion:* In the present case the depositor left sufficient space after the word "Four" before drawing the line to write in the letters "teen" and sufficient space between the dollar mark and the figure "4" to insert the figure "1." This case clearly falls within the decisions holding that if a depositor is so negligent as to leave spaces which can be filled in without giving the check a suspicious appearance, he and not the bank should be the loser. (*Inquiry from Minn., May, 1916.*)

294. If a check is raised, or if the name of the payee is changed and the check is cashed at the bank, who is responsible, the drawer or the bank? *Opinion:* Where a check is raised and paid by the drawee bank, as between the maker and the bank, the bank is the loser, unless the maker has been negligent in drawing the check, as by leaving blanks unfilled. But the bank would have the right to recover the money from any holder receiving payment. If the name of the payee is changed, the bank could not charge the amount to the maker, but could recover from the holder receiving payment. (*Inquiry from Ohio, July, 1918.*)

295. Where a draft to bearer is drawn for "..... twelve dollars," the word

"twelve" being written at the right of the line, a space also being left between the dollar mark and the figures "12," and is indorsed in that condition and afterwards fraudulently raised to "five hundred and twelve dollars" in words and figures, and negotiated to a bank by the drawer on faith of the indorsement, the authorities conflict as to the right of recourse of the bank upon the indorser for the full amount. The generally accepted rule of the law merchant is that where blanks negligently left are filled, the party who has invited the fraud by leaving the blanks should stand the loss, rather than a holder for value. *Bk. of Herington v. Wangerin*, 65 Kan. 423. *Hackett v. First Nat. Bk. of Louisiana*, 114 Ky. 193, 70 S. W. 664. *Nat. Exchange Bk. of Albany v. Lester*, N. Y. App. Div. decided May 8, 1907. *Humphrey Hardware Co v Herrick*, 72 Neb. 878, 101 N. W. 1016. (*Inquiry from Tex., Jan., 1909, Jl.*)

Check signed in blank or partly unfilled

296. A check drawn on bank A was paid by it. The drawer acknowledged the signature to be genuine, but claimed that the rest of the check which was written in a different hand and made payable to "Cash," was forged. Upon whom does the burden of proof rest as to the forgery? The bank claims it was justified in paying the check, while its customer insists, that, under Sec. 32 of Ch. 73 of the Revised Laws of Massachusetts, the bank must bear the loss. That section provides that "Where an incomplete instrument has not been delivered, it will not, if completed and negotiated without authority, be a valid contract in the hands of any holder as against any person whose signature was placed thereon before delivery." *Opinion:* The mere fact that the handwriting in the body of the check is different from that of the signature does not affect the validity of the payment. If the customer's claim of forgery is based on the fact that the check was signed in blank or was partly unfilled and, after being lost or stolen in this condition, was filled out and was paid by the bank, the bank can charge the payment to its customer, as the latter owes a duty to his banker to safeguard his checks which is violated when he signs them in blank and creates an opportunity for their misuse. This duty runs to the drawee bank which is under obligation to pay his checks. Some courts hold, while others deny, that there is also a liability to the innocent purchaser. In New York, which has a statute similar to the Massachusetts one mentioned,

the courts recognize this duty and liability of the drawer to the drawee bank in such case. There does not appear to be any Massachusetts decision to the contrary. But if the check were issued in ordinary and complete form and afterwards altered without the authority of the customer, the payment would not be chargeable. The signature being genuine, the burden of proof would be on the customer to establish that the writing above the signature was a forgery. (*Inquiry from Mass., Feb., 1915.*)

Care required of drawer in preparing check

297. Where a bank paid its customer's check, the amount of which was raised after erasure by acid, it is responsible to the customer, the customer not being bound to safeguard his check against every possible alteration. *Critten v. Chemical Nat. Bk.*, 171 N. Y. 219. *Belknap v. Nat. Bk. of North America*, 100 Mass. 380. *Greenfield Sav. Bk. v. Stowell*, 123 Mass. 196. (*Inquiry from Mass., July, 1908. Jl.*)

298. Is the maker of a raised check liable for the amount where such check shows on its face no indication of having been raised? *Opinion:* A bank is not relieved from liability to its depositor for paying a raised check because the increase of amount is not apparent from the face of the check itself. While the drawer of a check may be liable where he draws the instrument in such an incomplete state as to facilitate or invite fraudulent alteration, it is not the law that he is bound so to prepare the check that nobody else can successfully tamper with it. *Critten v. Chemical Nat. Bank*, 171 N. Y. 219, 63 N. E. 969, 57 L. R. A. 529. *Houser v. Bank*, 29 Pa. Super. Ct. 613. (*Inquiry from Pa., April, 1920.*)

299. A gave B a check supposed to be for the sum of ninety-nine cents, but which was cashed by B for \$99.99. B made out the check, which A signed but without noticing just how it was filled out. *Opinion:* If the check was originally drawn for \$99.99, A is liable. If the amount was subsequently raised the rule applies that the drawer is not bound so to prepare a check that nobody can successfully tamper with it, but if he carelessly executes the check so as to facilitate or invite raising of the amount without giving the check a suspicious appearance, the bank may charge the full amount paid to the drawer's account.

Critten v. Chemical Nat. Bk., 171 N. Y. 219. Young v. Grote, 4 Bing. 253. (*Inquiry from S. Dak., March, 1916, Jl.*)

Amount need not be protected by perforation

300. A bank in issuing a draft filled it out in pen and ink with ordinary care, but did not use a protectograph. The draft was subsequently fraudulently raised to an increased amount, perforated and negotiated to an innocent purchaser. *Opinion:* The innocent purchaser would have no recourse upon the drawer except for the original amount. No case has gone to the extent of holding the amount must be protected by perforation. Nat. Exch. Bk. v. Lester, 87 N. E. 779. Critten v. Chemical Nat. Bk., 171 N. Y. 219. (*Inquiry from N. C., Aug., 1918, Jl.*)

Where protectograph cutting not changed

301. Bank A draws a draft on its correspondent B for \$500 and cuts across its face with a protectograph "Not over five hundred dollars," and the draft is later raised in figures and writing, but the protectograph cutting is not changed, and the draft is paid for the amount called for by the figures and writing. Would A have recourse on B? *Opinion:* Where a check is drawn with reasonable care, even without the protectograph, and is raised, and afterwards paid by the drawee, the latter cannot charge the increased amount to the drawer's account. The protectograph is an added protection designed to place the drawee on his guard. The rule governing the duty of the drawer of a check is well stated in Critten v. Chemical Nat. Bank, 171 N. Y. 219, to the following effect: While he draws the instrument in such an incomplete state as to facilitate or invite fraudulent alteration, he is not bound so to prepare the check that nobody else can successfully tamper with it. It follows that A would have recourse on B for making payment on a raised check for a larger amount than that for which it was originally drawn. (*Inquiry from Cal., May, 1918.*)

Different handwriting on check

302. The first letter of a drawer's name, to wit "R," was written by another and the drawer finished the signature in his own handwriting, to wit, "obert Moore." *Opinion:* The drawer was bound by his signature, but if the signature created doubt as to the genuineness in the mind of the drawee, refusal of payment would be

justified until verification was obtained. See opinion No. 296. (*Inquiry from Ariz., April, 1912, Jl.*)

303. A drawee bank paid a check upon which the drawer's signature was genuine, but the body of the check was forged in a different handwriting, there being no sign of an alteration. *Opinion:* If the check was signed in blank, stolen and filled out or was originally unfilled or partly unfilled and afterwards altered by filling the blanks, the payment by the drawee would be chargeable to the customer; but if the check was issued in ordinary and complete form and afterwards altered without authority, the payment would not be chargeable. Young v. Grote, 4 Bing. 253. Critten v. Chemical Nat. Bk., 171 N. Y. 219. (*Inquiry from Mass., Dec., 1914, Jl.*)

Check altered by bookkeeper of drawer corporation

304. Authority was given to A, a bookkeeper of a corporation, who was intrusted with its banking business, to make out and sign checks, which were countersigned by an officer. A disappeared, and it was discovered that the name of a payee of a check drawn by the corporation had been erased from the check and A's name substituted. The check was in the handwriting of A, and was indorsed by him, and deposited in his private account with the drawee bank. It bore no evidence of alteration. Demand was made by a surety company, which had an assignment of all of the rights of the corporation, upon the drawee bank for amount of the check which it had credited to A's account. Can it recover? *Opinion.* As a general rule where a bank pays an altered check, it is not by order or authority of the depositor, and is not chargeable to his account; but this rule does not apply where the facts work an estoppel against the depositor by reason of negligence or otherwise. This case would seem to be one for the application of the rule that where one of two innocent parties must suffer for the fraud of a third person, the one who has reposed the confidence and put in the power of such third person to commit the fraud must bear the loss. See Allen Grocery Company v. Bank of Buchanan County, 192 Mo. App. 476, 182 S. W. 777. It would seem also that the alteration would be binding on the corporation, being done by its agent, authorized to fill out checks, and intrusted with the management of its banking business, and that it, and its

assignee, the surety company, would be estopped from questioning the validity of the payment of the check. See *Equitable Life Ins. Co. v. National Bank of Commerce*, 181 S. W. (Mo.) 1176. *National Dredging Co. v. President, etc., of Farmers Bank*, 6 Penn. (Del.) 580, 69 Atl. 607. (*Inquiry from Ill., March, 1919.*)

Raised lead pencil checks

305. The drawer who writes his check in lead pencil is not, for that reason, liable for the difference to the purchaser of such check after it has been raised. *Critten v. Chemical Nat. Bk.*, 171 N. Y. 219. *Tr. Co. v. Conklin*, 119 N. Y. S. 369. (*Inquiry from Ark., June, 1912, Ill.*)

306. A check that had been raised was cashed by the drawee bank for the raised amount. As was the drawer's practice, the check was written in lead pencil. Would this fact have any bearing on the question of the bank's liability? *Opinion:* It is a very undesirable practice for drawers of checks to write them in lead pencil. Where a bank pays a raised check, it cannot charge the excess to its depositor, and so far as it appears, checks drawn in lead pencil would come within this rule, as, under the law as it now stands, a check drawn in lead pencil is legal and valid, and it has never yet been held that the fact that the drawer has issued his check in lead pencil is such carelessness or negligence as to make him, rather than the bank, loser in case of payment of a check so written. In this case the bank has paid a raised check and cannot charge the excess to the drawer's account. Had the check been deposited in the bank by a customer, it might have recovered the excess from the latter. (*Inquiry from Kan., Aug., 1919.*)

Payee a stranger to drawer

307. A depositor of a bank wrote a check with a lead pencil payable to a stranger. The check was afterwards raised and passed to a merchant who cashed it at the drawee bank. Does the bank, merchant or drawer lose? *Opinion:* It has been held that an instrument drawn in lead pencil is valid and negotiable. The merchant who cashed the raised check and collected it from the bank, is liable to the bank for the excess, under the rule that money paid by mistake upon a raised check can be recovered back. The bank was no more bound to know that this check was raised than was the merchant, and, as

between the two the merchant is the loser. As to the drawer, it is the settled principle in Kentucky as announced by the court in *Hackett v. First Nat. Bank*, 114 Ky. 193, 70 S. W. 664, that, where the drawer of a bill, check or note, has himself, by careless execution of the instrument, left room for insertion to be made without exciting the suspicions of a careful man, he will be liable upon it to a bona fide holder without notice, when the opportunity which he afforded has been embraced and the instrument filled up with a larger amount than it bore when he signed it—but this principle has not as yet been extended so far as to declare that the drawing of a check in lead pencil was "careless execution" which enabled a larger amount to be inserted without exciting suspicion. The use of lead pencil checks, because of the facility with which they can be altered, should be discouraged. (*Inquiry from Ky., Oct., 1918.*)

Blanks in check written with indelible pencil filled with ordinary lead pencil

308. A check written with indelible pencil, the original figures and amount in the body of which being written some distance from the left hand end, was raised from \$7.50 to \$17.50, the inserting of the "1" before the \$7.50 and the adding of "teen" to the "Seven" being made with ordinary lead pencil. The drawee bank paid the raised amount, although the alteration of the check which bore two indorsements could easily be detected. Could the drawer hold the bank? *Opinion:* If a bank pays a check which has been materially altered after its issue by raising the amount, it cannot, in the absence of special circumstances, charge the drawer for more than the original amount. But a depositor owes his bank a duty of care which is broken where he writes a check leaving spaces before or after the words or figures expressing the amount which enables the holder to increase the amount without causing suspicion. In the present case, although the drawer was careless, and might have been held responsible to the bank had not the alterations been made in ordinary lead pencil and easily detected, the bank itself was careless in paying a check which so clearly showed on its face that it had been altered, and under the circumstances it would seem that the check could not be charged to the drawer's account for more than \$7.50. But the bank has recourse on the last indorser who received payment of the raised check, although he was a holder in good faith and may

recover from him the difference between the amount for which the check was drawn and the amount paid. (*Inquiry from Mont., July, 1914.*)

309. B used a lead pencil in drawing a check which is afterwards raised and cashed at the drawee bank which charges B's account with the increased amount. The latter objects. *Opinion:* While a check must be in writing, the Negotiable Instruments Act does not require that the writing must be in ink, and a check drawn and signed in lead pencil is valid if the bank does not object to it. Such a check is so readily altered, however, that it would seem that a bank should insist that their customers draw checks in ink in order to procure their payment. Whether a bank without such a prior agreement or requirement would be justified in refusing payment of a check, simply because it was drawn in lead pencil, has never been decided, and there is no case on record which has involved the question of responsibility as between bank and depositor for payment of a check drawn in lead pencil which has been raised. the general rule is that payment of a raised check is not chargeable to the depositor, except for the original amount, although a maker of a check may be liable to his banker where he draws the instrument in such an incomplete state as to facilitate or invite fraudulent alteration being not bound, however, so to prepare the check that nobody else can successfully tamper with it. It is doubtful if the mere drawing of a check in lead pencil, which is lawful, would be held such a careless and negligent act as to place the loss upon the depositor where the check has been raised and paid, for the bank, in agreeing to pay and in paying checks, drawn in lead pencil, would seem to assume the risk. In the present case the bank would be liable to B unless the check was drawn in such an incomplete state as to facilitate or invite fraudulent alteration. Lead pencil check—as to validity—see *Drefahl v. Rabe*, 132 Iowa 563, 107 N. W. 179. *Brown v. Butchers' & Drovers' Bank*, 6 Hill (N. Y.) 443. (*Inquiry from Me. Feb., 1918.*)

310. A bank states that it has a few customers who persist in writing and signing checks with an ordinary lead pencil and that such checks frequently become blurred and an alteration would be almost impossible to detect. Would there be any liability on its part in paying a check raised or altered under such circumstances?

Opinion: A check drawn in lead pencil is legal but it is very unsafe for the bank to handle, being so susceptible to alteration, and the customers should be discouraged from so drawing their checks. As to the law, a bank which pays an altered check cannot charge the raised amount to the depositor, in the absence of negligence on his part, but can recover the excess from the person receiving the money. It has never yet been held that the fact that the depositor draws his check in lead pencil is such a careless act as to make him responsible for the loss where it has been altered and then paid by the bank. (*Inquiry from N. Y., Feb., 1918.*)

311. A drawee bank promised over the telephone to cash or honor its customer's check for \$66.60. The check had been raised from \$16.60, and was written in lead pencil although it bore no signs of alteration. The bank paid the raised amount and now wishes to recover the excess from the holder who received payment. *Opinion:* The bank's promise even if in writing, would only bind the bank to pay a good check for that amount, namely, \$66.60, and not an altered check and such promise not being in writing, but over the telephone, was not binding in any event. The telephone message did not warrant that the check was drawn for the \$66.60 by its customer. The rule is well established that the drawee bank which pays a raised check has a right to recover the money from the holder to whom payment was made, as it is no more responsible for the genuineness of such amount than is the holder. The fact that the check was drawn in lead pencil and thus susceptible to alteration, it might be contended, was a careless act of the drawer and made him chargeable with the amount, in case the check was raised. But it is not unlawful to draw a check in lead pencil and the courts have never yet gone to the extent of holding the drawer of a check responsible, because it has been written in lead pencil and paid for an increased amount. Under the law, therefore, the holder is liable to refund to the drawee bank the excess of \$50 in this case. (*Inquiry from S. D., Dec., 1919.*)

Charge of original amount to depositor

312. A drawee bank paid two checks bearing the genuine signature of its customers, but their amounts of nine dollars and six dollars were raised to ninety dollars and sixty dollars respectively. *Opinion:*

The drawee bank has a right of recovery of the excess paid upon the raised checks from the owner who received payment upon the principle that money paid under a mistake of fact is recoverable. *Espy v. Bk. of Cincinnati*, 18 Wall. 614 Nat. Park Bk. v. Ninth Nat. Bk., 46 N. Y. 77. Nat. Park Bk. v. Seaboard Bk., 114 N. Y. 28. (*Inquiry from Iowa, Jan., 1917, Jl.*)

313. A check drawn on bank A for \$5.50 was raised to \$80.50 and cashed by bank B for that amount which was collected from A. Within two days B discovered the alteration, which had been very skillfully done, and immediately notified A. Who loses? *Opinion:* It is uniformly held by the courts that where a bank pays a check that has been raised, it may recover the amount from the party to whom payment was made, although he was a holder in good faith. The drawee cannot charge the amount to the drawer although the forgery was skillfully done, but has a right of action against the bank which received payment. In this case A has the right to charge to its customer's account the original amount of the check, viz., \$5.50, and should receive from B the excess, \$75.00 (*Inquiry from Kan., Nov., 1914.*)

314. A draws a number of checks which are raised as to amount when they reach the paying bank, and are charged to A's account. Does the loss fall on the drawer of the checks, or the bank? *Opinion:* Where a bank pays a raised check, it is liable to the depositor for the excess paid. See *Clark v. Nat. Shoe & Leather Bank*, 32 App. Div. 316 (N. Y.) A bank paying a raised check is entitled to recover the money from the innocent holder to whom paid. *Reddington v. Woods*, 45 Cal. 406. *Oppenheim v. West Side Bank*, 22 Misc. Rep. (N. Y.) 722. (*Inquiry from La., June, 1918.*)

315. A bank innocently cashing a raised check cannot hold the drawer for raised amount but only for the amount for which he drew check. (*Inquiry from Md., May, 1911, Jl.*)

316. A check drawn on bank A was paid by it, and it was afterwards discovered that it had been raised. Must the bank stand the loss? *Opinion:* The check having been raised, bank A can only charge its depositor the original amount and must stand the loss of the difference unless it is able to recover same from the person who received payment. If the check was paid directly to the forger, its chance of recovery would be hopeless,

but if it was first cashed by some merchant and then collected from the bank, bank A would have recourse upon the person receiving payment. (*Inquiry from N. D., Oct., 1917.*)

Drawer's liability to purchaser

317. A customer of bank A, by name of L, authorized one of his employees, W, to write a check on his account in favor of H, for \$10.10. The check was indorsed by H, and was cashed by one of the merchants, for a brother of H, but the check had been raised from \$10.10 to \$50.10 by one of the H brothers. Bank A had refused payment on check, as signature of L's employee did not appear on its books, and they had received no authority to honor the signature of the employee. The merchant is now holding the check and is out \$40.00. Does the merchant or L have to suffer the loss? *Opinion:* Where a check executed for \$10.10 is fraudulently raised to \$50.10 and negotiated to a merchant for the increased amount, the latter can only hold the drawer liable for the original amount of the check, in the absence of negligence on part of drawer in carelessly executing the check with blank spaces unfilled. *Merritt v. Boyden*, (Ill.) 60 N. E. 907. In *Yocum v. Smith*, 63 Ill. 321, and *Hackett v. First Nat. Bank* (Ky.) 70 S. W. 664, drawer was held liable for full amount for carelessness in execution of check. In the absence of facts showing such careless execution as would make the drawer responsible, the merchant and not L would be the loser. (*Inquiry from Mo., July, 1919, Jl.*)

Negotiation between drawer and payee for settlement

318. A drew a check in favor of B on bank C. Bearing the indorsement of the payee, it was deposited in bank D which collected from drawee. It was afterwards found that the check had been raised, and A negotiated with B for a settlement. Is bank D liable? *Opinion:* Ordinarily a bank which receives payment of a raised check must refund and can recover the amount from its depositor and such would be the result in this case unless it is possible for bank D to successfully contend that by negotiating with B for the return of the money, A ratified the payment. If A had actually received from B the increased amount paid on his check, the full amount would of course be chargeable to his account and bank C would have no right of recovery

from D; but in strict law B did not owe A anything but owed bank D from which he received money to which he was not entitled. As A opened up negotiations with B for the return of the money it might be contended that such negotiation operated as a ratification of the payment of the raised amount and that as A had chosen to look to B rather than to his own bank C for the money he would be barred from recovery in any action against that bank for reimbursement, in which event bank C would have no claim against Bank D. But it is very doubtful if such negotiation would be held a ratification or an estoppel in which event bank C would be liable to A and D would be liable to bank C and would in turn have recourse upon B; and even though A understood that B was to reimburse him, that would not affect B's liability to bank D because his indebtedness would be to that bank and not to A. (*Inquiry from N. Y., March, 1914.*)

Check on blank form of another bank

Use by drawer

319. In Kansas it has been held not negligent for a bank to pay a check wherein the name of the drawee has been changed in a handwriting other than the drawer's; but the safer practice is to refuse payment of such a check until the bank receives satisfactory evidence that the alteration has been authorized. *First St. Bk. of Scott City v. Vogeli*, 96 Pac. 490. *Morris v. Beaumont Nat. Bk.*, 83 S. W. 36. (*Inquiry from Mass., July, 1913.*)

320. A, who was a depositor in bank B and also in bank C, issued a check on bank C using one of bank B's forms with its name scratched out and bank C's written. B through error paid the check and charged it to A's account. The latter did not examine his paid vouchers for over a year, and then admitted his fault in not checking statement sooner. Bank C refused to take the check. Is bank B in any way liable to A? *Opinion*: The check is properly chargeable under the circumstances, by bank B to A, because his retention of the paid check so long without objection estops him from claiming that the payment was not by the right bank. It is simply a case where bank B paid the check instead of bank C paying it. The payee has received the money for which the check was given. A is not a loser in the transaction, for as bank C has not paid the check, the money must still be in that bank to his credit, or if he has since drawn it out, then

he, having received it, would have no claim on bank B. (*Inquiry from Miss., Feb., 1920*)

321. A check was drawn payable to John Doe only, upon the blank form of another bank, whose name was erased and the drawee bank's name substituted. *Opinion*: A check to the payee only is not negotiable. The fact that the check was drawn on the blank form of another bank did not render the instrument invalid, but places an additional burden on the drawee bank to safeguard itself against fraud. (*Inquiry from N. J., Oct., 1911, Jl.*)

322. It is legal but somewhat unsafe for a bank to pay a check drawn on the check form of another bank, with name substituted as drawee. *Inquiry from N. J., Sept., 1912, Jl.*

Alteration by payee of drawee upon check a forgery

323 A merchant sells to a number of negroes in the spring months, and, instead of giving them credit, he has them give him checks on various local and other banks in which they have no account at the time, and in the autumn, when these people sell their cotton, he ascertains where they bank, and then alters the checks to make them payable at the banks where his customers have opened their respective accounts. Is this legal? *Opinion*: The payee clearly has no right to alter these checks by changing the name of the bank on which they are drawn, without the authority of the drawers. Such unauthorized alteration would be forgery. The drawee bank should refuse to pay these altered checks. The merchant should take notes from customers to whom he sells goods, made payable at any bank in the place; then any bank would have authority to pay them out of the account of the maker. (*Inquiry from S. C., Oct., 1920.*)

324. A gave his check to B drawn on bank C. On presentation by B payment was refused because of insufficient funds. B then scratched out the printed name of the drawee bank C on the check and substituted that of bank D where A also had an account, and that bank paid the check on presentation. Did bank D incur any liability in so doing? *Opinion*: It has been held that a drawee bank is not guilty of negligence in paying a check merely because the check is drawn on the blank form of another bank. *First State Bank v. Vogeli*, 78 Kan. 264, 96 Pac. 490. But it has been

held in Texas in a case very similar to the present one, that where the payee wrongfully makes the alteration by striking out the printed name of the bank on which the check is drawn and inserting another bank, and the latter bank pays the check, it would be liable to the drawer. See *Morris v. Beaumont Nat. Bank*, 37 Tex. Civ. App. 97, 83 S. W. 36. In the present case A drew a check upon bank C which was refused payment because of insufficient funds. The payee, B, knowing that A, the drawer, had an account with bank D, changed the name of the drawee to that of that bank which paid the check. This under the Texas decision would be a fraudulent alteration or forgery and bank D's payment was without authority of A, and he is not chargeable with the amount. (*Inquiry from Tex., Sept., 1917.*)

Where check bears forgery of drawer's signature

325. On April 3rd a bank's customer deposited with it a check on the F bank, which was returned "No account." Knowing the maker of the check and that he kept his account in the G bank, the cashier of the inquiring bank changed the name of drawee therein to the G bank, and the check was paid. Thirty days later it was discovered that the drawer's signature had been forged. *Opinion:* If the check had been drawn on the G bank and had been paid on a forgery of the drawer's signature, it is doubtful if they would have the right to recover the money. But in this case, the inquiring bank having changed the name of the drawee from the F bank to the G bank, it would be clearly liable to refund the money received. It seems a word of caution in this connection may not be inappropriate. The bank doubtless changed the name from the best of motives, but by so doing it might lay itself open to the charge of making an unauthorized alteration in an apparent negotiable instrument, by reason of which the G bank was misled into paying a forged check. Under the circumstances it would be best to pay back the money and not enter into a controversy about it. (*Inquiry from Tex., May, 1916.*)

Specific cases of alteration

Striking out attorney fee clause

326. A bank submits a check with the following clause erased from its face: "And further hereby agrees that if this note is not paid when due, to pay all costs necessary for collection, including ten per

cent. for attorney fee." Would such erasure constitute a material alteration under the New Jersey Negotiable Instruments Law? *Opinion:* The striking out the clause providing for attorney's fees, by the holder without the consent of the maker, would constitute a material alteration under said law. It changes the legal effect of the instrument as to the amount payable. There are numerous decisions that an alteration in the amount of principal or rate of interest is material. (*Inquiry from N. J., Nov., 1916.*)

Counter check—Alteration of form

327. A form of check whereon was printed "Counter check not negotiable"; pay to "Myself only and without any indorsement hereof," and "This check is for use only at the counter of the X National Bank by the drawer personally," had the quoted words crossed out, and the drawer then made out the check to B. Would the drawee bank be held harmless for the refusal of this check when presented other than over the counter, even though the alteration was in the handwriting of the maker? *Opinion:* The rule is that a bank is obliged to honor the check of its customer when it has sufficient funds and is liable in damages to him if it refuses, because of injury to his credit. At the same time it would seem that a bank is entitled to insist that the check be drawn with reasonable care so as not to burden it with the risk of paying an altered check, and while the point has not been specifically decided, a bank would probably not be mulcted in damages where it refused to pay a check so carelessly drawn as was this one, as to make it uncertain whether the check as presented was the genuine unaltered order of its depositor or not. In this case, if the drawee bank is sure of the depositor's signature and of the identity of B, the payee, it would probably be safe in paying the amount, although the use of such a form is objectionable. (*Inquiry from Wash., Sept., 1917.*)

Alteration of date

328. The alteration of the date by the maker of a note before delivery does not affect its validity. If the change in date were made by the holder without the maker's consent, the note would be avoided as to him. Neg. Inst. A., Sec. 184 (Comsr's dft.) (*Inquiry from N. J., Nov., 1911, Jl.*)

329. A check after indorsement by the payee was stolen, the date altered, and

then negotiated to a bona fide holder. It was presented through the exchanges and paid by the drawee bank. *Opinion:* Bank is not liable for payment of check, it having been negotiated after the alteration to a holder in due course, who, under the Negotiable Instruments Law, was entitled to payment according to its original tenor. *Neg. Inst. A., Sec. 124 (Comsr's. dft.) (Inquiry from N. J., June, 1911, Jl.)*

330. The payee altered the date of a check drawn by A to six months later and then negotiated it. The bank cashing the check forwarded it to A's bank, where it was protested. The payee could not be found. *Opinion:* The cashing bank cannot recover from the drawer if the alteration was apparent; but if not apparent, the check is enforceable according to its original tenor and the purchaser's right of recovery depends on whether the check was negotiated within a reasonable time after issue. *Neg. Inst. A., Secs. 124, 52, 53 (Comsr's. dft.). Elias v. Whitney, 98 N. Y. S. 667. Moskowitz v. Deutsch, 92 N. Y. S. 721. Matlock v. Scheuerman, 51 Ore. 49. Mfg. Co. v. Summers, 143 N. C. 102. Bull v. Bk. of Kasson, 123 U. S. 105. Cowing v. Altman, 71 N. Y. 435. Lancaster Bk. v. Woodward, 18 Pa. 357. (Inquiry from Pa., July, 1914, Jl.)*

Erasure of words "for account indebtedness Doe to Roe"

331. A check in the ordinary form contained above the signature of drawer the words "For account indebtedness Doe to Roe." These words were scratched out or partially erased by the payee. The drawee refused payment on the ground that it was an altered check. *Opinion:* The bank should not pay because (1) alteration of the statement of consideration would probably be held material and avoid check, and (2) bank as paying agent of depositor would not properly protect his interests in making payment. *Richardson v. Fillner, 9 Okla. 513, 60 Pac. 270 (Inquiry from Conn., April, 1912, Jl.)*

Statement of consideration altered

332. In a number of cases where a creditor taking a check for a disputed account containing a condition that it is in full has, without the knowledge or authority of the debtor, erased the condition and collected the check and then sued the debtor for the balance claimed to be due, it has been held that his acceptance and

collection of the check binds him to the condition and he can recover nothing further. *Hussey v. Crass, 53 S. W. (Tenn.) 986; Worcester Color Co. v. Henry Woods' Sons Co. 95 N. E. (Mass.) 392. Hull v. Johnson, 46 Atl. (R. I.) 182. Kerr v. Sanders, 29 S. E. (N. C.) 943. Smith v. Bronstein, 107 N. Y. Supp. 765. Gribble v. Raymond Van Praag Supply Co. 109 N. Y. Supp. 242. According to the view of these cases as the alteration is unauthorized, it does not affect the rights of the debtor and is therefore immaterial. None of these cases, however, involved the right of the drawer to refuse to be charged with the amount by the bank on the ground that payment of the altered check was without authority. Should such a case arise there is fair ground to conclude that the payment would be held unauthorized and non-chargeable. (Inquiry from N. Y., June, 1919.)*

Erasure of words "in full of account to date"

333. A gives a check to B and indorses on back thereof: "This check is given in full of account to date." B draws his pen through this indorsement and writes underneath same: "Balance due on this account \$10.", and then cashes check. Is a bank justified in refusing payment of this check in view of the altered indorsement. *Opinion:* There is some authority to the effect that an erasure of the words "in full of account to date" by the payee is immaterial as when he accepts the check with that condition on and receives payment of it, he takes it subject to the condition although he erases it. But it seems that, if a bank upon which such a check was drawn should pay the check to the payee with such indorsement erased and a different condition substituted, the customer might well complain and say that he intended the check as a voucher showing the receipt in full and that where the payee has tampered with such voucher and changed its character, it was the bank's duty as his paying agent, to refuse payment of the check altered as to the condition upon which he made payment. It would probably be safer for the bank to refuse payment of a check so altered. *(Inquiry from Mont., Feb., 1919.)*

Erasure of words "in full payment," etc.

334. A drawee bank paid its customer's check in which the words "for full payment of account" were erased by the payee. *Opinion:* The bank should not have paid the check as the erasure of the words

was a material alteration and the check could not be charged to the customer's account. (*Inquiry from N. J., April, 1911, Jl.*)

335. The erasure by the payee of the words "in full of all accounts or claims" is probably a material alteration, which would avoid the instrument. Bank should not pay check containing such erasure. (*Inquiry from Ohio, June, 1913, Jl.*)

336. A bank should not pay a check which shows alteration in the statement of consideration, and should obey the request of a customer to refuse payment of checks thus altered. (*Inquiry from Pa., Aug., 1912, Jl.*)

Alteration of check "in full"—Right of bank to pay where indorser signs "not in full"

337. There is dispute between the drawer and drawee as to amount of a debt. The drawer made a check for the amount he was willing to pay, and put on the corner thereof the words, "In full payment," and the payee struck out such words and received payment from bank. The bank asks whether it incurred any liability in paying same. *Opinion:* There are certain decided cases upon the precise facts now presented wherein the court held that, in an action by the payee against the drawer, the payee's acceptance and collection of the check constituted an accord and satisfaction and barred him from recovering anything more and that the cancellation of the words "In full payment" did not affect the rights of the parties and was immaterial. *Gribble v. Raymond, etc., Co.*, 109 N. Y. Supp. (N. Y.) 242. *Hussey V. Crass*, 53 S. W. (Tenn.) 986. If the above decisions can be taken as a sound expression of the law, a drawee bank might safely pay such a check, notwithstanding the erasure or cancellation of the words "In full" as the drawer would not be damaged. And yet, notwithstanding the above, it would seem not quite the proper thing for the drawee bank to pay its customer's check when presented with the words "In full" erased. The customer relies upon the cancelled check as a receipt for the payment and such receipt "In full" for a disputed debt would be evidence in the customer's hands of a satisfaction of the debt. True, these courts have held that the erasure is immaterial and the payee who has accepted the check is bound by the condition notwithstanding he has erased it; and yet the customer, in an action against him by the payee, must have relied on evidence

outside the check itself to establish the condition. There might be cases where, after a customer had died it would be difficult to prove the erasure of the words "In full" had been made by the customer before he delivered the check or by the payee after he received it. Certainly it seems clear that the customer is entitled to receive back his paid check as a receipt in full without being compelled to resort to outside evidence and the bank as his paying agent should protect his interest in the matter. The necessary conclusion, therefore, seems to be that it is better practice for the bank to refuse to pay a check where the words "In full" have been erased before presentation. In the instant case, the payee did not erase the amount but writes the words "I do not accept the amount as payment in full" over his indorsement. This equally, it seems, nullifies the receipt in full in the form that the customer desires it, and, as above stated, it seems the better practice would be to refuse to pay the check under the circumstances. (*Inquiry from Wyo., Aug., 1918.*)

Striking out indorser's name

338. A corporation note was duly executed, signed by the proper officers, and indorsed by the directors individually. The indorsement of one director (now deceased) has been stricken out with pen and ink, and the name of another substituted. All this was done before delivery of the note. Does the striking out of the deceased indorser's name release the others? *Opinion:* Where a corporation note, indorsed by several directors individually, is altered before delivery to the payee, by striking out the name of one indorser (since deceased), and substituting another indorser, such alteration is material and, if done without the consent of the other indorsers, relieves them from liability, except to a holder in due course who can enforce the instrument according to its original tenor. (*Schwartz v. Wilmer*, 90 Md. 136. *Thorpe v. White*, 188 Mass. 333, 74 N. E. 592. *Bothell v. Schewitzer*, 84 Nebr. 271, 120 N. W. 1129. *Colonial Nat. Bank v. Duerr*, 95 N. Y. S. 810. *Heche v. Shenners*, 126 Wis. 27, 105 N. W. 309. *Burns' Anno. Ind. St.*, 1914, Sec. 9089t-4-124. As to what amounts to material alteration of an instrument, see *Babcock v. Henkle*, 117 Ill. App. 640. *State v. Blair*, 32 Ind. App. 79, 84 N. E. 1908. *Sheridan v. Carpenter*, 61 Me. 83. *Springfield First Nat. Bank v. Fricke*, 75 N. W. 178. *Davis v. Coleman*, 29 N. C. 424. *Smith v.*

Weld, 2 Pa. St. 54. Nashville First Nat. Bank v. Shook, 100 Tenn. 436. North v. Henneberry, 44 Wis. 306). Whether the payee discounting such note for the corporation would have the status of a holder in due course is doubtful under the decisions. (Vander Ploeg v. Van Zunk, 135 Iowa 350. Long v. Shafer, 185 Mo. App. 641. St. Charles Sav. Bank v. Edwards, 243 Mo. 553. *Contra*: Thorpe v. White, (Mass.) 74 N. E. 592, and Elias v. Whitney, 98 N. Y. S. 667). (*Inquiry from Ind., March, 1920, Jl.*)

Alteration of rate of interest and marginal figures

339. A demand note for ten dollars, having in the upper margin on the left the figures \$10.00, which note reads "with interest at the rate of eight per cent. per annum from maturity" has a credit of \$5.00 on account shown by a line drawn through the figures \$10.00, and the figures \$5.00 substituted, leaving the written amount "Ten dollars" in the body of the note. At the time the credit was so shown, the words "eight" and "maturity" were stricken out and the words "six" and "date" substituted, making the note read "with interest at the rate of six per cent from date." Does this constitute an alteration and make the note void? *Opinion*: The alteration of the marginal figure "\$10.00" to "\$5.00," leaving the written amount "Ten," so that the marginal figures would indicate the amount still due on the instrument, would not constitute a material alteration such as would avoid the note, as it would not change its legal effect. See opinion No. 340. But the changing of the rate of interest by striking out "eight" and inserting "six" per cent., and changing "from maturity" to "from date," would constitute a material alteration and avoid the note as to non-consenting parties. (*Inquiry from Mo., Oct., 1915.*)

Insertion of interest clause in trade acceptance

340. May a seller insert an interest clause in trade acceptances received from his customers? *Opinion*: Section 125 of the Negotiable Instruments Act (Sec. 1679-6 Wisconsin Act) provides that "any alteration which changes . . . the sum payable, either for principal or interest . . . is a material alteration." The effect of a material alteration without the assent of all parties liable thereon is to avoid the instrument except as against a consenting party and subsequent indorsers. But when an

instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof, according to its original tenor. Sec. 124. Neg. Insts. Act (Sec. 1679-5 Wisconsin Act). Where a merchant receives a trade acceptance which contains no provision for interest, the insertion of an interest clause without the consent of the acceptor is a material alteration which avoids the acceptance in his hands. (*Inquiry from Wis., July, 1919.*)

Alteration of marginal figures on check

341. A check was accepted by a bank from one of its customers and sent through the day's clearings to the bank on which it was drawn, and latter refused payment for reason stated on the back, "Figures altered" (amount written in body of check "Seven hundred thirty 99/100." The figures are "\$330.99," with a "7" written over the first "3"). What is position of holder in due course, and would collecting bank be justified in protesting the check under such circumstances? *Opinion*: Where the body of a check is written in words for \$730, and the marginal figures are first inserted \$330, and then changed by the drawer to \$730, by writing the figure "7" over the first figure "3", the check is valid for the amount written in the body, and the purchaser can enforce payment from the drawer, if refused by the bank. Even where the change in figures is made by the holder, the alteration is immaterial as the words control the figures and denote the sum payable; and the check is protestable upon refusal of payment, although the drawee bank is justified in delaying payment a brief period to make inquiry of the drawer. See opinion No. 338 Bryant v. Ga. Fertilizer & Oil Co., (Ga.) 79 S. E. 236. People v. Lewinger, (Ill.) 96 N. E. 837. Sec. 17 Neg. Inst. Law, and see Elias v. Whitney, 98 N. Y. Suppl. 667. (*Inquiry from La., July, 1920, Jl.*)

342. Where the amount of a note is written in the body and also given in figures in the margin, the deduction from such marginal figures of the amount of a partial payment is not a material alteration of the note. Neg. Inst. A. of Mass. Secs. 141, 142. Smith v. Smith, 1 R. I. 398. Prim v. Hammel, 134 Ala. 652. (*Inquiry from Mass., Nov., 1916, Jl.*)

Erasure of name of joint payee

343. A check, made payable to two joint payees, was altered by one of the

payees by erasing the name of the other. It was then negotiated to a local merchant who deposited it in his bank which collected the amount from the drawee. The drawee having been apprised of the alteration demands reimbursement from the depository bank. *Opinion:* The check was avoided by the alteration; the local merchant took no title and the drawee bank is entitled to recover the amount from the depository bank, which, in turn, has recourse upon the merchant. Neg. Inst. A., of Colo., Secs. 5174, 5175, 5091. (*Inquiry from Colo., Oct., 1917, Jl.*)

Erasure of payee's name

344. A customer of a bank sent a check to the payee named in an unregistered letter which was stolen from a mail box. The customer notified the bank of the loss, and issued a stop-payment, but this was not received by the bank before it had paid the check at its window, the payee's name having been erased and the word "Bearer" very skillfully substituted. The bank charged the check to the customer's account, and objection is made. *Opinion:* Where a bank pays a check which has been altered, it will not be permitted in the absence of special circumstances to charge the amount of the check against the drawer's account. Even where the alteration is so skillfully made that it is not discernable by ordinary inspection, the bank is nevertheless responsible to its depositor. Crawford v. West Side Bank, 100 N. Y. 50, 2 N. E. 881, 53 Am. Rep. 152. The mailing of the check in an unregistered letter would not be held negligence. (*Inquiry from N. Y., Oct., 1918.*)

345. Miss A desiring to buy 50 shares of D—Oil Co. Stock, at \$6.50 per share, drew her check on bank B for \$325, payable to the D—Oil Co., and sent same to C, in Tex., where the Company is located, requesting him to procure the stock for her. C, having 50 shares of this stock, had same transferred to A and sent same to her. C then changed the name of the payee on the check, making same payable to him. C, instead of the D—Oil Co., indorsed same and deposited it for collection. The drawee bank, B, noting the alteration when check was presented, refused to honor same, and turned it. The check was again presented to drawee in same condition, except that in addition to the indorsement of B, and under that indorsement, was indorsed the name of "D—Oil Co.," the original payee of the check. The drawee then paid the check on

November 11th, 1919, and on November 30th mailed same to Miss A with her monthly statement of account. On the last of January, 1920, the bank received a letter from Miss A's attorney, dated January 26th, 1920, demanding the immediate reimbursement of \$325 to Miss A, on account of payment of altered check. B bank declines to pay, and wishes opinion as to what defenses it has in premises. *Opinion:* The rule is well settled that the drawee bank must bear the loss where it pays out money on a check which has been altered, (Bank v. Arden, 177 Ky. 520, 197 S. W. 951. First State Bank v. Vigeli, 78 Kan. 264. Morris v. Beaumont Nat. Bank, 37 Tex. Civ. App. 97) as by making a check drawn to a designated person payable to another person or to bearer. (Nat. Dredging Co. v. Farmers Bank, (Del. 1908) 69 Atl. 607. Belknap v. Nat. Bank, 100 Mass. 376. Critten v. Chemical Nat. Bank, 171 N. Y. 219). In instant case bank is prima facie liable, in that it charged to drawer's account a check not as made by her, the alteration of the name of payee being a material alteration, a forgery, which vitiated it as a genuine order to pay from the deposit of Miss A. The fact that Miss A has received 50 shares of oil stock would be no defense to the bank, for it might well be that the D—Oil Co., the original payee of the check, still holds her liable for the price of such shares. (*Inquiry from Va., March, 1920.*)

346. A check drawn on a Boston bank, from which the name of the payee and the amount were washed by acid, was altered by having different payee and an increased amount inserted. After indorsement by the purported payee, the check was cashed by a customer of a Philadelphia bank, but only after he had deposited the same for collection and had received advice that it had been paid. *Opinion:* Irrespective of the Philadelphia bank's guaranty of indorsement there is a clear right of recovery by the Boston bank either against the former bank as apparent owner of the check, or if the check was indorsed "for collection," against the customer. Park Bk. v. Seaboard Bk., 114 N. Y. 28. Park Bk. v. Eldred Bk., 90 Hun (N. Y.) 285. Houser v. Nat. Bk. of Chambersburg, 27 Pa. Super. 619. Leos v. Walls, 161 Pa. 57. Robb v. Pa. Co. 3 Pa. Super. 254. Critten v. Chemical Nat. Bk., 171 N. Y. 219. Crocker-Woolworth Bk. v. Nevada Bk., 139 Cal. 564. Second Nat. Bk. v. Guaranty Tr. & Safe Dep. Co., 206 Pa. 616. (*Inquiry from Pa., July, 1908, Jl.*)

Place of payment altered

347. A was the holder of a check drawn by B on a bank which returned it to A indorsed "not sufficient funds." Thereupon A changed the name of the drawee to the bank of C, where B also had an account, and obtained the money. Later a subsequent good check, drawn by B on the bank of C was presented, and dishonored because of a shortage created by payment of the altered check. *Opinion:* As to the altered check, the alteration constituted forgery and rendered A criminally liable, and as between B and bank of C, the bank must bear the loss. The alteration by A would also avoid any possible liability on the part of B to A. As to the good check, the bank is answerable in damages should B prove injury to his credit arising out of the bank's failure to honor his check in the hands of a third party. (*Inquiry from Miss., Aug., 1910, Jl.*)

348. A note was altered by drawing lines through the place of payment. *Opinion:* The note was materially altered and avoided, except that a holder in due course may enforce it according to its original tenor. In this case the purchaser could not be a holder in due course, when a mere inspection of the note shows the alteration. *First Nat. Bk. v. Barnum*, 160 Fed. 245. *Elias v. Whitney*, 50 Misc. (N. Y.) 326. (*Inquiry from N. Y., June, 1916, Jl.*)

Erasure of words "Payable in New York exchange"

349. A drawee bank had presented to it a check coming through regular channels, that, when originally issued had thereon the words "Payable in New York exchange" but which words had been erased. *Opinion:* The proper procedure for the drawee bank would have been to have refused to pay the check on the ground that it had been materially altered, and was not the order issued by the drawer. Such a check would be returnable without protest. (*Inquiry from N. Y., Feb., 1917.*)

Time of payment altered

350. Where payee of note changes time of payment without assent of maker, this constitutes a material alteration and avoids instrument unless change is made to make instrument conform to intent and agreement of parties. Where note avoided by material alteration, original consideration generally held recoverable unless alteration

fraudulently made, in which case consideration is forfeited. *Neg. Inst. A., of Okla., Sec. 9089 t., 4, 9089 u., 4. Busjahn v. McLean* 29 N. E. (Ind.) 494. *Osborn v. Hall*, 66 N. E. (Ind.) 457. *Hayes v. Wagner*, 89 Ill. App. 390. *Savage v. Savage*, 59 Pac. (Ore.) 461. *Bigelow v. Stephens*, 35 Vt. 525. *Tate v. Fletcher*, 77 Ind. 102. (*Inquiry from Ind., July, 1917, Jl.*)

Check with partly erased figures

351. A check was presented and payment refused by the bank because the instrument written in indelible pencil contained partly erased figures and the writing was obscure. The bank telephoned the maker, who stated that he had not drawn the check. The check was protested and subsequently the maker notified the bank that he had drawn the check. *Opinion:* A bank is under obligation to its depositor to pay his properly drawn check when duly presented, if the funds are sufficient, but where the check when presented bears a suspicious appearance, it is the bank's duty to refuse to pay until it has had opportunity to make inquiry and satisfy itself as to its genuineness. The description of the check would certainly indicate a suspicious appearance sufficient to put the bank on inquiry and having made inquiry, payment was properly refused. *Scholey v. Ramsbottom*, 2 Comp. (Eng.) 485. *Ingham v. Primrose*, 7 C. B. N. S. (Eng.) 82. *First St. Bk. of Scott City v. Vogeli*, 96 Pac. (Kan.) 490. *Israel v. St. Nat. Bk. of New Orleans*, 50 So. (La.) 783. (*Inquiry from N. Y., Jan., 1918, Jl.*)

"Collection" rubber stamped on note not a material alteration

352. It is a general custom of bankers to place a collection stamp on notes and the inquiring bank uses a rubber stamp with name of bank and the word "collection" followed with blank space for their collection number, placing same on face of the note in the margin, or any other blank space thereon. A local attorney cautions the bank not to place the collection stamp on any part of the notes received for collection, stating that in suit on the note, it might be used by the maker as a defense in refusing payment. *Opinion:* The word "collection" rubber stamped on the face of an instrument, as described, does not constitute a material alteration and does not affect the validity thereof. *Bachellor v. Priest*, 12 Pick (Mass.) 399. *Pitt v. Little*, 108 Pac. (Wash.) 940. (*Inquiry from Ore., Sept., 1915, Jl.*)

Rights of holder in due course

353. A drew a check on his bank, written in pencil, in favor of B for \$15. B gave the check to C to cash for him, who failed to return with the money; then B notified A, who stopped payment on the check. When check was presented to drawee bank it had been raised from \$15 to \$55, and was held by D, a local merchant. Payment was refused. Has D any recourse against A? *Opinion:* D, the innocent purchaser, could recover from A, the drawer, the original amount of the check, \$15, but would be the loser to the extent of \$40, unless his right of recovery from C would avail. This, assuming that the check was indorsed in blank by B, so as to pass by delivery. (Sec. 124 Neg. Inst. Law, which provides that material alteration avoids the instrument, "but when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor.") (*Inquiry from Wyo., Feb., 1917.*)

354. A bank held A's note of \$1,300 for several years, which indebtedness was renewed from time to time. B, a third person, came into the bank and indorsed the note as surety, at the same time paying \$350 on the principal. B never received any consideration for his indorsement which was made without the knowledge or consent of the maker. The maker disclaims liability on the note because of material alteration. *Opinion:* The fact that after a note is delivered, another person without the knowledge or consent of the maker adds his name as surety, does not release the maker from liability on the ground of material alteration. *Miller v. Finley*, 26 Mich. 249. *Muir v. Demaree*, 12 Wend. (N. Y.) 468. *McCoughey v. Smith*, 27 N. Y. 39. *Brownell v. Winnie*, 29 N. Y. 400. (*Inquiry from Kan., June, 1919, Jl.*)

355. A bank through inadvertence cashed a check raised from \$8.75 to \$80, notwithstanding the fact that the check bore evidence of alteration on its face, by reason of the words stamped thereon "not over ten dollars." *Opinion:* If bank is a holder in due course, it can recover for amount of check as originally drawn, but from the facts stated, it is doubtful that bank is such holder in due course. Neg. Inst. A., Sec. 124 (Comr's. dft.). *Elias v. Whitney*, 98 N. Y. S. 667. (*Inquiry from Okla., Feb., 1914, Jl.*)

Duty to report alteration within reasonable time

356. A check drawn on bank A was cashed by bank B and paid by bank A. A little over a month later bank A returned the check to bank B with statement that check had been raised from \$1.15 to \$91.15, and requesting reimbursement for over-payment. Is B released by the lapse of time in returning the item. *Opinion:* The drawee is entitled to a reasonable time in which to discover the forgery and demand restitution, and the question as to what is a reasonable time is usually a question of fact to be determined under the circumstances of each particular case. *Third Nat. Bank v. Allen*, 59 Mo. 310. There does not seem to have been any unreasonable delay on drawee's part in this case, and it was no more bound than was the holder to know that the check had been raised. B would undoubtedly be liable to refund to A and would be the loser unless it could obtain recourse upon the person for whom it cashed the check. (*Inquiry from Ark., Sept., 1918.*)

Delay in notice after discovery

357. A bank cashed a check for the payee upon which the amount had been raised from \$18.02 to \$81.02, and the check was subsequently honored by the drawee bank. The drawer discovered the fraud upon receiving his monthly statement from his bank, and upon demand upon it the drawee bank refunded him \$63, the difference between the original and the raised amount in the check. Some weeks after this adjustment the drawee bank called upon the collecting bank to make restitution to it. Is the collecting bank liable? *Opinion:* Money paid by the drawee upon a raised check is recoverable, but the bank is obligated to give reasonably prompt notice after discovery of the forgery, and if it delays for several weeks to give such notice, and as a result of such delay the collecting bank is deprived of opportunity to obtain reimbursement, which a prompt notice would have afforded, such delay would probably estop the drawee bank from recovery. *Redington v. Woods*, 45 Cal. 406. *Nat. Bank v. Met. Nat. Bank*, 107 Ill. App. 455. *Third Nat. Bank v. Allen*, 59 Mo. 310. *Oppenheim v. West Side Bank*, 22 Misc. (N. Y.) 722. (*Inquiry from Ore., Aug., 1920, Jl.*)

358. A drawee who pays a raised check is entitled to recover the money paid from

the person receiving payment, in the absence of negligence in giving notice after discovery of the forgery. (*Inquiry from Pa., Oct., 1908, Jl.*)

359. Drawee bank D made demand on bank A more than six months after payment of a raised check, bank A's customer having waited that length of time before advising bank D that check had been raised. Immediately upon receipt of such advice bank D reported the same to bank A. *Opinion:* The rule is that the drawee which has paid a raised check is under duty to give reasonably prompt notice to the person to whom payment was made upon discovering the forgery. Some cases hold, however, that, even although there is neglect in giving prompt notice of such discovery, the person or bank receiving payment cannot avoid responsibility to refund by showing that he did not receive notice unless he shows that he was damaged as a result of the delay. *Cont'l Nat. Bk. v. Met. Nat. Bk.*, 107 Ill. App. 455. *Third Nat. Bk. v. Allen*, 59 Mo. 310. *Oppenheim v. West Side Bk.*, 22 Misc. Rep. (N. Y.) 722. Where the forgery was not immediately discovered but prompt notice was given by the depositor to bank D upon discovery, the latter having given prompt notice to bank A, A would be entitled to recover. (*Inquiry from Tenn., Nov., 1919.*)

Duty of depositor to examine pass book

360. What is the obligation of a depositor in examining his pass book and returned vouchers for the purpose of discovering unauthorized payments. *Opinion:* The depositor who sends his pass book to be written up and receives it back with his paid checks as vouchers, is bound to examine the pass book and vouchers and to report to the bank without unreasonable delay any errors which may be discovered. See *Leather Manufacturers' Bank v. Morgan*, 127 U. S. 96. *First Nat. Bank v. Allen*, 100 Ala. 476, 14 So. 335. *McLaughlin v. First Nat. Bank*, 71 Ill. App. 329. *American Nat. Bank v. Bushey*, 45 Mich. 135, 7 N. W. 725. *Scanlon-Gipson Lumber Co. v. Germania Bank*,

90 Minn. 478, 97 N. W. 380. *Morgan v. United States Mortgage & Trust Co.*, 208 N. Y. 218, 101 N. E. 871. *Critten v. Chemical Nat. Bank*, 171 N. Y. 219, 63 N. E. 969, 57 L. R. A. 529. *Frank v. Chemical Nat. Bank*, 84 N. Y. 209, 38 Am. Rep. 531. *Clark v. National Shoe & Leather Bank*, 32 App. Div. (N. Y.) 316. *Myers v. Southwestern Nat. Bank*, 193 Pa. 1, 44 Atl. 280, 74 Am. St. Rep. 672. *Weinstein v. Bank*, 69 Tex. 38. *First Nat. Bank v. Richmond Electric Co.*, 106 Va. 347, 56 S. E. 152, 7 L. R. A. (U. S.) 744. (*Inquiry from Ohio, Oct., 1917.*)

Alteration of deed—Rights of purchaser

361. A trust deed was altered in a material respect while in the hands of a trust company, the trustee named therein, and an opinion is requested as to whether the deed was destroyed by the alteration. *Opinion:* The deed was avoided by the alteration or forgery if done by a responsible official of the trust company. The rule is well recognized that any change in an instrument which causes it to speak a different language in legal effect from that which it originally spoke—which changes the legal identity or character of the instrument either in its terms or the relation of the parties to it—is a *material* change or technical alteration and such a change will invalidate the instrument as to all parties not consenting to the change. In the case of *Baldwin v. Haskell Nat. Bk.*, Tex. (1911) 133 S. W. 864, the court used this language: "That a material alteration in an instrument, without the consent of the maker, will avoid all recovery on same, is no longer an open question in this state. *Otto v. Half & Bro.*, 89 Tex. 384." See also *Bogarth v. Breedlove*, 39 Tex. 561. *Park v. Glover*, 23 Tex. 469. *Heath v. State*, 14 Tex. App. 213. *Bowser v. Cole*, 74 Tex. 222. But if the alteration was by a stranger, it would be a "spoliation" and the deed would not be avoided. *Daniel Neg. Inst.* 1373a. (*Inquiry from Tex., Oct., 1915.*)

ATTACHMENT AND GARNISHMENT

Garnishment by creditor of B of bank account subject to checks signed

"A by B"

362. A bank has a notice of garnishment in which the following question is

asked: "At the time of the service of this garnishment, did you have any money in your possession, or any bank account on which the said defendant is authorized to write checks, either in his name or in the name of any other person, persons, firm or

corporation, by himself?" The plaintiff, a mercantile co-partnership, in this action is trying to recover debt alleged to be owing from one Col. W. T., defendant. It is true that Col. T. is authorized to draw checks on a certain account in the name of F. T. L., which he signs "F. T. L. by Col. W. T." What is required by law in the way of an answer from the bank? Is the account subject to attachment? *Opinion:* Where a bank which carries an account for A, upon which B is authorized to draw, signing checks "A by B," is served with a notice of garnishment in an action against B, the bank is not liable as garnishee, where the account does not belong to B, and the bank should make answer setting up the title of A. *Donald v. Nelson*, 95 Ala. 111. *Smith v. Taylor*, 9 Ala. 633. *Cox v. Reeves*, 78 Ga. 543. *McKittrick v. Clemens*, 52 Mo. 160. *Phoenix Ins. Co. v. Angel* (Ky.) 38 S. W. 1067. *Chase v. Bradley*, 26 Me. 531. *Baltimore, etc., Bank v. Jagers*, 3 Md. 38. *Johnson v. Carlin*, 123 Minn. 444. *Providence Brew. Co. v. Maxwell*, 222 Mass. 123, 109 N. E. 916. *Chick v. Ventrees*, 32 Mo. 431. *Pundt v. Clary*, 13 Neb. 406. *Eckels v. Smyser*, 180 Pa. St. 66. *Balliet v. Brown*, 103 Pa. St. 546. *Montidónico v. Page*, 10 Husk. (Tenn.) 443. *Miller v. State*, (Tex. 1905) 84 S. W. 844. *Chesapeake, etc., R. Co. v. Paine*, 29 Gratt. (Va.) 502. *Lehigh Coal, etc., Co. v. West Superior, etc., Co.*, 91 Wis. 221. *Idaho, Rev. Codes, Ch. 4, Secs. 4309, 4310-b, 4310-h.* (*Inquiry from Idaho, Sept., 1919, Jl.*)

Account owned by one person in name of another

363 A customer carries his account in his father's name which is subject to checks drawn by him in father's name. The bank is served with garnishment writ against the customer in his own name and asks whether it will affect the balance. *Opinion:* The bank knowing that the deposit belongs to the customer and not to his father, the account is subject to garnishment although carried in the father's name. *Head v. Cole*, 53 Ark. 523. (*Inquiry from Ark., Nov., 1911, Jl.*)

Attachment of insufficient deposit by two creditors

364. A bank is served simultaneously with two writs of trustee process against the account of the same depositor in behalf of different creditors. Each writ called for \$7,000, and the deposit amounted

to \$13,000. The deposit being insufficient for both, the bank asks which writ is given the preference. *Opinion:* The rule in Massachusetts and probably in Maine is that the respective plaintiffs are entitled to recover an aliquot part of the deposit, each being entitled to one-half the fund, although their claims are for unequal amounts. In Pennsylvania the rule appears to be that each would share in the deposit pro rata, according to their respective claims. In the instant case, the claims being of equal amount, each would take one-half in any event. *Rockwood v. Varnum* 17 Pick (Mass.) 289. *Davis v. Davis*, 2 Cush. (Mass.) 111. *Baldwin's Appeal*, 86 Pa. 483. (*Inquiry from Me., Oct., 1917, Jl.*)

Bank garnished for debt of check holder

365. A, having an account with a bank, gave his check to B who indorsed it over to C. Before presentment C was sued by creditors and a writ of garnishment was served on A's bank against "Anything in your possession belonging to C." *Opinion:* The garnishment will not hold good because it is incorrect to assume that the bank was indebted to C before the check was presented. Even if the bank were indebted to C, the order should require the surrender of the check as a condition of making payment. *Head v. Cole*, 53 Ark. 523. *Nelson v. Blank*, 67 Ark. 347. (*Inquiry from Ark., Oct., 1908, Jl.*)

366. Certain creditors of A learned that he was to receive commissions in a land deal. A bank in the same town was served with a writ of garnishment for any funds that might pass through its hands belonging to A. A's attorney gave his check to A, drawn on the said bank, and the bank asks if it is proper to pay the same. *Opinion:* Check is not an assignment of deposit and drawee bank is not indebted to payee, who is defendant in garnishment proceedings, and not liable where check is paid to payee after service of writ. Nor is bank held for funds of defendant received after service of writ. *Neg. Inst. A., Sec. 187* (Comsr's. dft.). *Turner v. Hot Springs Nat. Bk.*, 101 N. W. 348. *Stone v. Dowling*, 78 N. W. (Mich.) 549. *Cogswell v. Mitts*, 51 N. W. (Mich.) 514. (*Inquiry from S. D., April, 1917, Jl.*)

Bank not indebted at time writ is served

367. A customer purchased drafts from a bank. The bank is served with garnishment writ against the customer. At time

of service the customer has not cashed the drafts. *Opinion:* Judgment will not be rendered against the garnishee bank unless the drafts are delivered into court or until they mature and it is shown the customer still holds them. *Head v. Cole*, 53 Ark. 523. (*Inquiry from Ark., Nov., 1911, Jl.*)

368. A bank received a telegraphic request from its correspondent to pay a specified person a certain sum. A creditor of such person served a writ of garnishment upon the bank before it received a remittance from its correspondent. *Opinion:* The garnishment would not hold, because the bank was not indebted to the person at the time the writ was served. 20 Cyc. 1005-6. (*Inquiry from Wash., April, 1913, Jl.*)

Note: Now by judicial construction of the Washington Code, a writ of garnishment holds the moneys or goods of defendant in hands of garnishee at the time of the service of the writ, or at any time thereafter until the service of the answer of the garnishee, but not debts created between time of service of the answer of the garnishee and the time of the trial of the issue.

Bank's obligation to disclose balance

369. A bank is under obligation to disclose the amount of the balance where it is garnished by a creditor of the customer. (*Inquiry from Mich., July, 1911, Jl.*)

Attachment of funds represented by certificate of deposit

370. Can money left on deposit with a bank, for which a certificate of deposit has been issued, be attached? *Opinion:* Money left on deposit for which a negotiable certificate of deposit has been issued and is outstanding is not subject to attachment by a creditor of the depositor. *Cottingham v. Greeley & Co.*, 129 Ala. 200. *Auten v. Crahan*, 81 Ill. App. 502. *Denham v. Pogue*, 20 La. Ann. 105. *Diefendorf v. Oliver*, 8 Kan. 365. *Woodman v. Caster*, 90 Me. 302. *Cushman v. Haines*, 20 Pick. (Mass.) 132. *Stone v. Dean*, 5 N. H. 502. *Howe v. Harkness*, 11 Ohio St. 449. *Kimbrough v. Hornsby*, (Tenn.) 84 S. W. 613. *Bassett v. Garthwaite*, 22 Tex. 230. *Davis v. Pawletto*, 3 Wis. 300. See also *Enos v. Tuttle*, 3 Conn. 27. Gen. Stat. Conn., 1918, Ch. 230, Sec. 4705. (*Inquiry from Conn., Feb., 1920, Jl.*)

Certificate payable "in current funds"

371. Is a certificate payable in current funds subject to garnishment? A certain

bank was informed that an instrument payable in current funds is not negotiable, and can, therefore, be garnished. *Opinion:* There is a conflict of authority whether an instrument payable "in current funds" is negotiable, and in jurisdictions such as Idaho where the point has not been decided, where a bank is served as garnishee at the instance of a creditor of the payee, the safer course is to refuse payment to the holder until the point is settled. The cases which hold instruments payable "in current funds" non-negotiable are, generally speaking, not of such recent date as those which hold the contrary. The numerical weight of cases is in favor of negotiability. However, a recent Iowa decision holds such instruments non-negotiable. *Dille v. White*, (Iowa, 1906) 190 N. W. 909. *Ida. Rev. Codes*, 1908, Ch. 4, Sec. 4310 K. (*Inquiry from Idaho, Nov., 1919, Jl.*)

Time certificate of deposit

372. A bank is in doubt regarding the matter of reporting time certificates of deposit when an attachment is served upon it. *Opinion:* A bank is not liable as garnishee upon a debt due upon a negotiable time certificate of deposit while same is outstanding, but it is incumbent upon the bank, upon being served as garnishee, to make answer concerning its indebtedness upon such certificate. *Ida. Rev. Codes*, 1908, Ch. 4, Sec. 4310 K. (*Inquiry from Idaho, Nov., 1919, Jl.*)

373. Under the law of Illinois a bank, national or state, is not liable to garnishment by a creditor of its depositor for funds represented by an outstanding negotiable certificate of deposit. *Hurd's Rev. Stat. Ill.* (1911), Chap. 62, Sec. 15. *Waine v. Kendall*, 78 Ill. 598. *Auten v. Crahan*, 81 Ill. App. 502, 505. *Starr & Curtis' Ann. Stat.*, Chap. 62, Par. 15. (*Inquiry from Ill., Sept., 1913, Jl.*)

374. A bank submits the following form of certificate of deposit and asks whether it is subject to attachment by creditors of the payee.

"The Blank National Bank,

Blank, Iowa, Dec. 1, 1917.

John Doe has deposited in this bank One Hundred Dollars payable to the order of himself in current funds on the return of this certificate properly indorsed three months after date with interest at the rate of 4 per cent. per annum. No interest after maturity. Certificate of Deposit

Not subject to check Cashier"

Opinion: A certificate of deposit in the hands of the payee is property subject to attachment but where a bank is garnished for funds represented by an outstanding negotiable certificate it is entitled, under the law of Iowa, to complete indemnity before suffering judgment; if, however, the certificate is non-negotiable paper, the bank can be charged as garnishee of the payee before notice of assignment. The above certificate being payable "in current funds" has been held according to Iowa decisions a non-negotiable instrument. *Nordyke v. Charlton*, 108 Iowa 414. *Code of Iowa, Sec. 3950. McPhail v. Hyatt*, 29 Iowa 137. *Dille v. White*, 109 N. W. (Iowa) 909. *Huse v. Hamblin*, 29 Iowa 591. *Dore v. Dawson*, 6 Ala. 712. *Robinson v. Mitchell*, 1 Harr. (Del.) 365. *Elston v. Gillis*, 69 Ind. 128. *Marrett v. Equitable Ins. Co.*, 54 Me. 537. *Scott v. Hawkins*, 99 Mass. 550. *Walter v. Washington Ins. Co.*, 1 Iowa 404. *McCoid v. Beatty*, 12 Iowa 299. *Yocum v. White*, 36 Iowa 288. *Seals v. Wright*, 37 Iowa 171. (*Inquiry from Iowa, Jan., 1918, Jl.*)

375. A deposited funds in a national bank in Rhode Island and received therefor a negotiable certificate of deposit payable to himself. A creditor of A seeks to attach the deposit. *Opinion:* The deposit is exempt from attachment under the provisions of the Rhode Island statute exempting debts secured by bills of exchange or negotiable promissory notes. *Gen. Laws R. I. (1909), Chap. 302. Sec. 5. Subdiv. 11. Littlefield v. Hodge*, 6 Mich. 326. *Bills v. Bk.*, N. Y. 343. *McMillan v. Richards*, 9 Cal. 365. (*Inquiry from R. I., Aug., 1916, Jl.*)

376. B, the wife of A, deposits money with a bank as collateral security on a note discounted by A for his business. B wants the fund free from attachment and the bank advises her to indorse a certificate of deposit in blank and leave it with the bank accompanied by a letter stating the desired purpose. *Opinion:* A creditor of the husband would have no right to attach a fund belonging to the wife specially pledged by her as security for her husband's debt. In Rhode Island a deposit represented by an outstanding negotiable certificate is exempt from attachment; but the certificate itself is subject to seizure by creditors of the owner. *Com. v. Abbott*, 168 Mass. 471. *Gen. Laws R. I. (1909), Chap. 302, Sec. 5. Nichols v. Schofield*, 2 R. I. 123. (*Inquiry from R. I., April, 1913, Jl.*)

Maker of note not subject to garnishment in suit against payee

377. A bought a pair of mules from B giving his note in payment, payable to B's wife. C had judgment against B and served a writ of garnishment on A for the amount. Later D bought the note with no notice of the garnishment and C claims the amount of the garnishment out of the note. *Opinion:* In Alabama, while a negotiable note is current as negotiable paper and subject to transfer to a bona fide purchaser without notice and before maturity, the maker of the note is not subject to garnishment, nor chargeable as a garnishee of the original payee of the note. A's answer shows his only indebtedness was to B on a note not yet matured made payable to B's wife, in which case A would not be chargeable as garnishee. *Wohl v. First Nat. Bk.*, 154 Ala. 332. *Ala. Code (1896), Sec. 2191. Gatchell v. Foster*, 94 Ala. 624. 10 South 434. *Mayberry v. Morris*, 62 Ala. 115. (*Inquiry from Ala., Dec., 1918, Jl.*)

Drawer of draft not subject to garnishment in suit against payee

378. A purchased a draft issued by a bank in favor of B. A claimed that B lost the draft and requested a duplicate. Before the duplicate was issued, a creditor of B serves a writ of attachment upon the maker of the draft. *Opinion:* Where a negotiable draft has been issued by a bank and it is outstanding, the drawer is not liable to garnishment in suit of a creditor against the payee, under the law of Illinois, unless it can be shown that the draft has matured and is still in the hands of the payee. The bank should not issue a duplicate draft unless indemnified against loss. *Wohl v. First Nat. Bk.*, 151 Ala. 332. *Gregory v. Higgins*, 10 Cal. 339. *Wilson v. McEachern*, 9 Ga. App. 584. *Littlefield v. Hodge*, 6 Mich. 326. *Hubbard v. Williams*, 1 Minn. 54. *Fisher v. O'Hanlon*, 93 Neb. 529. *First State Bk. v. Lattimer*, 149 Pac. (Okla.) 1099. *Oakdale Mfg. Co. v. Clarke*, 29 R. I. 192. *Willis v. Heath*, 75 Tex. 124. *Guillot v. Wallace*, 168 S. W. (Tex.) 978. *Timm v. Stegman*, 6 Wash. 13. *Carson v. Allen*, 2 Pinn. (Wis.) 457. *W. A. Smith & Bro. v. Spinnen*, 170 S. W. (Ark.) 84. *Enos v. Tuttle*, 3 Conn. 27. *King v. Vance*, 46 Ind. 246. *Knight v. Bowley*, 117 Mass. 451. *Bills v. Nat. Park Bk.*, 89 N. Y. 343. *Secor v. Witter*, 39 Ohio St. 218. *Day v. Zimmerman*, 68 Pa. 72. *Prout v. Grant*, 72 Ill. 456. *Rev. Stat. Ill., Chap. 62, Sec. 15. Wright v. McCarty*, 92 Ill. App. 120.

Wells v. Binner, 170 Ill. App. (1912) 412. (*Inquiry from Ill., July, 1916, Jl.*)

Garnishment of deposit represented by cashier's check

379. A bank issued a cashier's check to A for \$3,390 which A indorsed to one W—. Later the sheriff levied under execution of alimony judgment obtained by Mrs. W— against W— attaching all moneys in the hands of the bank owing W— and particularly all money represented by the cashier's check. Subsequent to the levy upon the issuing bank, the check was attached by sheriff while in the hands of the clerk of court where it had been deposited as security in a litigation foreign to divorce proceedings. The bank wishes to be advised on all phases of the case. *Opinion:* In *McMillan v. Richards*, 9 Cal. 365, it was held that deposit represented by outstanding negotiable certificate is not attachable in the hands of bank as it is not indebted to the depositor, but to holder of certificate. This case was cited with approval in *Walters v. Rossi*, 6 Cal. (Unoff. pages) 266, 272. It would be proper for the bank as garnishee to pay the money into court thereby relieving itself of all responsibility and the court may order an action to be brought under Sec. 720 of the Code of Civil Procedure and that all persons claiming to be interested be made parties thereto. See *Deering v. Richardson-Kimball Co.*, 103 Cal. 73. *High v. Bank of Commerce*, 103 Cal. 525. With respect of attachment of check in hands of clerk of court the rule is that such course is not allowable. See *Clymer v. Willis*, 3 Cal. 363. (*Inquiry from Cal., Jan., 1920.*)

380. A bank, when called on under attachment proceedings to respond to the extent of its indebtedness to a customer, asks whether it should include any cashier's checks outstanding in the name of its customer. *Opinion:* In most jurisdictions the rule is that a debt owing upon a negotiable security, such as a cashier's check, is not subject to garnishment, because the indebtedness of the maker is to the holder of the instrument, whoever he may be. In a few jurisdictions it is held that where a note is overdue and is still in the hands of the payee it is subject to garnishment and in a few others, that debt represented by a negotiable instrument is subject to garnishment which will, however, be defeated by proof that the instrument has been transferred to a bona fide holder. It

seems there are no decisions in Mississippi on the point, but probably the prevailing rule would apply in that state, that the bank would not have to include in its return cashier's checks issued to the customer and outstanding. (*Inquiry from Miss., Aug., 1919.*)

381. A depositor procured from the bank a cashier's check for the amount of his balance. After he had left the bank with the same in his possession, the account was garnished. Is the account subject to garnishment? *Opinion:* Where, as in the present case, the bank has issued a cashier's check which is outstanding and unpaid, it is not liable as garnishee at suit of creditor of the payee, or indorsee, unless the check is shown to be in the hands of such payee or indorsee after maturity; that is to say, after such time as it would be presumed overdue so that its transfer thereafter would subject the subsequent taker to equities. And such is the rule in Texas, made applicable to all negotiable instruments. *Willis v. Heath*, (Tex. 1914) 168 S. W. 198. *Thompson v. Findliter H. Co.*, (Tex. 1913) 156 S. W. 300. *Kapp v. Teel*, 33 Tex. 811. *Price v. Brady*, 21 Tex. 614. *Inglehart v. Moore*, 21 Tex. 501. *Bassett v. Farthwaite*, 22 Tex. 230. *Thompson v. Bank*, 66 Tex. 156. (*Inquiry from Tex., June, 1920.*)

Garnishment notice with incorrect name

382. A bank having funds only of "John Jones, Agent" is served with a writ of garnishment against the funds of "John Jones." The bank disregarded the writ and was threatened with a damage suit because the funds in fact belonged to John Jones. *Opinion:* The bank, not knowing the real owner of the funds, should not have taken the risk of answering that it was not indebted to Jones and then subsequently paying him the money on his check as agent. *Silsbee St. Bk. v. French Market Grocery Co.*, 132 S. W. 465. Ala. Civ. Code (1907) Chap. 91, Art. 2, Sec. 4317 (2188). *Curtis v. Parker*, 136 Ala. 217. *Kimbraugh v. Davis*, 34 Ala. 583. *Myatt v. Lockshort*, 9 Ala. 91. *Foster v. Walker*, 2 Ala. 177. *Nat. Com. Bk. v. Miller*, 77 Ala. 168. *Saller's Case*, 62 Ala. 221. *Wicks v. Branch Bk.*, 12 Ala. 594. *Security Loan Assn. v. Wems*, 69 Ala. 584. *Edwards v. Levison*, 80 Ala. 477. *Crayton v. Clark*, 11 Ala. 787. (*Inquiry from Ala., March, 1913, Jl.*)

383. A garnishment notice was served on a bank charging funds of Mary Smith,

and bank carries an account in the name of Mrs. James Smith, and subsequently pays without knowledge or notice of the identity of the two. *Opinion*: The bank is not liable for the amount of Mrs. James Smith's deposit, as it has no knowledge or notice of its depositor's identity, and there were no circumstances which would charge it with the duty of making inquiry as to such identity. German Nat. Bk. v. Nat. St. Bk., 31 Pac. (Colo.) 122, 39 Pac. 71. Terry v. Sisson, 125 Mass. 560. Paul v. Johnson, 9 Phila. (Pa.) 32. White v. Springfield Sav. Institution, 134 Mass. 232. O'Neil v. New England Tr. Co., 67 Atl. (R. I.) 63. (*Inquiry from Minn., April, 1917.*)

Garnishment takes precedence over checks not presented before service of writ

334. A depositor had a balance of \$40 which amount was garnished on Jan. 10, 1912. Two checks of \$5 and \$10, drawn prior to Jan. 10, were presented after the service of the writ. *Opinion*: The garnishment takes precedence over the checks dated before but not presented until after the service of the writ. Deposits made after the service of the writ are not covered by it. Neg. Inst. A., Sec. 189 (Comsr's dft.). Old Second Nat. Bk. v. Williams, 112 Mich. 564. (*Inquiry from Ill., Feb., 1912, Jl.*)

335. The check of a depositor was presented after a writ of garnishment was served attaching the deposit. The check was issued before the service of the writ. *Opinion*: The writ of garnishment takes precedence over the outstanding check because the check of itself is not an assignment of the deposit, and the bank is not liable to the holder unless and until it accepts or certifies the check. Neg. Inst. A., Sec. 189 (Comsr's dft.) (*Inquiry from Mo., Aug., 1916, Jl.*)

336. A check comes to a bank for payment through its correspondent, arriving at 8.30 A. M., and is charged to the customer's account between 11 and 12 o'clock. At 9.01 A. M. the account is attached. The bank asks which takes precedence. *Opinion*: A writ of garnishment served against a deposit account at 9.01 A. M. takes precedence over the debtor's check received through the mail at 8.30 A. M. but not charged against his account until 11 A. M. There appears to be no reason why a writ of attachment against a bank served upon the proper officer at the bank cannot be just as effective when served during non-banking hours as it would

be when served during banking hours. Albers v. Commercial Bk., 85 Mo. 173. American Nat. Bk. v. Miller, 229 U. S. 517. St. Nat. Bk. v. Boettcher, 5 Colo. 185. Liggett v. Weed, 7 Kan. 273. Western Wheeled Scraper Co. v. Sadilek, 50 Neb. 105. Boyd v. Emerson, 2 Adol. & El. 184. Gen. Laws R. I., Chap. 299, Sec. 14. Chap. 300, Sec. 22. See also cases cited under Opinion 301. (*Inquiry from R. I., Aug., 1918, Jl.*)

Garnishment of proceeds of bill of lading draft

337. A draft with bill of lading attached was received by a bank from its customer for collection. It was forwarded to a collecting bank and the payor after paying the draft immediately garnished the proceeds for an indebtedness of the customer. The customer was obliged to settle on the payor's terms and it is claimed that the collecting bank wrongfully withheld the funds, and that they could not legally be reached by garnishment proceedings. *Opinion*: Where the proceeds of a bill of lading draft are garnished in the hands of collecting bank for indebtedness of the shipper, the garnishing creditor is not entitled to the proceeds if the draft has been sold by the shipper prior to collection. But if the bank was merely an agent for collection, and the proceeds belonged to the customer, the amount would be subject to garnishment proceedings. The duty of the collecting bank when served with process of garnishment is to advise the forwarding bank of the service of the writ. If the forwarding bank claimed the funds as its property, the collecting bank should make due answer, naming the bank as owner, and pay funds into court taking receipt therefor. If the customer owned proceeds, he should have opportunity to contest proceedings to release the funds under bond. Seward Co. v. Miller, 55 S. E. (Va.) 681. Mather v. Gordon, 77 Conn. 341. American Nat. Bk. v. Henderson, 123 Ala. 612. Neil v. Rogers, 41 W. Va. 37. First Nat. Bk. v. Milling Co., 103 Iowa 518. Nat. Bk. v. Everett, 71 S. E. (Ga.) 669. Howell's Mich. Stat. (1913), Chap. 355. Sec. 13463, 13482. Marx v. Wayne Circuit Judge, 119 Mich. 19. Stephens v. Pa. Casualty Co., 135 Mich. 189. (*Inquiry from Mich., Oct., 1917, Jl.*)

338. A bank forwarded for collection a draft with a bill of lading attached. The proceeds were garnished in the hands of the drawee bank because of a claimed shortage, but the prosecution of the garnishment proceedings has been delayed three years.

Opinion: Application for dismissal of the proceedings because of undue delay should be made; if the proceeds belonged to the discounting bank they are not subject in any event to garnishment by a creditor of the shipper. *Noble v. Bourke*, 44 Mich. 193. *Dunham v. Murphy* (Tex. Civ. App. 1894); 28 S. W. 132. *England Bros. v. Young*, 26 Okla. 494. *Whitaker v. Coleman*, 25 Ind. 374. *Meigs v. Weller*, 90 Mich. 629. *Kily v. Bertrand*, 67 Mich. 332. *Vincent v. Wellington*, 18 Wis. 159. *Comp. Laws, Okla.* (1909), Sec. 5918. (*Inquiry from Mo., March, 1916, Jl.*)

389. A bank purchased from its customer a draft with a bill of lading attached, and forwarded it for collection to a neighboring bank. The latter bank, being a creditor of the shipper, attached the proceeds in its hands and refused to transmit the amount to the purchaser of the draft. *Opinion:* Bank purchasing draft with bill of lading attached has a right to the goods, or to the proceeds of the draft when paid, superior to an attaching creditor of the shipper. *Seward v. Miller*, 55 S. E. (Va.) 681. *Temple Nat. Bk. v. Louisville Cotton Oil Co.*, 82 S. W. (Ky.) 253. *Webb City Nat. Bk. v. Everett*, 71 S. E. (Ga.) 660. *Kansas City First Nat. Bk. v. Mt. Pleasant Milling Co.*, 72 N. W. (Ia.) 689. *Walsh v. Hiawatha First Nat. Bk.*, 81 N. E. (Ill.) 1067. (*Inquiry from Tex., June, 1918, Jl.*)

Garnishment proceedings may be instituted before judgment

390. A customer overdrew his account in a bank and opened up a new account in another bank in Oklahoma. The creditor bank wishes to garnish the new account. *Opinion:* The creditor bank should bring an action against its debtor and after the action is brought, proceed at once by writ of garnishment against the other bank. Garnishment proceedings may be instituted before judgment against the principal debtor under the laws of Oklahoma but the plaintiff must have judgment in the principal action before trial can be had in the garnishee action. *Comp. Laws Okla.* (1909), Sec. 5711 (S. 1893, Sec. 4078). (*Inquiry from Okla., May, 1913, Jl.*)

391. A bank's customer came to the bank and withdrew the balance of his account. In determining the balance, the bank overlooked a check for \$25 which had not been posted to his account; the customer consequently overdrawing his account \$25.

The bank asks whether it can garnishee its former customer's account in another bank. *Opinion:* The Oklahoma statute provides that any creditor shall be entitled to proceed by garnishment in the district court of the proper county against any person (excepting a municipal corporation) who shall be indebted to, or have any property, real or personal, in his possession, or under his control belonging to such creditor's debtor. (Rev. Laws Okla. 1910, Chap. 60, Sec. 4822.) According to this law the bank can garnishee its former customer's account in the other bank and institute such proceedings before judgment. (*Inquiry from Okla., June, 1920.*)

Garnishment of bank stock

392. A stockholder of a Texas bank has been sued, and the bank garnisheed. Can his stock be levied upon and sold? In case it can, what is the liability of the bank to the holder of the original stock certificates in case they have been pledged to a third party, and would the bank be required to issue new certificates to the purchasers at the sheriff's sale? *Opinion:* In Texas bank stock is subject to garnishment by a creditor of the stockholder, and may be sold under execution without the original certificates being first delivered to the court, which may compel the bank to issue new certificates to the purchaser at sheriff's sale. (*Holloway Seed Co. v. City Nat. Bank*, [Tex. Civ. App. 1898] 47 S. W. 77. *Marble Falls Ferry Co. v. Spittler*, 7 Tex. Civ. App. 82. *McEachin's Tex. Civ. St., Arts.* 273, 296, 297, 298). But where the stock has been sold or pledged to a third person, although not transferred on the bank's books, before notice of the attachment, the rights of the pledgee or purchaser are paramount to those of the attaching creditor. (*Seeligson v. Brown*, 61 Tex. 114. *Twombler v. Palestine Ice Co.*, 17 Tex. Civ. App. 596 [citing in support *Smith v. Bank*, 74 Tex. 457. *Strange v. Railway*, 53 Tex. 162. *Baker v. Wasson*, 53 Tex. 150.] *Cook on Stock & Stockholders*, Sec. 487.) (*Inquiry from Tex., Sept., 1920, Jl.*)

Garnishment of contents of safe deposit box

393. A bank rented a safe deposit box to a holder, giving him two keys and keeping a master key for all of the boxes held. A creditor of the box holder desires to attach the contents of the box. *Opinion:* The contents of the safe deposit box belonging to a box renter are subject to attach-

ment, and according to the weight of more recent authority the bank may also be garnished for such contents. *Jennings v. McElroy*, 42 Ark. 236. *State v. Lawson*, 7 Ark. 391. *Gay v. Southworth*, 113 Mass. 52. *McCullough v. Carragan*, 24 Hun (N. Y.) 157. *U. S. v. Graff*, 67 Barb. (N. Y.) 304. *Tillinghast v. Johnson*, 82 Atl. (R. I.) 788. *Bliven v. Hudson R. Co.*, 35 Barb. (N. Y.) 188. *Roberts v. Stuyvesant Safe Dep. Co.*, 123 N. Y. 57. *Bottom v. Clark*, 7 Cush. (Mass.) 487. *Gregg v. Hilson*, 8 Phila. (Pa.) 91. *Wood v. Edgar*, 13 Mo. 451. *Case v. Dewey*, 55 Mich. 116. *Gleason v. South Milwaukee Bk.*, 8 Wis. 534. *Trowbridge v. Spinning*, 23 Wash. 48. *Washington, etc., Co. v. Susquehanna Coal Co.*, 26 App. D. C. 149. (*Inquiry from Cal., Jan., 1914, Jl.*)

394. A bank asks whether garnishment proceedings attach property belonging to the defendant which is in a safe-deposit box in its vaults, to which box only the defendant has access. The bank holds the master key to the vaults, while the defendant holds a private key to the box. To open the box it is necessary first for the master key to be used and second for the private key to be used. *Opinion*: In Washington, where a bank leases to a customer a safe-deposit box, and is summoned as garnishee by a creditor of the lessee, it must retain exclusive control of the box until discharged by the court, and should not in the meantime allow the depositor access thereto. *Trowbridge v. Spinning*. (Wash.) 62 Pac. 125. (*Inquiry from Wash., Sept., 1919, Jl.*)

Garnishment of bank deposit and safe deposit box

395. Bank has been informed that where a bank account has been attached, and the depositor also rents a safe deposit box from the bank, and the amount of the garnishment is in excess of the deposit, the bank lays itself liable in allowing the depositor access to his safe deposit box; and, further, that the attaching party will have a right to break into the box, if he deems it necessary to protect his claim. *Opinion*: Where a bank which carries a general account for a depositor, and also leases him a safe deposit box, is summoned as garnishee of such depositor, it cannot safely allow the depositor access to the safe deposit box, where the depositor's account is insufficient to satisfy the writ of garnishment, because being in control of the contents of the box, it is its

duty as garnishee to retain exclusive control until discharged by the court. *Nat. Safe Deposit Co. v. Stead*, (Ill.) 95 N. E. 973. *Washington Loan & Trust Co. v. Susquehanna Coal Co.*, 26 App. D. C. 149. *Tillinghast v. Johnson*, (R. I.) 82 Atl. 788. *Trowbridge v. Spinning*, 23 Wash. 48, 62 Pac. 125. *Jones & Add.* Ill. St. Anno., Par. 5936. But see *Wood v. Edgar*, 7 Cush. (Mass.) 487. *Gregg v. Hilson*, 8 Phila. (Pa.) 91. (*Inquiry from Ill., Dec., 1919, Jl.*)

Savings account is subject to garnishment

396. A savings account is subject to garnishment, and it is doubtful if the garnishee bank can require return of the book, as it is the property of the depositor and is not negotiable. The difference between a negotiable certificate of deposit and a savings bank book with respect to attachment or garnishment proceedings is that in case of a negotiable certificate the debt of the bank runs to the holder of the certificate and not to the original depositor. *Wagner v. Second Ward Sav. Bk.*, 76 Wis. 242. (*Inquiry from Ida., Nov., 1917, Jl.*)

397. An account represented by a savings bank pass book is subject to garnishment. (*Inquiry from Mich., Oct., 1911, Jl.*)

Effect of assignment before service of writ

398. A savings account is subject to attachment, but if the account has been assigned before the service of the writ of attachment on the bank, the assignee is protected, whether or not the bank has been notified of the assignment. *Caldwell Banking & Tr. Co. v. Porter*, 52 Ore., 318, 323. *Amarillo Nat. Bk. v. Panhandle Tel. & Teleg. Co.* (Tex. Civ. App. 1914), 169 S. W. 1091. (*Inquiry from Ore., April, 1917, Jl.*)

399. An account in a savings bank equally as in a commercial bank is subject to garnishment by a creditor of the depositor in the absence of a statute exempting such an account from garnishment. *Murphree v. Mobile*, 108 Ala. 663. *Maloney v. Casey*, 164 Mass. 124. *Farmers, etc., Nat. Bk. v. Ryan*, 64 Pa. 236. *Kaesemeyer v. Smith* (Ida. 1912), 123 Pac. 943. *Washington, etc., Brick Co. v. Traders Nat. Bk.*, 46 Wash. 23. *Allen v. Woodruff*, 2 Ala. App. 415. (*Inquiry from Wash., Nov., 1914, Jl.*)

Partnership account or trust fund cannot be garnished to pay an individual debt

400. Parties engaged in real estate business placed with bank an account known as

"X-Y Trust Fund," advising bank that nothing would appear in it but funds received by the firm for use in paying insurance premiums, rentals, etc., in the general course of business and earnest payments that might be made in connection with real estate deals. The personal account of one of the partners was garnished. In order to be on the safe side, the bank refused payment of checks drawn by the firm on the trust account, and thus gained the displeasure of its customer, and a possible suit for damages. Bank wishes advice as to what its action in the premises should have been. *Opinion:* Where a bank holds the deposit account of a firm consisting of trust funds, and is summoned as garnishee in an action against a customer who carries a personal account, and who is a member of such firm, no return should be made of the trust fund, but the bank should continue to honor checks against such account, because, (1) a partnership account cannot be garnished to pay an individual debt. (Scott v. Scheidt. [N. D.] 160 N. W. 502. See Moore v. Gilmore, 16 Wash. 123, 47 Pac. 239), and (2) a trust fund cannot be garnished for the individual debt of the trustee. (Home Land, etc., Co. v. Routh, 123 Ark. 360. Morrill v. Raymond, 28 Kan. 415. Marx v. Parker, 9 Wash. 473). (*Inquiry from Wash., Sept., 1919, Jl.*)

Attachment of proceeds in hands of collecting bank

401. A draft drawn payable to the order of bank A for value received is indorsed by it, "Pay any bank or banker for collection," and sent to bank B which collects it from drawee; afterwards the money in B's hands is attached by a creditor of drawer and B opposes action brought. *Opinion:* The attaching creditor is not entitled to the proceeds. The draft expressly states that it is given for value received. The indorsement of bank A payee to B is, of course, an indorsement for collection, the effect of which was to notify the drawee or any subsequent party that B held the draft simply as A's agent for collection and had no title to the draft or its proceeds. The fact that the payee bank A indorsed the draft for collection, does not indicate that it was not owner, but the form and the indorsement do indicate that A owned the draft and gave value for it to the drawer and appointed B its agent to collect. The draft carries no notice that bank A was not a holder for value and the fact that it used a

form of indorsement creating merely an agency to collect, instead of a straight title-conveying form, carries no notice that it is not owner. See First Nat. Bank v. City Nat. Bank, 182 Mass. 130, 65 N. E. 24, 94 Am. St. Rep. 637. Gregory v. Sturgis, 71 S. W. 66 (Tex.). Nat. Park Bank v. Seaboard Bank, 114 N. Y. 28, 20 N. E. 632, 11 Am. St. Rep. 612. Kuder v. Greene, 72 Ark. 504, 82 S. W. 836. (*Inquiry from Ark., May, 1912.*)

Liability of bank as garnishee for subsequent deposits

402. In Montana, where a bank is served with a writ of attachment of moneys owing its depositor, it is only liable for the amount of the balance to the credit of the depositor at the time the writ is served. This rule also holds in California, Connecticut, Georgia, Iowa, Kansas, Maine, Michigan, Minnesota, Texas and Wisconsin. The statutes in Alabama, Arkansas, Illinois, Maryland, Massachusetts, Missouri, New Hampshire, North Carolina, Pennsylvania, Vermont, West Virginia and Washington, hold the bank liable for subsequent deposits. Norris v. Burgoyne, 4 Cal. 409. Coyne v. Plume, 90 Conn. 293. Burrus v. Moore, 63 Ga. 405. Thomas v. Gibbons, 61 Iowa 50. Gillette v. Cooper, 48 Kan. 632. Ormsby v. Anson, 21 Me. 23. Cogswell v. Mitts, 90 Mich. 353, 51 N. W. 514. Nash v. Gale, 2 Minn. 310. Arrington v. Screws, 31 N. C. 42. Eikel v. Frelich, 1 Tex. Civ. App. Cas., Sec. 1117. Wood v. Wall, 24 Wis. 647. Loewe v. Sav. Bk., 236 Fed. 444. Lady Ensley Furnace Co. v. Rogan, 95 Ala. 594, 11 So. 188. Dunnegan v. Byers, 17 Ark. 492. Young v. Cairo First Nat. Bk., 51 Ill. 73. Glenn v. Boston, etc., Glass Co., 7 Md. 287. Capen v. Duggan, 136 Mass. 501. Dinkins v. Crunden-Martin Woodenware Co., 99 Mo. App. 310, 73 S. W. 246. Palmer v. Noyes, 45 N. H. 174. Goodwin v. Claytor, 137 N. C. 224, 49 S. E. 173. Glazier v. Jacobs, 250 Pa. 357, 95 Atl. 532. Seymour v. Cooper, 25 Vt. 141. Ringold v. Suiter, 35 W. Va. 186, 13 S. E. 46. Frieze v. Powell, 79 Wash. 483. Rev. Codes Mont. 1907, Chap. 4, Secs. 66, 67. Cowell v. May, 26 Mont. 163. (*Inquiry from Mont., June, 1919, Jl.*)

Set off by bank to defeat attachment

403. A bank makes a loan to a customer and credits him with the proceeds. Before the proceeds are checked out, the account is garnished and the bank desires to

cancel the credit. *Opinion:* The mere fact that the account is garnished before the proceeds are checked out will not entitle the bank to cancel the credit. But if the loan was obtained by fraud, the credit may be cancelled or if the customer has become insolvent the bank may, according to the law of some states (Ga., Iowa, Ky., Mass., Minn., Tenn., N. J., Ohio, N. C. and Texas) a contrary rule obtaining in other states (Ala., Miss., N. Y., Pa., R. I., S. C. and Wis.) set off the insolvent customer's deposit against his unmatured indebtedness. *Bk. v. Union Tr. Co.*, 50 Ill. App. 434. *Kling v. Irving Nat. Bk.*, 21 App. Div. 373. Affirmed 160 N. Y. 698. *Presnall v. Stock Yards Nat. Bk.*, 151 S. W. (Tex.) (*Inquiry from Kan., Dec., 1916, Jl.*)

404. A creditor, learning that its debtor had a deposit in a certain bank, attached the funds. The bank that owned a past due note of the same debtor set off his deposit against the note so as to defeat the attachment and made a return to the sheriff on the balance remaining after its note was paid. *Opinion:* The bank had the right to make such set-off, and such right, although subsequently exercised, existed prior to the attachment and enabled the bank to take priority over the attaching creditor. (*Inquiry from Mont., Aug., 1911, Jl.*)

405. A customer having a balance with his bank of \$500 was indebted to

the bank on a matured note of \$2,500. A writ of garnishment was served upon the bank by a creditor of the customer on the same day the note was due. *Opinion:* The bank owning the note had a right to set off the deposit against the note and make reply that it was not indebted to its depositor. *Marble Co. v. Merchants Nat. Bk.*, 115 Pac. (Cal.) 59. *Schuler v. Laclede Bk.*, 27 Fed. 424. (*Inquiry from W. Va., May, 1914, Jl.*)

Set-off of unmatured mortgage note against garnisheed account

406. A bank account subject to check has been garnisheed. The bank owns a mortgage note of the depositor, which matured three days after service of the writ. Can the bank charge the note against the garnisheed account? *Opinion:* Where the account of a depositor is garnisheed, the bank has no right to set off an unmatured note of the depositor against the account so as to defeat the garnishment; except that in some states (but not in Wisconsin) insolvency of a depositor gives the bank a right to set off his unmatured paper against his deposit. *County v. Pfeffer*, 236 Fed. 183. *Bank v. Crayter* (Ala.) 75 So 7. *Bank v. Presnall*, (Tex.) 194 S. W. 384. *Oatman v. Batavian Bank*, 77 Wis. 501, 46 N. W. 881. (*Inquiry from Wis., Jan., 1921, Jl.*)

ATTORNEY'S FEES

Attorney's fee note payable at bank

407. A local attorney presented a past due note payable at a bank for payment, adding thereto ten per cent. for his fees, in accordance with clause expressed in the note: "If this note is not paid when due and is collected by attorney or legal proceedings, we promise to pay an additional sum of 10 per cent. of the amount of this note as attorney's fees." The bank asks (1) whether it should pay without the special authorization of the maker, and (2) was the amount collectible on the note merely its face value or the protest fees in addition. *Opinion:* Where a note providing for attorney's fees if not paid when due and collected by an attorney is made payable at a bank in which the maker has sufficient funds at maturity and the note is not presented until after maturity and then by an attorney, it is (1) doubtful whether the bank has authority to pay the overdue note without express author-

ization from the maker, and (2) in any event the amount collectible is the face of the note, without attorney's fees. The safest course for the bank is to obtain an express instruction from the maker of the note. *Neg. Inst. A.*, Secs. 87, 70 (Comsr's. dft.). *Rev. Stat. Ariz.*, 1913, Secs. 4215, 4232. *Armistead v. Armistead*, 10 Leigh, (Va.) 525. *Florence Oil, etc., Co. v. First Nat. Bk.*, 38 Colo. 119. (*Inquiry from Ariz., Feb., 1919, Jl.*)

Claim of attorney's fee in bankruptcy

408. The maker of a note, containing a provision for the payment of an attorney's fee of fifteen per cent. if not paid at maturity, became a bankrupt before the note fell due. The receivers of the bankrupt estate refused to pay the additional attorney's fee. *Opinion:* The claim for the attorney's fee upon the note which did not mature until after the maker became bankrupt was not provable against his estate, because such

claim is not "a fixed liability absolutely owing at the time of the filing of the petition in bankruptcy." In *re Gorlington*, 115 Fed. (Tex.) 199. *Merchants Bk. v. Thomas*, 121 Fed. 306 (Ga. & Miss.). In *re Keeton, Stell & Co.*, 126 Fed. (Tex.) 426. In *re Gebbard*, 140 Fed. (Pa.) 571. *British & American Mortgage Co. v. Stuart*, 210 Fed. 425 (Ga. & Miss.). (*Inquiry from Miss., Aug., 1915, Jl.*)

Reasonable attorney's fee

409. A bank, contemplating the insertion of a clause in a printed note respecting attorney's fees, desires to ascertain whether it would be better to insert the words "reasonable attorney's fees" instead of filling in a definite amount. *Opinion:* The courts have held that where a reasonable attorney's fee is specified, the provision is enforceable for a reasonable amount charged by the attorney, when this is pleaded and proved. When the note provides for ten per cent. attorney's fee, it would be enforceable for that amount, in the absence of a plea or proof by the maker that such amount was unreasonable. The trend of authority and the best considered judicial decisions are in favor of the upholding and enforcement of a stipulation for a reasonable attorney's fee in case of default at maturity of the note. See *Matthews v. Norman*, 42 Ind. 176. *Fort Dodge Natl. Bk. v. Breese*, 39 Iowa, 640. *Peyser v. Cole*, 11 Oregon, 39F A specified percentage, *Wood v. Wiship*, 83 Ala. 424. *Dorsey v. Wolff*, 142 Ill. 589. *Smiley v. Meir*, 47 Ind. 559. *Brahan v. Clarksville First Natl. Bk.*, 72 Miss. 266. (*Inquiry from Wyo., Nov., 1916.*)

Negotiability of notes with attorney's fee clause

410. A bank uses a note which it thinks of doubtful negotiability on account of the statement in the body of the note: "In case the holder shall place this note in the hands of an attorney for collection, I promise to pay 10 per cent. of the indebtedness as attorney's fees for making such collection." It wishes advice regarding this. *Opinion:* Stipulation in note promising to pay certain per cent. in case holder shall place note in hands of attorney for collection, can only reasonably be construed to mean that in case of default at maturity, note will be placed in hands of attorney and therefore does not destroy negotiability of note. *Idaho Rev. Codes*,

1908, Sec. 3459. *Morrison v. Ornbaun* (Mont.) 75 Pac. 953. *First Nat. Bank of Shawano v. Miller* (Wis.) 120 N. W. 820. (*Inquiry from Idaho, Aug., 1919, Jl.*)

411. The Negotiable Instruments Act provides that the instrument shall be negotiable although it is payable "with costs of collection or an attorney's fee in case payment shall not be made at maturity," and any clause which sufficiently conforms to such provision will not affect the negotiability of the instrument. A note containing a clause providing for the payment of an attorney's fee in case payment is not made at maturity is valid in Missouri and negotiable under the provisions of the Negotiable Instruments Act. *Neg. Inst. A., Sec. 2* (Comsr's. dft.). *German American Bk. v. Martin*, 129 Mo. App. 485. (*Inquiry from Mo., March, 1914, Jl.*)

412. Under the law of New Jersey a note containing a provision for attorney's fee if not paid at maturity is both valid and negotiable. The following clause if inserted in a note is valid and the note negotiable: "I further agree that if this note is not paid when due to pay all cost necessary for collection, including ten per cent. for attorney's fees." *Mackintosh v. Gibbs*, 80 Atl. (N. J.) 554. *Neg. Inst. A., Sec. 2* (Comsr's. dft.). (*Inquiry from N. J., Nov., 1915, Jl.*)

Trade acceptances

413. Does a provision in a trade acceptance for the payment of an attorney's fee in case payment is not made at maturity affect its negotiability? *Opinion:* Negotiability is not affected. *Neg. Inst. Act, Sec. 2* (5). (*Inquiry from N. Y., June, 1918.*)

414. The face of a note contains the following statement: "The maker of this note hereby agrees in the event of non-payment of the note when due to pay an amount equal to 10 per cent. of the face of the note as attorney's fees, if such an amount shall be charged as attorney's fees for the collection of the note." Question is raised as to the validity of this clause and negotiability of note under the law of New York. *Opinion:* The note is negotiable under the Negotiable Instruments Law, and the clause providing for attorney's fees although not specifically passed upon by a New York Court would undoubtedly be held to be valid and enforceable. *Neg. Inst. A., Sec. 2* (Comsr's. dft.). *Oglesby v. Bk. of N. Y.*, 77 S. E. (Va.) 468. (*Inquiry from N. Y., April, 1917, Jl.*)

415. Negotiable Instruments Act makes note negotiable although it is payable "with costs of collection or an attorney's fee in case payment shall not be made at maturity." *Opinion:* A note containing clause promising to pay "as collection fees, the additional sum of 10 per centum of principal then due, if collection be made through attorney" is negotiable under Act. *Farmers Nat. Bk. v. McCall*, 106 Pac. (Okla.) 866. *Neg. Inst. A., Sec. 2* (Comsr's. dft.). (*Clevenger v. Lewis*, 20 Okla. 837. *Cotton v. Deere Plow Co.*, 12 Okla. 516—Cases decided before passage of *Neg. Inst. A.*) *First Nat. Bk. v. Miller*, 120 N. W. (Wis.) 820. (*Inquiry from Okla., March, 1914, Jl.*)

416. A bank asks comment upon a proposed clause in note reading as follows: "And we further promise and agree that in case suit should be instituted on this note to collect same, we will pay, in addition, attorney's fees, and all expenses incurred in collecting the same to be taxed as part of the costs in case this instrument shall be the cause of action. Negotiable and payable without defalcation or discount, and without relief of Homestead or Exemption Laws." *Opinion:* This clause will not affect the negotiability of the note. Before the Negotiable Instruments Act, it was held in Pennsylvania (see *Woods v. North*, 84 Pa. St. 407) that insertion in a promissory note of the clause "and five per cent. collection fee, if not paid when due" renders the note uncertain, destroys its negotiability, and relieves the indorser from liability thereon, and (*Johnson v. Speer*, 92 Pa. St. 227) that a promissory note containing a provision to pay attorney's commissions if collected by legal process, although the amount to be so paid is left in blank in the note, is not negotiable. But the Negotiable Instruments Act has changed this rule and one of its express provisions is that "the sum payable is a sum certain" within the meaning of the Act "although it is to be paid * * * with costs of collection or an attorney's fee in case payment shall not be made at maturity." The Negotiable Instruments Act further provides that the negotiable character of the instrument is not affected by a provision which "waives the benefit of any law intended for the advantage or protection of the obligor." Under the Act, therefore, neither the attorney's fee provision nor the waiver of Homestead Exemption Laws affects the negotiability of the note. (*Inquiry from Pa., June, 1914.*)

417. A promissory note has printed on its face a clause "All expenses in collecting this note, including ten per cent. of amount due as attorney's fees, in case this note is collected by attorney by suit or through court," and it is asked whether clause is sufficiently definite and does not insure negotiability. *Opinion:* The clause is sufficiently definite and does not affect negotiability. It has been held that the clause, "if collected by attorney or if suit is brought on this note," is a promise to pay attorney's fee for collection, only after dishonor, and does not impair the negotiability of the note. The Negotiable Instruments Act provides that "the sum payable is a sum certain within the meaning of this Act, although it is to be paid * * * with cost of collection or an attorney's fee in case payment shall not be made at maturity." *First Nat. Bank of Shawano v. Miller*, 139 Wis. 126, 120 N. W. 820. (*Inquiry from S. C., Feb., 1918.*)

418. Is a clause in a promissory note that the maker agrees to pay all costs of collection including reasonable attorney's fees if not paid, valid and enforceable in South Dakota? *Opinion:* The legislature of South Dakota which passed the Negotiable Instruments Act in 1913, struck out the provision of the Uniform Act which makes the instrument negotiable although it is to be paid "with costs of collection or an attorney's fee in case payment shall not be made at maturity" and inserted in lieu thereof "provided that nothing herein contained shall be construed to authorize any court to include in any judgment on an instrument made in this state any sum for attorney's fees or other costs not now taxable by law," and the courts have held that the negotiability of an instrument is not affected by a provision for attorney's fee, but that the provision is void and unenforceable. *Baird v. Vines*, 18 S. D. 52, 99 N. W. 89. *Chandler v. Kennedy*, 8 S. Dak., 56, 65 N. W. 439. (*Inquiry from S. D., March, 1915.*)

Validity of attorney's fee clause

419. In Arkansas the courts have held that the stipulation for an attorney's fee does not affect the negotiability of a note, but that the stipulation is itself void and unenforceable. The subsequent passage of the Negotiable Instrument Act may or may not validate such stipulation. (*Inquiry from Ark., April, 1915, Jl.*)

420. Upon the question of the effect of a stipulation for attorney's fees in promissory notes, the four following conflicting views before the Negotiable Instruments Act were held in the various states: (1) that which sustains both the validity of the provision and the negotiability of the instrument; (2) that which holds that the provision is valid and enforceable but that it destroys negotiability; (3) that which holds that negotiability is not affected but the provision is void and unenforceable, and (4) that which holds that the provision for an additional amount as attorney fee above the highest rate of interest allowable renders the transaction usurious. The Negotiable Instruments Act which declares that the negotiability is unaffected by a provision for attorney's fee "in case payment shall not be made at maturity" leaves uncertain the question whether such provision is valid and enforceable in those states which held it void before the Act was passed. In Ohio and West Virginia the Act does not validate the attorney fee provision; but in Virginia and Colorado such provision under the Act is held valid. In Nebraska, North Carolina and South Dakota the Negotiable Instruments Act itself expressly provides that nothing in the Act shall be construed to authorize the enforcement of the stipulation for the attorney's fee. Neg. Inst. A., Sec. 2 (Comsr's. dft.). *Miller v. Kyle*, 93 N. E. (Ohio) 372. *Raleigh County Bk. v. Poteet*, 82 S. E. (W. Va.) 332. *Oglesby Co. v. Bk. of N. Y.*, 77 S. E. 468. *Florence Oil Refining Co. v. Hiawatha Oil, Gas & Refining Co.*, 135 Pac. (Colo.) 454. *Boozar v. Anderson*, 42 Ark. 167. (*Inquiry from Ark., April, 1918, Jl.*)

421. In Ohio, stipulations in promissory notes providing for attorney's fees are against public policy, void and unenforceable, and the Supreme Court of Ohio has held that the provision of the Negotiable Instruments Act providing that such stipulations do not affect negotiability, does not make them valid. Neg. Inst. A., Sec. 2 (Comsr's dft.). *Miller v. Kyle*, 97 N. E. (Ohio) 372. (*Inquiry from Ind., May, 1914, Jl.*)

422. A note in Michigan contained the following provision: "I further agree to pay ten per cent. additional as attorney fee, if this note is not paid when due, and is collected by or through an attorney at law." *Opinion:* Prior to the passage of the Negotiable Instruments Act in Michigan the attorney fee provision was void and unenforceable but under the Act which makes

a note containing such a clause negotiable it has not been decided in Michigan whether or not such provision is thereby validated and the few decisions upon the point in other states conflict. Neg. Inst. A., Sec. 2 (Comsr's. dft.). *Miller v. Kyle*, 93 N. E. (Ohio) 372. *Raleigh County Bk. v. Poteet*, 82 S. E. (W. Va.) 332. *Bk. of Holly Grove v. Sudbury*, 180 S. W. 470. *W. H. Casey & Co. v. Swan & James*, 150 S. W. (Ky.) 534. *Oglesby Co. v. Bk. of N. Y.*, 77 S. E. 468. *Florence Oil Refining Co. v. Hiawatha Oil, Gas & Refining Co.*, 135 Pac. (Colo.) 454. The following cases were decided prior to passage of the Neg. Inst. A. in Michigan: *Bullock v. Taylor*, 39 Mich. 137. *Van Marten v. McMillan*, 39 Mich. 304. *Meyer v. Hart*, 40 Mich. 517. *Vosburg v. Lay*, 45 Mich. 455. *Louder v. Burch*, 47 Mich. 109. *Wright v. Traver*, 73 Mich. 493. *Bk. v. Purdy*, 56 Mich. 6. *Bk. v. Wheeler*, 75 Mich. 546. *Brewing Co. v. McKittrick*, 86 Mich. 191. *Kittermaster v. Bressard*, 105 Mich. 220. *Bendley v. Townsend*, 109 U. S. 665. *People v. Bennett*, 122 Mich. 283. *Shrewsbury Point Bk. v. Lee*, 117 Mich. 123. (*Inquiry from Mich., Feb., 1916, Jl.*)

Note executed in Missouri and sued on in South Dakota

423. A note for \$3,000, dated in Missouri, and made payable at a bank in that state, promises to pay the amount "with costs of collection and reasonable attorney's fees in case payment shall not be made at maturity". Opinion is desired as to legality and enforceability of this clause in note in South Dakota. *Opinion:* Where a note, executed in Missouri, containing a provision for reasonable attorney's fees, valid under the laws of that state, is sued on in the courts of South Dakota, where such provisions are prohibited and held to be void, the principles of comity by which the courts of one state enforce contracts valid by the laws of another state, though invalid according to the laws of the state of enforcement, does not extend to stipulations of this nature, and the contract for attorney's fees is probably not enforceable in the courts of South Dakota. *Chandler v. Kennedy* (S. D.) 65 N. W. 439. Sec. 1706 S. D. Rev. Codes. *Arden Lumber Co. v. Henderson Iron Works*, (Ark.) 103 S. W. 185. *Rogers v. Raines* (Ky.) 38 S. W. 483. *Exch. Bank v. Appalachian Land, etc., Co.*, (N. C.) 38 S. E. 813. *Security Co. v. Eyer* (Neb.) 54 N. W. 838. See *Martin v. Berry* (Ind.

Ter.) 37 S. W. 399, and Robinson v. Queen, 87 Tenn. 446. See Opinion No. 426. (*Inquiry from Mo., Feb., 1921, Jl.*)

424. Under the present law of Nebraska, a provision in a mortgage that in the event of foreclosure the defendant shall pay a reasonable attorney's fee, to be determined by the court and taxed as costs in the case, is invalid and not enforceable. Such a stipulation would not affect the negotiability of a note. For the history of the law of the state on the subject, see 8 A. B. A., Jl., 249. Rev. Stat. Neb. 1913, Chap. 54, Art. 1, Sec. 5320. The following cases show history of the law of Nebraska on the subject of attorney's fee clauses: Laws 1879, p. 78. Rich v. Stretch, 4 Neb. 186. Hendrix v. Rieman, 6 Neb. 516. Heard v. Bk., 8 Neb. 10. Dow v. Updike, 11 Neb. 95. Moore v. Gregory, 13 Neb. 563. Aultman & Co. v. Stout, 15 Neb. 586. Hand v. Phillips, 18 Neb. 850. Stark v. Olsen, 44 Neb. 646. Chambers v. Chambers, 75 Neb. 850. Hardy v. Miller, 11 Neb. 395. Otoe Co. v. Brown, 16 Neb. 395. Winkler v. Roeder, 23 Neb. 706. Nat. Bk. v. Thompson, 90 Neb. 223. Hallam v. Telleren, 55 Neb. 255. (*Inquiry from Neb., Sept., 1915, Jl.*)

425. In Oklahoma a note providing for "a reasonable amount" as attorney's fee if not paid at maturity is negotiable, and should suit be commenced would be enforceable for a reasonable amount charged by the attorney when pleaded and proved; and a note providing for "ten per cent." attorneys fee would be enforceable for that amount, in the absence of plea or proof that such fee was unreasonable. Baker Gin Co. v. U. S. Sherman Mach. & Iron W'ks., 122 Pac. (Okla.) 235. Colton v. Deere Plow Co. 14 Okla. 605. Clevenger v. Lewis, 20 Okla. 837. Clowers v. Snowder, 21 Okla. 476. Farmers Nat. Bk. v. McCall, 106 Pac. (Okla.) 866. Childs v. Junger, 162 S. W. (Tex.) 474. First Nat. Bk. v. Stow, 171 S. W. (Mo.) 567. Florence, etc., Co. v. Hiawatha, etc., Co., 135 Pac. (Colo.) 454. (*Inquiry from Okla., July, 1915, Jl.*)

426. In South Dakota the provision for an attorney's fee in a promissory note

has been held void and unenforceable, but does not affect its negotiability. In passing the Negotiable Instruments Act, the legislature eliminated the provision that negotiability is not affected by the attorney fee clause and substituted a provision that nothing in the Act should authorize inclusion in a judgment on an instrument a sum for attorney's fees or any other costs not now taxable by law. See opinion No. 423. Baird v. Vines, 18 S. Dak. 52. Chandler v. Kennedy, 8 S. Dak. 56. Neg. Inst A., Sec. 2 (Comsr's dft.). (*Inquiry from S. D., April, 1915, Jl.*)

427. There has been some doubt in Virginia as to whether a provision in a promissory note for payment of collection fee was legal or enforceable in the state, the lower courts of the state not having ruled in agreement on this point; but unless a change is made by legislative action, the question seems to have been settled once and for all by its highest court, as the Supreme Court in a late case (Colley v. Summers Parrott Hardware Co., 12 Va. App. 463) has held that an attorney's fee of ten per cent. provided for in a promissory note could be collected in addition to the face of the note. See Colley v. Summers Parrott Hardware Co., 119 Va. 439. (*Inquiry from Va., Oct., 1916.*)

428. While in the far greater number of states attorney's fee notes are both negotiable and valid as to attorney's fees, the question remains undecided in those states, such as Virginia*, where the courts have held such stipulations to be penalties and against public policy and void, and the legislature has later enacted the Negotiable Instruments Act whether such Act abrogates the decisions and validates such stipulations. The probability is that the Act would be held to validate such provisions. Rixy v. Pearre, 89 Va. 113. Ronald v. Bk. of Princeton, 80 Va. 813. Chestertown Bk. v. Walker, 163 Fed. (W. Va.) 510. Toole v. Stephen, 4 Leigh (Va.) 581. (*Inquiry from W. Va., Oct., 1911, Jl.*)

*Note: Point decided in Virginia. See opinion No. 427.

BANKING HOURS

Payment of check after banking hours

Payment with funds borrowed by assistant cashier

429. A gave B his check for \$500 in payment for an automobile. B, knowing the

assistant cashier of A's bank very well, requested him to cash the check on Saturday after banking hours, stating that he was going to leave on a night train. The assistant cashier, desiring to accommodate him, secured the money by borrowing from differ-

ent merchants of the neighborhood, and turned it over to the payee. On Monday morning A stops payment. Was the act of the assistant cashier done in his official capacity on behalf of the bank, and was payment after banking hours valid? *Opinion:* Payment of a check after banking hours out of the funds of the bank has been held valid. Assuming the assistant cashier had authority to borrow money in the ordinary course of business, the chances are it would be held that here the money was not borrowed on behalf of the bank, but by the officer individually, in which case payment would not be out of the bank's funds and the stop payment order came in time. Morse on Banks and Banking, Vol. 1, Sec. 168d. Bolles Mod. Law of Banking, p. 343. Bullard v. Randall, 1 Gray (Mass.) 605. (*Inquiry from Del., Sept., 1918.*)

Refusal to pay or certify justified

430. The by-laws of a bank provide for the hours of business from 9 A. M. to 4 P. M. During the busy season the teller's cage is sometimes kept open until 5 P. M. At 5 o'clock on Saturday afternoon A presented for payment a check for \$685. The cash being in the safe, the teller refused his request. A then asked that the check be certified, which request was also refused. *Opinion:* A bank is not liable for refusing to pay a check when presented out of the usual hours which it has established for doing business with the public. See Jones v. Coos Bank, Smith (N. H.) 249. First Nat. Bank v. Payne, 85 Va. 890. Marshall v. Wells, 7 Wis. 1. There is no legal obligation to certify in any event. (*Inquiry from Neb., Feb., 1920.*)

Deposit of check of another depositor

431. A check of another depositor on the same bank was received by the teller, and a deposit ticket issued after banking hours. The teller stated at the time that the deposit would be handled in the next day's business. The drawer stopped payment at the opening of business on the next day. *Opinion:* The giving of the deposit ticket would be equivalent to payment of the check unless the teller's statement made the transaction provisional and made the check subject to such condition. (*Inquiry from N. C., April, 1920.*)

Validity of payment

432. Is a check cashed outside of regular banking hours at the risk of the bank making

the payment? *Opinion:* The Appellate Division of the New York Supreme Court in Butler v. Broadway Savings Institution, 157 N. Y. Supp. has upheld the validity of a payment outside the usual banking hours. The by-law of a savings bank which provided that the bank should be open for business daily from 10 A. M. to 3 P. M. was held not to render illegal the payment of a draft without the fixed hours. It would seem that the cashing of the check outside the regular banking hours is proper. (*Inquiry from Pa., April, 1917.*)

433. Can a bank which has banking hours from 9 A. M. to 3 P. M. pay its customer's check after banking hours, or is there an implied contract between the bank and its customer that it will pay his check only when presented during banking hours? *Opinion:* The proper view is that payment or certification by a bank after banking hours is valid. The bank has a right to refuse but it may pay or certify. If it refuses upon presentment after banking hours to pay a customer's check, having sufficient funds, such a refusal is not a dishonor because there has been no due presentment; but if it chooses to pay or certify, it is obeying the order of its customer on a business day, waiving in a particular case the banking hour limit fixed for its own convenience. Of course, if payment or certification was made on a holiday, a different question would be presented. (*Inquiry from Va., July, 1919.*)

Payment of note during evening banking hours

434. A bank advertises that it will be open from five until eight-thirty o'clock, Monday afternoons and evenings, and inquires whether the makers of notes, payable at its bank have until eight-thirty to make payments or should a note maturing on Monday be protested at the regular closing time, at three o'clock. *Opinion:* The rule is well established, that the maker has the whole of the day on which the instrument falls due in which to pay the same. Sutcliffe v. Humphreys, 58 N. J. L. 442. When the bank establishes banking hours from five to eight-thirty P. M., Monday afternoon and evening, the makers of notes payable at the bank would have until eight-thirty in which to make payment. Protest before that time would either be wholly bad or conditionally good if the maker before the close of banking hours did not make his account good. German American Bank v.

O'Neillman, 65 N. Y. Supp. 242. (*Inquiry from N. J., May, 1917.*)

Receiving deposits after banking hours and entering as deposits of the following day

435. On account of inexperienced help, particularly among the women who are not allowed by law to work more than eight hours a day, a bank is forced to receive deposits after banking hours. In view of the rule requiring presentment of checks on the day following delivery in order to hold the drawer should bank fail, the bank asks if it would be liable to its depositor in such contingency for delay in presenting the deposited paper received after banking hours on one day and handled as if received the next day. *Opinion:* The authorities conflict on the question of the bank's liability, and it might be that the bank could relieve itself from liability for any possible negligence growing out of delay, by an agreement with depositor, evidenced by a clause on the deposit slip, that "items deposited after 3 o'clock are received for the convenience of the depositor and are held for deposit on the following business day." See *First Nat. Bk. v. Payne & Co.*, 85 Va. 890. *Marshall v. American Express Co.*, 7 Wis. 1. *Columbian Bk. Co. v. Bowen*, 134 Wis. 218. *Calisher v. Forbes*, 41 L. J. Ch. 56. *Lowry Nat. Bk. v. Seymour*, 91 S. C. 305. *Salt Springs Nat. Bk. v. Burton*, 58 N. Y. 430. *Averill v. Second Nat. Bk.* 17 D. C. 358. *Simpson v. Pemigewasset Nat. Bk.*, 68 N. H. 289. *Ex Parte Clutton*, Fonbl. 167. *Sadler v. Belcher*, 2 Moody & Rob., 489. (*Inquiry from Minn., Jan., 1918.*)

Delivery of express package of money after hours

436. An express company tendered a package of money to a bank in North Carolina at 7 o'clock in the evening upon the arrival of the train. The bank refused to accept the shipment at that time of the night while the company claimed that it had no safe place to store the money over night and refused to make further shipments unless the bank keeps open to receive them at 7 P. M. *Opinion:* A tender of delivery of an express package of money to a bank is sufficient if made within the reasonable business hours general to the place, although such tender is made after the close of banking hours. What is a reasonable time for delivery is a question for the jury and in this case 7 o'clock at night in the winter time might be held an un-

reasonable time. In no event can the express company, being a common carrier, discontinue handling shipments to the bank. *Young v. Smith*, 33 Ky. (3 Dana) 91, 28 Am. Dec. 57. *Marshall v. American Exp. Co.*, 7 Wis. 1, 73 Am. Dec. 381. *Merwin v. Butler*, 17 Conn. 138. *Pate v. Henry*, 5 Stew. & P. (Ala.) 101. (*Inquiry from N. C., March, 1915, Jl.*)

Payment of check on Saturday evening

437. For the convenience of its patrons, a bank is opened on Saturday evening from 7 to 9 P.M. All deposits received during these hours are entered on the following Monday's business. The bank asks what would be its liability where a customer notified it to stop payment on his check which was cashed over the window on Saturday night. *Opinion:* The question has never been decided as far as known, but in view of the fact that in some states Saturday is a half holiday from 12 o'clock noon to 12 o'clock midnight, and the further fact that the Negotiable Instruments Act contains a provision that "instruments falling due or becoming payable on Saturday are to be presented for payment on the next succeeding business day, except that instruments payable on demand may, at the option of the holder, be presented for payment before 12 o'clock noon on Saturday, when that entire day is not a holiday," it would seem that the bank is taking a risk in paying or certifying a check on Saturday afternoon or evening, or on any holiday, except, of course, to the depositor himself. (*Inquiry from N. Y., June, 1920.*)

Right to fix banking hours

438. The banks in a city in Missouri agreed to change their banking hours by closing Thursday afternoon during July and August. The banks question the legal right to close and what would be their liability in case a check was presented on Thursday afternoon and payment refused. *Opinion:* Banking hours are not established by law, but by the banks themselves. The courts hold that banks may establish reasonable hours for transaction of business. It is competent for the banks in question to change the banking hours as indicated, and the changed banking hours having been announced to the public by advertisement, a check afterwards presented on Thursday afternoon will not be subject to protest. *Jones v. Coos Bk.*, (N. H.) *Smith* 249. *Marshall, Isley & Ellis v. Wells*, 7 Wis. 1.

First Nat. Bk. v. Payne, 85 Va. 890. (*Inquiry from Mo., June, 1917, Jl.*)

439. Is there any statute in New Jersey regulating banking hours, and if not, what would be reasonable notice to the public should a bank desire to make a change in hours from 3 to 2 P.M.? *Opinion:* There is no statute in New Jersey regulating banking hours. If banks decide to change their closing hours from 3 to 2 P.M., it would seem a reasonable notice to the public would be by printing the announcement in the local newspaper for, say, two or three weeks, and also posting the announcement in the office of the bank and mailing a printed notice also to the bank's customers. (*Inquiry from N. J., Sept., 1918.*)

Right to close on Saturday afternoon

440. Legal banking hours in Pennsylvania are from 9 A.M. to 3 P.M., except on holidays. By a law passed in 1897 "Every Saturday after 12 o'clock noon until 12 o'clock midnight is hereby designated a half holiday." By order of the fuel administrator the banks of a certain locality close at 1 o'clock on Saturday. One of the banks desires to close at 12 noon. *Opinion:* There seems to be no legal reason why the banks should not close at 12 o'clock on Saturday afternoon and confine their hours to the legal banking hours of Pennsylvania. There is a statute in Pennsylvania which permits a bank by vote of its directors to keep its doors open and transact business on Saturday afternoon. But this statute is permissive and if a bank chooses to close on Saturday afternoons it has a legal right to do so. (*Inquiry from Pa., March, 1918.*)

441. Is there anything in the banking law regulating the hours of opening and closing of a national bank each day? *Opinion:* There is apparently nothing in the Pennsylvania Banking Law (aside from what is provided in the holiday law as to Saturday) nor in the National Banking Law which regulates the hour of opening and closing of a bank on a secular or business day. Banks fix their own hours for doing business and these become customary but it would seem that the bank has a right, if it chooses, to do business in other hours. (*Inquiry from Pa., April, 1917.*)

442. The banks in a certain locality fix two instead of three o'clock as the closing hour, and notify the public to that effect. As the usual and customary hour of closing has been three o'clock the bank believes that

it would be dangerous to protest a check before that hour or decline to receive a deposit tendered up to three o'clock to protect such check. *Opinion:* A check may be protested immediately upon dishonor and a bank is not obliged to wait until the close of banking hours. The public having been notified, two o'clock becomes the established banking hour. Banks would have a right to refuse payment of a check presented after two and before three o'clock without incurring damages to their depositor for wrongfully dishonoring the check. (*Inquiry from Wash., D. C., July, 1918.*)

Right of bank to close for funeral

443. A bank asks whether it has a legal right to close for funerals. The bank held a note for collection and the maker appeared at the bank with funds ready to pay, but afterwards became bankrupt so that the amount was lost. Would the bank be responsible to the payee? *Opinion:* A bank would have no right to close during banking hours of a business day to enable its officers to attend a funeral. It is quite likely the bank would be held liable for negligence in failing to collect the note. (*Inquiry from Ill., Feb., 1918.*)

Right of bank to close on non-legal holiday

444. All the banks of a community except Bank A closed their doors on a non-legal holiday. Bank A asks if it had the right to present checks drawn on the other banks thus closed and have them protested for non-payment. *Opinion:* Banking hours are established by custom and sometimes by statute and during legal banking hours on a business day a bank would have no right to close. Checks presented at the banks thus closed without right would be legally protestable for non-payment. (*Inquiry from Ill., March, 1918.*)

Daylight Saving

When is 12 o'clock noon?

445. Section 4551 of the Connecticut statutes provides that "On Saturday of each week banking hours shall end at twelve o'clock noon." Nearly all of the banks and merchants of Connecticut are conducting business on the Daylight Saving Plan—which is one hour later than the Standard time. The bank protests a check at eleven o'clock (Standard time) on Saturday and the customer appears at the bank during the next hour with funds to make the check

good. Is the bank liable for its action in protesting? *Opinion:* It seems reasonable that a court would hold that 12 o'clock noon referred to in the statute was the 12 o'clock noon recognized by the merchants and banks of the community in the conduct of their daily business, although it would only be 11 o'clock according to Standard Eastern time; and that the protest of a check for insufficient funds at 11 o'clock Eastern time, but 12 o'clock local time, would not be premature. As a matter of fact, a check can be protested as soon as dishonored at any time of the day, so that this question would not arise in reference to a check. (*Inquiry from Conn., May, 1920.*)

446. A bank asks whether it would be fulfilling the legal requirements if it observed the usual local changed hours, opening one hour earlier, but allowing an extra hour, i. e., until four o'clock local time instead of three for the payment of all notes. *Opinion:* Where an ordinance or regulation of a city

or town changes the hour for local purposes and the newly fixed hour is generally conformed to by the people, including public service and other corporations, the banks would have to fix their own hours for doing local business with reference to such local standard, although the hour has not been changed by the law of the state. Of course, if a bank wanted to allow an extra hour, until four o'clock local time, it would be within its power to fix that as its closing time. (*Inquiry from Conn., March, 1920.*)

447. A bank inquires as to the effect of the local daylight savings ordinance upon the opening and closing of national banks. *Opinion:* Banking hours are fixed by the banks themselves, and it is consistent for a bank to adjust its banking hours to conform to a local daylight savings ordinance. There is nothing in the National Bank Law which would affect the right of a national bank to fix its own banking hours. (*Inquiry from N. Y., May, 1920.*)

BANKS AND BANKING

Contracts and dealings in general

Charge for checking accounts

448. Is there any legal objection to a bank making a charge for checking accounts, where the balances are not sufficient to remunerate the bank for the expense entailed? *Opinion:* There is no legal objection to such charge where it is done by prearrangement with the customer. Banks have the power to make contracts, and this would simply be a matter of contract between bank and customer as to the terms upon which the account will be carried. (*Inquiry from N. Y., Aug., 1917.*)

Sale of foreign exchange

449. The larger banks in certain centres make an arrangement with smaller banks throughout the country by which the small bank as agent of the large bank will sell their draft upon a foreign correspondent of the large bank, advising and remitting the large bank in payment, the large bank in return arranging with the foreign correspondent to pay the draft. *Opinion:* In case of the failure of the foreign correspondent without paying the draft, the small bank would undoubtedly be liable to the purchaser as drawer. Upon the question of the liability of the large bank to the small bank, presumably the latter acting as agent for the former, there would be a liability over; at

the same time, this would depend probably upon the nature of the agreement between the two banks, and it is believed in cases of this kind it would be wise that there should be a specific written agreement between the two to the effect that, in the event the small bank is held liable to the purchaser for non-payment of the draft, there being no negligence on its part, the large bank will hold it harmless and reimburse it. (*Inquiry from Mont., Nov., 1920.*)

450. Have state banks the right to draw bills upon foreign correspondent and issue drafts on an order similar to that of the American Express Company money order? *Opinion:* The Banking Law of New York gives state banks the power to negotiate drafts and bills of exchange; also to buy and sell exchange. There is no restriction as to locality or country upon which the exchange shall be sold. It would seem, therefore, that state banks have power to issue foreign bills of exchange in the form and style of those issued by the American Express Company (New York Banking Law, Sec. 106). However, such bills could probably not be issued payable in foreign money. Sec. 142 of the Act provides no person shall give, pay or receive in payment, or in any way circulate or attempt to circulate, any bank bill, promissory note, bill, check, draft or other evidence of debt issued by any bank, individual banker or private banker which shall

be made payable otherwise than in lawful money of the United States. (*Inquiry from N. Y., Sept., 1917.*)

Creation of contingent fund

451. A bank states that, at a recent examination of its affairs by the State Banking Department, exception was taken to its practice of carrying a Contingent Fund Account, and the bank was requested to transfer the fund to either the Surplus Fund or Undivided Profits Account. The bank desires to ascertain what objection there can be to such a fund. *Opinion:* It seems there is no legal obstacle against the bank maintaining such a fund. There is nothing in the Banking Law of Ohio to prevent it, and the extent of power of the Superintendent of Banks is to "execute the laws." A question of this kind very rarely gets into court. There was a case in California where the statute required banking corporations having no capital to retain a portion of each dividend to constitute a reserve fund of \$100,000 to be used in paying losses. The corporation acquired a much larger fund and it was held that the discretion of the directors as to the maximum would not be controlled by the courts unless unfairly or wantonly exercised. *Mulcahy v. Hibernia Sav. Society*, 144 Cal. 219. This case at least illustrates that the bank has power to create a contingent fund of the kind suggested. (*Inquiry from Ohio, June, 1916.*)

Purchase of notes

452. A bank calls attention to an opinion of an Oklahoma attorney wherein it is stated that a state bank in Oklahoma could not be a holder of a note in due course; that the state statute enumerates the rights of a state bank and the power to purchase notes is not one of them; that a note purchased by an Oklahoma State Bank, negotiable in form, purchased before maturity, is subject to all equitable defenses, the same as if in the hands of the original holder. The bank asks an opinion thereon. *Opinion:* The Oklahoma Banking Act enumerates among other powers "To buy and sell exchange, gold * * * uncurrent money * * *." It might be contended that the phrase "uncurrent money" included negotiable promissory notes. No attempt will be made to discuss just what this phrase means. The Act includes the power "To lend money on chattel and personal security" * * * Under this last stated grant of power a bank might by way of loan become the holder in

due course not only of the negotiable promissory note made by A payable directly to the bank for a loan but also the holder of a negotiable promissory note made payable by A to B and discounted by the bank for B. Most banking statutes grant the express power to discount, and it has been held the term discount includes purchase as well as loan. *Pape v. Bank*, 20 Kan. 40. But the Oklahoma statute does not expressly include the power to discount; it simply confers the power to loan. Even so, it seems this would be held to include the purchase as well as the discount of negotiable paper. In *Smith v. Bank*, 26 Ohio St. 141, the court said: "In the business of banking, the purchasing and discounting paper is only a mode of loaning money." It is the consensus of modern judicial opinion that a bank has authority to purchase promissory notes and thereby become a bona fide holder of same, in the absence of express statutory prohibition. *State Bank v. Criswell*, 15 Ark. 230. *Pape v. Capitol Bk.* 20 Kan. 440. *U. S. Bk. v. Norton*, 3 A. K. Marsh (Ky.) 422. *Taft v. Quinsigamond Nat. Bk.*, 172 Mass. 363. *Salmon Falls Nat. Bk. v. Leyser*, 116 Mo. 51. *Smith v. Exch. Bk.*, 26 Ohio St. 141. *Com. v. Com'l Bk.*, 28 Pa. St. 383. In re Ontario Bk., 21 Ont. Law 1. The Oklahoma statute contains no express prohibition of purchasing negotiable promissory notes, and it is quite certain Oklahoma banks would be held to have that power. (*Inquiry from Okla., Aug., 1916.*)

Purchase of bonds for customer

453. What is the liability of a bank as a purchasing agent of government bonds for a customer, where the bonds turn out to be stolen and the circumstances are such that the customer suffers loss? *Opinion:* The case is governed by the rule that since the agent is required to exercise only ordinary care, skill and diligence, he is not, in the absence of an express agreement, an insurer of the success of the undertaking, (*Louisville & R. Co. v. Buffington*, 131 Ala. 620. *Loeb v. Hellman*, 83 N. Y. 601. *Ins. Co. v. Laubenstein* 162 Wis. 165, 155 N. W. 918) and does not guarantee the principal against incidental losses, or undertake that he will commit no errors or mistakes, (*Richardson v. Taylor*, 136 Mass. 143. *Page v. Wells*, 37 Mich. 415. *Lake City Flouring-Mills Co. v. McVean*, 32 Minn. 301) and so will not be liable for losses occurring without any fault or negligence on his part. *Smallhouse v. Keller*, 142 Ky. 432, 134 S. W. 493. *Furber*

v. Barnes, 32 Minn. 105. (*Inquiry from Ark., Feb., 1921.*)

Purchase of stock for customer

454. The question presented is whether a trust company or bank in New York which gives an order on behalf of a customer to a broker to buy stock is liable to the customer where a loss results because of failure of the broker. *Opinion:* The question will depend upon whether the trust company or bank is to be regarded as an independent contractor or whether the broker is a sub-agent of the customer, in which latter event the trust company would not be liable to its customer for the loss. The general rule is that where the employment of a sub-agent is authorized, he becomes the agent of the principal and the original agent is not responsible for his acts or omissions. Davis v. King, 66 Conn. 465. Morris v. Warlick, 118 Ga. 421. Whitlock v. Hicks, 75 Ill. 460. Loomis v. Simpson, 13 Iowa, 532. Joor v. Sullivan, 5 La. Ann. 177. Williamsburg City F. Ins. Co. v. Frothingham, 122 Mass. 391. Hoag v. Graves, 81 Mich. 628. Many other cases might be cited, but there seem to be no decisions in New York on the question presented. An authority to appoint a sub-agent may be implied from the conduct of the parties or the usage of trade. Thus, the appointment of a sub-agent may be justified by a known and established usage or course of dealing. If the principal constitutes an agent to do business as to which there is a known and established usage of substitution, the principal must be held to have expected and authorized such substitution. Darling v. Stanwood, 14 Allen (Mass.) 504. Planters Nat. Bk. v. First Nat. Bk., 75 N. C. 534. Lausatt v. Lippincott, 6 Serg. & R. (Pa.) 386. (*Inquiry from N. Y., March, 1919.*)

Sale of foreign lottery bonds on commission

455. A bank states that a number of foreign internal bonds having lottery provisions are being sold in this country, and the bank asks whether there is any reason why it should not sell Swedish lottery bonds. *Opinion:* The decision of the Supreme Court of the United States in Horner v. United States, 147 U. S. 449, seems to establish that where foreign bonds which have lottery provisions are sold in this country, it constitutes an offense against Section 3894 U. S. Revised Statutes whenever the United States mail is used in connection therewith. If, as stated, banks are

selling such bonds on commission, there must be some laxity in the enforcement of the law. (*Inquiry from Ill., April, 1920.*)

Bank as agent to procure loan

456. Bank A offered to procure a loan for Bank B which proposition was accepted. Thereupon Bank A sent a note it has discounted to Bank B, which was taken by the latter thinking it was an outside loan. The note owned by Bank A was worthless. *Opinion:* Bank A would be liable to Bank B. It is a breach of duty for an agent employed to make an investment for his principal to supply investments out of his own property unless done with knowledge and consent of the principal. Sikes v. Inhabitants of Hatfield, 79 Mass. 347. Meek v. Hurst, 122 S. W. 1022. (*Inquiry from Mo., June, 1912, Jl.*)

Sale of notes with agreement to repurchase

457. An investment company submits a note list of paper which it buys from national and state banks, at the foot of which is a repurchase agreement signed by the bank which recites: "In consideration of the purchase by you from us of the notes above described we hereby agree to repurchase from you or your assigns each or all of said notes on their respective maturity dates or at any time thereafter upon demand, paying therefor the face value with interest," etc. The investment company asks whether a bank, either national or state, would be legally bound by such repurchase agreement. *Opinion:* The courts quite generally hold at the present day that a bank, whether State or National, has power to buy and sell notes. The power to purchase was at one time denied by the Supreme Court of Minnesota on the theory that the power to purchase was not included within the power to discount. Rochester First Nat. Bk. v. Pierson, 24 Minn. 140. Farmers, etc., Bank v. Baldwin, 23 Minn. 198. But now, by statute, authority has been given to banks in that state to purchase bills and notes. Minn. Gen. St. 1886, Ch. 33, Sec. 15. Merchants Nat. Bk. v. Hanson, 33 Minn. 40, overruling 24 Minn. 140. See, also, Becker's Invest. Agency v. Rea, 63 Minn. 459, recognizing the latter statutory rule. In the present case the bank sells notes with an agreement to repurchase. Such an agreement would be within the power of the bank and binding on it. (*Inquiry from Minn., Jan., 1919.*)

Payment on order by wire prior to remittance

458. A bank receives a request by telegram from another bank to notify and pay a certain party an amount of money, the bank sending the wire promising to remit. Would the bank receiving the wire be under any obligation to advance the money prior to receipt of the remittance? *Opinion:* Generally where wires are so forwarded, the sending bank has an account or credit with the receiving bank and it is contemplated that the money will be immediately paid. But if the receiving bank is not willing to trust the responsibility of the sending bank and advance the money prior to remittance, it having no funds in possession to the credit of the sending bank, there is no law which would compel it to do so. (*Inquiry from N. Dak., Jan., 1918.*)

Pledge of assets to secure deposits

459. The City of D deposited with an Ohio bank \$30,000. The bank directors signed a bond to the city and to secure themselves deposited \$36,000 of the bank's assets with a trustee. *Opinion:* In the absence of statutory prohibition there is no reason of public policy or otherwise why the bank has not the right to pledge its assets to secure the sureties on the bond. Page & Adams, Ohio Gen. Code, Secs. 2715 et seq.; Secs. 4295 et seq.; Secs. 4515 et seq.. Secs. 324 et seq. (*Inquiry from Ohio, Aug., 1919, JI.*)

460. The law of Wisconsin prohibits a bank from pledging its assets as security for deposits. It is somewhat doubtful whether bonds borrowed by the bank could be lawfully pledged as security for postal savings deposits. (*Inquiry from Wis., Sept., 1911, JI.*)

Cancellation of contract for purchase of supplies

461. On September 14th a bank ordered from a cake and feed company a car of "cake", and signed a contract therefor containing this clause: "No contract will be cancelled unless we are notified and agree thereto." On September 15th an officer of the bank saw the salesman of the company, and endeavored to cancel the contract, on the ground that they could buy "cake" for \$2.50 per ton less than he quoted. The salesman protested, as he had already sent the signed contract into the company, but offered, if the bank would buy two more cars at a price of \$2.50 per ton less than the

price of the first car, they could have the three cars at the reduced price. The bank acceded to this, but the company refused to ratify the modified contract, and, as the bank refused to accept the first car at the contract price, the company now seeks to collect the difference between the market price on day of sale and present price of "cake" per ton. Is the bank liable? *Opinion:* It is elementary that one party to a contract cannot alter its terms without the assent of the other; (Trowbridge v. Auto Co. [Conn.] 103 Atl. 843. Bearden Merc. Co. v. Madison Oil Co., 128 Ga. 695. Portland, etc., R. Co. v. Boston, etc., R. Co., 101 Mass. 269. Sperry & Co. v. Hertzberg, 69 N. J. Eq. 264. Paine v. Lautz, 168 N. Y. Supp. 369) the minds of the parties must meet as to the proposed modification. (The Sappho, 69 Fed. 366. Smith v. Miller, 79 Conn. 624. Carnahan Mfg. Co. v. Bebee Bowles Co., 80 Ore. 124, 156 Pac. 584. Molostowsky v. Grauer, 113 N. Y. Supp. 679). So, while the parties to an executory contract may rescind it by mutual agreement (Dunaway v. Roden, 14 Ala. App. 501. Syphend v. Myers, 80 N. J. L. 521. McIntosh v. Minor, 55 N. Y. Supp. 1074) yet one party to a contract cannot rescind it by merely giving notice to the other of its intention to do so. (Gillespie v. U. S., 47 Ct. Claims 167. C. R. of Ga. v. Goratowsky, 123 Ga. 366. Flynn v. Finch, 137 Iowa 378) the offer on one side being accepted on the other, such offer and acceptance are governed by the same rules which govern the inception of contracts generally. (Adams v. Giraud [Colo.] 169 Pac. 580. Parks v. Elmore, 59 Wash. 584, 110 Pac. 381). Conclusion reached that in the instant case the bank would have no right to cancel the contract, or to modify same, without consent of Cake & Feed Co., and, they not having consented to cancel the contract, the bank would be liable for its breach. (*Inquiry from Okla., Oct., 1920.*)

Borrower's financial statement coupled with collateral agreement

462. A bank encloses statement of financial condition of a borrower for the purpose of procuring credit and has added to this statement a form of agreement of a character usual in collateral notes maturing the note or other obligations upon the borrower becoming insolvent, making an untrue statement and various other contingencies; authorizing set-off of the entire amount due against the deposit balance of the borrower;

and giving the bank a continuing lien thereon. The statement also contains a further agreement giving the bank permission to examine the books of the borrower and providing that failure to exercise any option at any time shall not be a waiver of the right thereto. The question upon which the bank desires an opinion is whether it is legal and valid to incorporate in the statement for credit such an agreement relating to the right to mature notes in the events specified and containing the other agreements. *Opinion:* There seems to be no reason why such an agreement would not be valid and enforceable. As to the statement for credit and added agreement, it seems both legal and valid and provides a better method than by incorporating such agreements in the notes given for the loan. This method takes the agreement out of the note, leaving the latter fully negotiable, and couples it with the statement for credit. It appears that such combined form of financial statement and collateral agreement has advantages which make it preferable as well as being valid and enforceable. (*Inquiry from Pa., Dec., 1914*)

Threatening debtor with criminal prosecution

463. Is there any law covering an attempt to collect a debt by threat of prosecution of suit? Would a bank or an individual be liable for sending such a letter to a delinquent customer? *Opinion:* (a) With regard to sending a letter threatening to bring civil suit if a debt is not paid there would, of course, be no liability, except, possibly, in a case where the letter was published and contained injurious imputations. (*Apolinaire v. Roca*, 43 La. Ann. 842). (b) Concerning the sending of a letter threatening criminal prosecution for obtaining money by false pretenses, in some jurisdictions the courts hold that the sending of a letter threatening to accuse another of a crime in connection with the attempt to collect a debt, is not within the statute, for a creditor is entitled to demand payment of honest debts, and a threat to charge the debtor with an offense committed in connection with the debt or obligation is not punishable. (*State v. Hammond*, 80 Ind. 80. *State v. Ricks*, [Miss. 1914] 66 So. 281. *People v. Griffin*, 2 Barb. [N. Y.] 427. *U. S. v. Mena*, 11 Philippine Islands 543. *Reg. v. Johnson*, 14 U. C. 2 B. 566. And see *Mann v. State*, 47 Ohio St. 566, and *Rev. Laws Okla.*, 1910, Ch. 23, Sec. 2687). In other jurisdictions, however, the threaten-

ing, for the purpose of obtaining money, to prosecute for a crime, is punishable. (*People v. Choyinski*, 95 Cal. 640. *State v. De Bolt*, 104 Iowa 105. *State v. Waite*, 101 Iowa 377. *State v. Goodwin*, 37 La. Ann. 713. *Com. v. Buckley*, 148 Mass. 27. *People v. Whittemore*, 102 Mich. 519. *State v. Coleman*, 99 Minn. 487). (*Inquiry from Okla., April, 1917.*)

Agency of private bank for transmission of money to foreign countries

464. A firm of private bankers ask an interpretation of Section 15½ of the Illinois Banking Act which goes into effect "after January 21, 1921," as to whether or not a person or persons, firm or partnership, can under any circumstances transmit money to foreign countries by acting as agent, or otherwise, to express, steamship, telegraph companies or banks. *Opinion:* Under the amendment of the Banking Act of Illinois it is apparent that the transmitting of money to foreign countries is part of the business of banking which natural persons, firms or partnerships are forbidden to transact, except that express, steamship and telegraph companies may continue their business of transmitting money and receiving money to be transferred. Natural persons, therefore, cannot continue to transact this business independently, but it is impossible to see why it would not be competent for express, steamship and telegraph companies to have natural persons or firms, formerly engaged in such business, act as their agents in its conduct by special arrangement with such companies. These companies transact business through agents, and it would seem competent for them to authorize a private firm to receive and transmit money to foreign countries for them, as their agents. (*Inquiry from Ill., Oct., 1920.*)

Use of word "savings" by state banks

Cross reference—For savings departments of national banks—see National banks

Use of word "savings" by state bank in New York

465. May a state bank use the word "savings" in connection with its interest department? *Opinion:* Under the explicit provision of section 279 of the Banking Law of New York, the Attorney-General of this state has ruled (Attorney-General Rep. Feb. 6, 1908) that any use in business by banks of the word "savings" is prohibited

except in the case of savings banks, building and loan associations, organized under the laws of this state, or, in certain cases, public school authorities. It seems clear that a state bank may not use the word "savings" in connection with its business. (*Inquiry from N. Y., May, 1914.*)

Use of word "savings" by commercial bank in Kentucky

466. A commercial bank in Kentucky is not prohibited by statute from carrying savings accounts and from having a savings department, but in that connection it must keep separate books for savings business and post the rate of interest allowed depositors and other regulations prescribed by the directors. There is no statute in Kentucky prohibiting the use or advertisement of the word "savings" by a commercial bank. (*Inquiry from Ky., April, 1917, Jl.*)

Right of private bank to advertise a savings department in Iowa

467. May a private bank in Iowa advertise a savings department? *Opinion:* The Iowa statute (Code Iowa Anno. 1897, Chap. 11, Sec. 1859) prohibits a private bank from advertising or exhibiting any sign "as a savings bank or savings institution." Advertising "a savings department" would seem to violate this law. (*Inquiry from Iowa, June, 1915.*)

Distribution of surplus upon liquidation of mutual savings bank

468. On dissolution of a mutual savings bank to whom does the surplus belong? Are the former depositors entitled to any portion? *Opinion:* Only those who are depositors at the time a savings bank is being wound up are entitled to share in the surplus. *Morristown Inst. for Savings v. Roberts*, 42 N. J. Eq. 496, 8 Atl. 315. See also *People v. Peck*, 157 N. Y. 51, citing New York Banking Act, section 123. It would seem that depositors who have closed out their accounts prior to the beginning of winding up proceedings have no claim to any portion of the surplus. (*Inquiry from Ind., Nov., 1919.*)

Suggested exercise of trust powers of state bank in New Mexico

Cross references—For trust powers of national bank—see National Banks

469. A sparsely settled country cannot have the benefits of trust companies in the

way they usually operate and as private parties are continually called upon to act in various capacities of the sort generally undertaken by such companies, why could not any bank be authorized to act by giving security for each individual case as it comes up? Can you suggest a form of statute?

Opinion: The suggestion is that the power to act in a fiduciary capacity be thrown open to all state banks in New Mexico, irrespective of capital, upon their giving security in each individual trust. There is no apparent reason why such suggestion is not a good one as the men running a bank, no matter how small, are probably more competent to execute trusts of which their bank is trustee than would the ordinary individual or even, certain lawyers. It might be well to take the New Jersey law giving state banks power to act in fiduciary capacities as a model, amend it by striking out the provision as to amount of capital required, make a more definite provision as to the giving of security, to be fixed by the appropriate court having jurisdiction of trusts in each particular case; making, of course, amendments in such provisions as are not applicable to New Mexico. (*Inquiry from N. M., Nov., 1920.*)

Bank as borrower

Loan to bank on personal note of executive officer

470. The cashier and manager of a bank desiring to procure a loan for the bank, gave his personal note secured by his bank stock. The money passed to the bank, but the loan did not appear on the books or reports of the bank as a liability. There was no written disclaimer from the lender bank that they did not in any way hold the borrowing bank. *Opinion:* The circumstances would probably be held to evidence a loan and benefit to the bank and that the cashier pledged his personal stock as security and therefore the bank would be liable. Whether the loan is to the cashier or to the bank is tested by the inquiry for whose benefit the loan is made, which is based upon the entire circumstances constituting the contract and not on the form of the note alone, and sometimes on the ratification of the loan by the bank. *Merrell v. Witherby*, 120 Ala. 418. *Bush v. Devine*, 5 Harr. (Del.) 375. *Hazelhurst Lumber Co. v. Carlisle Mfg. Co.*, 112 S. W. (Ky.) 934. *Lambert v. Phillips & Son*, 64 S. E. (Va.) 945. *Andrews Co. v. Nat. Bk.*, 129 Ga. 53. *Paige v. Stone*, 10 Metc. (Mass.) 160. *Western Nat.*

Bk. v. Armstrong, 152 U. S. 346. Cherry v. City Nat. Bk., 144 Fed. 587 aff'd as Rankin v. City Nat. Bk., 208 U. S. 541. Hanover Nat. Bk. v. First Nat. Bk., 109 Fed. 421. American Exch. Nat. Bk. v. First Nat. Bk., 82 Fed. 961. (*Inquiry from Neb., Aug., 1915, Jl.*)

471. A bank discounted the personal note of the cashier of another bank and the proceeds were placed to the credit of the bank sending the note. The lender bank also accepted as collateral, notes with the payee blank unfilled. *Opinion:* The discounting of the personal note of the cashier of another bank and crediting such bank with the proceeds would probably be held a transaction with the bank, which would make it liable on the note. Where collateral consists of notes with the payee blank unfilled, the lender bank is put on inquiry and takes subject to the maker's defenses. Guerrant v. Guerrant, 7 Va. Law Reg. 639. Chrystie v. Foster, 61 Fed. 551. Pensacola Bk. & Tr. Co. v. Nat. Bk. of St. Petersburg, 52 So. (Fla.) 294. (*Inquiry from Neb., Feb., 1914, Jl.*)

Bonds borrowed by bank

472. A bank states that there is frequently mentioned in bank statements the item "Bonds borrowed," and asks the position of the one loaning the bonds to the bank in case of failure of the bank. *Opinion:* Where money is loaned to a bank, the bank becomes the debtor and upon its failure the lender is simply a general creditor, unless secured in some manner. But where bonds are loaned to a bank, these are not money, and it seems that the lender would not be a creditor, but would retain title to the bonds and could recover them or their equivalent amount in full as a full preferred claim. It is quite clear where anything but money is loaned, that the title to the thing loaned does not pass, but simply the possession; therefore, on failure of the borrower, his relation is not debtor, but bailee, and there is an obligation to return the thing bailed or its equivalent. It seems this would apply to bonds borrowed the same as to a horse borrowed. (*Inquiry from W. Va., Oct., 1919.*)

Loans in general

Loan on Canadian farm land

473. Can a state bank in Montana make "farm loans" to Canadian farmers? *Opinion:* By the Montana Bank Act (Mont. Bank Act 1915, Sec. 4), commercial banks

are authorized to loan money upon real property with certain limitations, but there is no provision restricting the real estate security to that located in the state of Montana. In the absence of such restriction, it would seem reasonable to construe the law as allowing loans upon the security of real estate wherever located. (*Inquiry from Mont., June., 1917.*)

Loan by New York to Wisconsin bank

474. A bank inquires whether under the Wisconsin law a bank in New York City could legally loan money to a Wisconsin bank without first filing power of attorney with the Secretary of State designating him to receive service of process. *Opinion:* This would depend upon whether the loaning of money constituted doing business in the state. If it was a contract entered into in Wisconsin, to be performed there and subject to its laws, the transaction would doubtless constitute doing business in Wisconsin; on the other hand, if the loan was made in New York and constituted a New York transaction, the law would not apply. (*Inquiry from Wis., Oct., 1915.*)

Loan to contractor—Rights against surety company

475. Bank is informed of recent decision by which a surety company bonding a contractor was held liable to a bank for a loan made by the bank to the contractor, the bank proving that the money thus loaned was used for material and labor in the construction of the building; and asks for report on the case. *Opinion:* The case probably referred to is Fidelity & Deposit Co. of Maryland v. City of Stafford, (Kan. 1917) 165 Pac. 837, 144 Pac. 852. In that case a contractor began the construction of a plant for a city, and later abandoned the work, which was taken up and completed by his surety, who paid out more than the unpaid portion of the contract price. Before such abandonment, but after the execution and filing of the building contract and the bond, the contractor arranged with the bank to lend \$2,000 by paying that amount of labor and material claims as they accrued, and he gave the bank an order on the city for that sum, the bank making no payment except for receipted claims attached to the checks. The bond provided that upon completion of work by the surety company it would be entitled to all sums which would have been due or become due the contractor had he performed the contract. The city,

over the protest of the surety, paid the bank in full. The court held that equity required the bank and the city to account to the surety for the difference between such sum and the pro rata portion thereof for which the original labor and material men would have been entitled to look to the city had they retained such claims. (*Inquiry from Mass., Dec., 1917.*)

Loan to bank official

476. *Opinion:* Section 12 of New Jersey Banking Act which prohibits a bank from making a loan to an officer or director or clerk until certain requirements are complied with might be construed to apply to a loan to an executor, trustee or receiver who is an officer or director but not to a loan to a corporation of which a director or officer of the bank was an officer unless, in reality, the officer was chief beneficiary of such loan. N. J. Banking Act, Sec. 12. *People v. Knapp*, 99 N. E. 841. (*Inquiry from N. J., Nov., 1913, Jl.*)

Custody of U. S. bonds securing 15-day loan

477. A member bank received advances from a Federal Reserve Bank on its fifteen-day notes, secured by customers' notes which were themselves secured by Liberty Loan bonds. The member bank asks whether it is properly the custodian of the bonds. *Opinion:* The Federal Reserve Act provides for advances by Federal Reserve Banks to member banks on their fifteen-day notes secured "by the deposit or pledge of bonds or notes of the United States." When, therefore, a Federal Reserve Bank makes advances to a member bank upon its fifteen-day note secured by customers' notes which are themselves secured by Liberty Bonds, the law contemplates that the bonds shall be deposited with the Federal Reserve Bank as well as the customers' notes for which they are security, and not retained by the member bank. (*Inquiry from N. Y., May, 1918.*)

Limitation on loans to single borrower

Discount of trade acceptance in Connecticut

478. A bank asks what amount a bank can invest in trade acceptances, and whether it counts against a man's line of discount. *Opinion:* The Connecticut statute limits loans of a state bank or trust company to any one borrower to 10% of capital, surplus and undivided profits; except that loans secured by collateral worth 20% more than the loan can be made to any one borrower

up to 20%. The Connecticut law contains no provision so far as can be seen, similar to that in the National Bank Act, which excludes from the 10% limit the discount of bills of exchange drawn against actual existing values and the discount of commercial or business paper actually owned by the person negotiating the same, and under which the holder of a bona fide trade acceptance might procure its discount irrespective of the 10% limit on loans. It seems under the Connecticut law the trade acceptance of A held by B and offered as security by B for a loan, might be discounted for B up to the 20% limit. If in any case the acquiring of a trade acceptance by a bank might be deemed a purchase thereof as an investment and not a loan to the holder then it would not come within the limitation upon money borrowed. But when trade acceptances are discounted by a bank for the holder, it appears that the transaction is regarded as a loan and that it would come within the limitations imposed by law upon money borrowed by any one person. (*Inquiry from Conn., June, 1920.*)

Interpretation of Idaho 20% limit

479. A bank requests an interpretation of Sec. 5260 of the Idaho act, respecting the 20% limitation on loans to a single borrower. *Opinion:* There is a similar provision of the National Bank Act excluding from the 10% limit of that Act "The discount of bills of exchange drawn in good faith against actually existing values and the discount of commercial or business paper actually owned by the person negotiating the same." It has been ruled that a bank may discount without limit, bills of exchange drawn by the seller of commodities upon the buyer to which are attached bills of lading or warehouse receipts representing the goods, or the bank may make advances without limit upon "commercial or business paper" by discounting notes given in payment for cotton, grain or other productions. The Idaho act expressly provides that the 20% limit, (see, also, Sec. 13 of Fed. Reserve Act) shall not apply to loans made on warehouse receipts and bills of lading. The ruling above referred to might be taken as a guide to what may be considered commercial paper under the Idaho law; but it would seem preferable that the official view of the Bank Department be obtained. (*Inquiry from Idaho, July, 1920.*)

Loan limit in Illinois

480. A bank has a capital and surplus of \$450,000. If a customer is maker on a \$40,000 note, secured by 500 shares of high grade stock, is maker on a \$15,000 note with surety, and is indorser on a \$15,000 note, would this paper be considered an excessive loan according to Sec. 10 of the Banking Act? *Opinion:* Section 10 of the Illinois Banking Act fixes a loan limit to a single borrower of 15% of capital and surplus and the loan limit of the bank in this case is \$67,500. The aggregate of the three notes, on two of which the bank's customer is maker and on the other of which he is indorser, is \$70,000 and this would exceed the loan limit by \$2,500 unless one of these notes comes within the exceptions provided by Section 10, namely; (1) discount of bills of exchange drawn against actually existing values. None of the notes fall within this exception. (2) Discount of commercial or business paper actually owned by the person negotiating the same. If the note on which the customer is indorser falls within this class, having been received in due course of business and indorsed over to the bank, the loan limit would not apply and the total of loans would not be excessive. The character of this note is not stated and if the customer is accommodation indorser it would be within the loan limit. None of the notes come within exceptions (3) and (4) to Section 10 covering evidences of debt secured by mortgage or by live stock. There is also excluded from the 15% limit liability of a borrower secured by collateral approved by and deposited with the auditor of public accounts or by bond; and the law allows a bank to file a bond with the state auditor and obtain a permit to obtain excessive loans. The conclusion in the present case is that the loan limit would be exceeded by \$2,500 unless the note upon which the customer is indorser is commercial or business paper actually owned by him, or unless the provisions as to collateral security or bond filed with the auditor are availed of, or unless the bank is granted a permit to exceed the loan limit. (*Inquiry from Ill., Aug., 1919, Jl.*)

Loan limit of Kentucky banks

481. If a customer is indebted to a bank up to the legal limit under Sec. 583, Kentucky Statutes, would a rediscount of his paper, reducing his direct indebtedness to the bank, permit the bank to loan the customer additional funds? Neither the original debt nor the proposed increase comes

under the exceptions in the last clause of the Amendment of 1918 to Sec. 583. *Opinion:* The 20 per cent. loan limit to a single borrower provided by the Kentucky statutes does not permit a bank, after loaning the limit to a borrower and rediscounting his paper, to make a further loan to the same borrower while the original paper remains unpaid. The fact that the borrower's paper has been rediscounted does not extinguish his liability to the bank thereon, which exists until the paper is paid. See *Cunningham v. Shellman*, (Ky.) 175 S. W. 1045. *Wickliffe v. Turner*, (Ky.) 157 S. W. 1125. (*Inquiry from Ky., Nov., 1919, Jl.*)

Guaranty by bank*Guaranty of draft of third person*

482. A state bank in Kansas wired that it would guarantee to pay a draft by a drawer in Texas upon the Blank Produce Co. in Kansas for a car of lemons. *Opinion:* In the absence of express authority conferred by statute, a bank has no power to guarantee to pay the draft, it being a transaction in which it has no interest and from which it derives no substantial benefit, and the bank would not be liable upon the draft. *First Nat. Bk. of Moscow v. American Nat. Bk. of Kansas City*, 173 Mo. 153. *Mine & Smelter Supply Co. v. Stockgrowers Bk.*, 173 Fed. 859, 865. *Ayer v. Hughes*, 69 S. E. 57. *Bacon Farmers Bk.*, 79 Mo. App. 407. *Merchants Bk. of Valdosta v. Baird*, 160 Fed. 642, 645. (*Inquiry from Kan., Aug., 1913, Jl.*)

483. A bill of lading draft was drawn on a party in Mississippi and payment was guaranteed by a Mississippi bank. The draft was marked paid and the bank claimed to have fulfilled its guarantee, but the proceeds were afterwards attached by the consignee. *Opinion:* The draft in question was a bill of lading draft within the meaning of the Mississippi statute, which requires the collecting bank to hold the proceeds 96 hours after delivery of the bill of lading and not an ordinary sight draft as to which it should have remitted immediately. The bank which guaranteed payment fulfilled its guarantee, as it did not go to the extent of insuring that after payment the proceeds would be paid over free from attachment; but it is the prevailing theory of the law that it is not competent for a bank to bind itself by such a guarantee. (*Inquiry from Fla., Aug., 1919, Jl.*)

Guaranty of signature to stock assignment

484. A bank guaranteed the signature to an assignment of a stock certificate by using the words "signature guaranteed," duly signed by a qualified officer. The question concerns the extent of liability incurred by a guaranty of signature. *Opinion:* Assuming a case where the bank has power and the officer authority to make the guaranty, it binds the bank for the genuineness of the signature as well as for the authority of the person signing when the signature is made by a representative; but does not extend to warranting the validity of the acts of the person whose signature is guaranteed with reference to the use of the certificate. *McKinnon v. Boardman*, 170 Fed. 920. *Johnston v. Schnabaum*, 86 Ark. 82. *Second Nat. Bk. v. Curtiss*, 153 N. Y. 681. (*Inquiry from N. Y., June, 1915, Jl.*)

Bank as bondsman for non-resident correspondent

485. It is asked whether it is usual for a bank to furnish bond for costs of suit in collecting note when requested by another bank and whether there is any breach of courtesy in refusing. *Opinion:* The giving of bonds in attachment or replevin suits or the like is often done by a bank for another bank, especially where banks have reciprocal correspondence relations. At the same time, where one bank is stranger to another, there is no breach of courtesy in refusing to furnish bond, and such refusals are often made, especially since the advent of surety companies, part of whose business it is for a stipulated premium to furnish bonds in cases of this kind. A further consideration is that national and state banks are without power to bind themselves by the execution of such bonds in suits in which they have no pecuniary interest and, if the bond is to be worth anything, it must be executed by the bank officer individually, which is undersirable. See "Power of national bank to go on bond in attachment suit and personal liability of cashier." 2 Bank. L. J. 88; "Cashier's Risks in Execution of Indemnity Bonds" 4 B. L. J. 69. (*Inquiry from Wyo., Oct., 1914.*)

Guaranty of payment of post-dated check

486. A gives B a post-dated check. B writes the bank in regard thereto and the cashier mails a written guarantee to B that the check will be paid when due. *Opinion:* The cashier by virtue of his office had no authority to bind the bank by guaranteeing

payment of the check before its due date and the bank is not bound. *Clarke Nat. Bk. Bk. of Albion*, 52 Barb. (N. Y.) 592. (*Inquiry from Okla., Oct., 1915, Jl.*)

Indemnity bond covering risk of unauthorized indorsements

487. A bank receives a large volume of checks and drafts payable to certain clients of an attorney, who indorses them for deposit in his personal account. A bond of indemnity will secure the bank against loss by reason of a possible unauthorized indorsement by the attorney. For suggested form of bond see 5 A. B. A. Jl. 445. (*Inquiry from Minn., Jan., 1913, Jl.*)

Banks as depositaries*Funds of county*

488. A bank states that at the May term of the County Court, 1913, it was the successful bidder for the county funds, for a term of two years; that the statute provides that the clerk of the court shall advertise for the letting of the county funds at least 20 days prior to the time of selecting such depositary, in a newspaper published in the county; that the clerk failed to cause such publication to be made. The bank asks whether in view of such failure the court has power to compel the bank to continue to pay interest on the fund; and also asks whether said court could, without advertisement for bids as provided by statute take the funds out of its hands and give them to a new depositary who might bid for same. *Opinion:* It seems notwithstanding the expiration of the bank's two year term as county depositary, if it continued to use and hold the county funds there would be a liability for interest. True, the bank's bid or promise to pay interest was only for two years and at the date of expiration the bank was ready to pay over the money to its successor, there being no successor owing to the failure of the clerk to advertise for bids. But the statute would seem to contemplate that the depositary shall so remain until a successor is duly appointed. It seems that if the bank continued to hold the funds and act as depositary, the liability for interest would continue, but possibly the interest might be stopped by a tender of the funds to the proper county officer or a notice that funds were held ready to be turned over at any time. Concerning the further question, whether the County Court could, without advertisement for bids as provided by the statute, take the funds out of the bank's

hands and give them to a new depository, etc., the answer cannot be positively stated until the Missouri Supreme Court shall construe the same upon the points involved. (*Inquiry from Mo., July, 1915.*)

Postal savings

489. State banks which are non-members of the Federal reserve system may be depositories of postal savings funds under certain specified conditions, namely, if member banks fail to qualify to receive such deposits or in the event there are no member banks in the same city; otherwise, where there are one or more member banks in the city where postal savings deposits are made, the law provides that such deposits shall be placed in such qualified member banks. Fed. Res. Act, Sec. 15. Postal Sav. Act, Sec. 2. (*Inquiry from Ill., Nov., 1917.*)

Note: The law at the present time remains unchanged.

Deposits of state member with non-member state bank

490. A bank, not a member of the Federal Reserve System, states that the Federal Reserve Bank has notified state bank members that they will not be permitted to carry balances with the non-member bank in excess of 10 per cent. of capital and surplus. Is this ruling correct? *Opinion:* It seems that, in view of the provisions of the Federal Reserve Act (Secs. 9 and 19), the ruling is clearly supported by the law and is not an arbitrary or unwarranted ruling of the Federal Reserve Board or the Federal Reserve Bank. (*Inquiry from Texas, Oct., 1919.*)

State member banks as government depositories

491. Is it possible for a state bank, being a member of the Federal Reserve System, to become a United States depository? *Opinion:* The Federal statutes, as officially interpreted, do not confer the power upon the Secretary of the Treasury to designate state banks members of the Federal Reserve System as Government depositories, except for postal savings funds, the proviso to Sec. 15 of the Federal Reserve Act that nothing in the Act "shall be construed to deny the right of the Secretary of the Treasury to use member banks as depositories" not being construed as affirmatively vesting such right in the Secretary. Legislation recommended by the A. B. A. was introduced in the 66th Congress (H. R. 11918) to make state bank and trust company members

eligible. (*Inquiry from W. Va., Dec., 1920, Jl.*)

Duty as between customer and public

General duty of secrecy as to customer's affairs

492. The banking law of Connecticut does not prohibit a bank official from giving information that a certain person has an account in the bank, whether it be a savings or commercial account, and provides no penalty for the giving of such information. Relation of banker and customer creates duty of secrecy, and banker should not disclose information as to account or affairs of customer, except under legal compulsion; but in absence of statute, no legal consequences would follow breach of this duty by banker except a possible liability in damages in case customer could prove injury. *Hardy v. Veasey*, 3 L. R. Exch. 107 (Eng.). *Foster v. Bk. of London*, 3 Falc. & F. 214 (Eng.) In re *Davies*, 68 Kan. 791. (*Inquiry from Conn., Sept., 1914, Jl.*)

Compulsory disclosure of customer's balance for tax purposes, etc.

493. The Collector of Internal Revenue, who is authorized "to take evidence touching any part of the administration of Internal Revenue Laws," would presumably be acting within the scope of his authority if in a given case he required a bank officer to give information whether or not a depositor's check was paid. (*Inquiry from La., July, 1910, Jl.*)

494. A tax assessor being a director in a rival concern demanded of a bank that it furnish a statement of the names of its stockholders with the number of shares held by each, under penalty, the information probably to be used by the assessor to an unfair advantage. *Opinion:* The bank was obliged to make the required statement, and the assessor could be removed if found guilty of using the information in an improper way. *People v. Feltner*, 191 N. Y. 188. (*Inquiry from N. Y., July, 1912, Jl.*)

495. The depositor of a bank made returns to a tax assessor which did not suit the officer. The assessor attempted to get information from the bank concerning the depositor's balance. *Opinion:* Decisions protect bank officers from being compelled to make disclosure of names of depositors in gross and amounts of their deposits for purposes of taxation—but in a proper proceeding against one or more depositors, specified by name, a bank officer is not privileged to

refuse to produce books and testify as to balances of such depositors. *First Nat. Bk. v. Hughes*, 6 Fed. 737. U. S. Rev. Stat., Sec. 5241. *First & Second Nat. Bks. v. Auditor of Mahoning Co.*, 5 Cin. Law Bul. 515. *Decher v. Langenberg*—Superior Ct., Marion Co., Ind., Oct. 1891. In re Davis, 68 Kan. 791. *Loyd v. Freshfield*, 2 C. & P. 325 (Eng.). *Interstate Commerce Commission v. Harriman*, 157 Fed. 432. In re Lathrop, Haskins & Co., 184 Fed. 534. (*Inquiry from Pa., Feb., 1913, Jl.*)

496. In a proper legal proceeding against a customer, the bank's officer can be compelled to state the amount of his balance, the information not being privileged in a legal sense. This case is differentiated from those where the wholesale disclosure of all of the depositors' balances is sought for tax purposes, wherein the right to compel disclosure has been denied. *Loyd v. Freshfield*, 2 C. & P. 325 (Eng.). *Morse on Banking*, Sec. 294 a. In re Davies, 68 Kan. 791. (*Inquiry from Va., Dec., 1913, Jl.*)

Disclosure of customer's balance to check-holder

497. Where a check was presented and refused for insufficient funds, the bank is not obliged to disclose the amount to the credit of the customer by making part payment nor to receive from the holder or anyone other than the drawer or his agent, a deposit sufficient to make the check good. *Hardy v. Veasey*, 3 L. R. Ex. 107. *Foster v. Bk. of London*, 3 F. & F. 214. *Dana v. Third Nat. Bk.*, 13 Allen (Mass.) 445. *Harrington v. First Nat. Bk.*, 85 Ill. 212. *Bromely v. Commercial Nat. Bk.*, 9 Phila. 522. (*Inquiry from La., May, 1915, Jl.*)

Investigation of private affairs by Congressional Committee

498. The Committee on Banking and Currency of the House of Representatives required the state banks and trust companies to fill out certain blanks in answer to various questions concerning the private affairs of the institution. For example, the investigation called for a list of the officers, directors and stockholders, their stockholdings and loans, description of securities held, the dates and amounts of paper indorsed for others, a list of borrowers, etc. *Opinion*: Grave doubt as to jurisdiction of House of Representatives or power of committee to investigate private affairs of state banks and trust companies—questions of jurisdiction considered in light of Federal deci-

sions and 4th and 5th Amendments—further question as to invasion of state rights—conclusion that general inquiry by a Congressional Committee into the affairs of all banks of a state is probably beyond jurisdiction of House of Representatives to authorize, and that national banks are not subject to proposed investigation in view of provision of National Bank Act limiting visitorial powers. *Kilbourne v. Thompson*, 103 U. S. 168. *Anderson v. Dunn*, 6 Wheat. 204. *Interstate Commerce Commission v. Brimmon*, 154 U. S. 447. U. S. Constitution, 4th and 5th amendments. *Boyd v. U. S.*, 116 U. S. 616. U. S. Rev. Stat., Sec. 102. (*Inquiry from Ky., June, 1912, Jl.*)

Liability for misrepresentation of customer's financial condition

Mistaken statement that drawer has no account

499. The holder of a check makes inquiry of drawee over the telephone as to drawer's account, and because of defective wire the inquiry is understood to refer to a different person and answer is made that the party has no account, which leads to apprehension of drawer whose check is good. *Opinion*: The drawee is not liable to depositor in action for slander, nor to inquiring bank, in case the latter is held liable in damages to the drawer. Cal. Civ. Code, Sec. 46, Subdiv. 3. *Swan v. Thompson*, 124 Cal. 193. *Rea v. Wood*, 105 Cal. 314. (*Inquiry from Cal., Dec., 1916, Jl.*)

False overstatement of assets

500. In response to an inquiry by an Iowa bank concerning the financial condition of its customer, a Georgia bank by its officer returned words of general and pointed praise and specifically stated that the customer "is worth approximately \$20,000 and we are sure a note for \$600 on him is perfectly good and collectible." These statements, which proved false, were relied upon to the injury of the Iowa bank in extending credit to its customer. *Opinion*: The Georgia bank was not liable for the unauthorized act of its officer, unless the bank derived some benefit, but the officer is personally liable for damages in an action for deceit. The authorities generally support the view that the making of statements as to the financial responsibility of customers is no part of the banking business and that a bank officer has no authority to make such statements on behalf of the bank and does not bind the bank thereby, except that where the bank has profited by the false statement

it will be held liable, although such liability has been denied in some cases. For a review of the law applicable to the recovery of damages for false statements, see 6 A. B. A. Jl. 204. *Henry v. Allen*, 93 Ala. 197. *Einstein v. Marshall*, 58 Ala. 153. *Goodale v. Mid-daugh*, 8 Colo. App. 223. *Endsley v. Johns*, 120 Ill. 469. *Bowen v. Carter*, 124 Mass. 426. *Beebe v. Knapp*, 28 Mich. 53. *Hamlin v. Abell*, 120 Mo. 188. *Hancock v. Osmer*, 153 N. Y. 604. *Weeks v. Burton*, 7 Vt. 67. *Shaw v. Gilbert*, 111 Wis. 165. *Bush v. Wilcox*, 82 Mich. 315. *Holcomb v. Noble*, 69 Mich. 396. *Bauer v. Taylor*, 98 N. W. (Neb.) 29. *Watson v. Baker*, 71 Tex. 739. *Krouse v. Busacker*, 105 Wis. 350. 1 Cooley, Torts 501. *Brooks v. Hamilton*, 15 Minn. 31. *Lynch v. Tr. Co.*, 18 Fed. 486. *Caldwell v. Henry*, 76 Mo. 254. *Cooper v. Schlesinger*, 111 U. S. 148. *Montgomery So. R. R. Co. v. Matthews*, 77 Ala. 357. *Thompson v. Phenix Ins. Co.*, 75 Me. 55. *Birdsey v. Butterfield*, 34 Wis. 52. *Crawford v. Boston Store Mercantile Co.*, 67 Mo. App. 39. *Horriggan v. First Nat. Bk.*, 56 Tenn. 137. *First Nat. Bk. v. Marshall & Ilsley Bk.*, 83 Fed. 725. *Taylor v. Commercial Bk.*, 174 N. Y. 181. *Nevada Bk. v. Portland Nat. Bk.*, 59 Fed. 338. *Liggett v. Levy*, 136 S. W. (Mo.) 299. *Binghamton Tr. Co. v. Auten*, 68 Ark. 299. *American Nat. Bk. v. Hammond*, 25 Colo. 367. (*Inquiry from Iowa, Sept., 1913.*)

Publication of debtors in delinquent book of collection agency

501. A collection agency which publishes in a "delinquent book" the names of debtors against whom it holds claims for collection would be subject to action for libel, and a bank furnishing to such agency the names of certain of its debtors, with authority and intention, if the debts are not paid, that such names be so published, would be likewise responsible. *Nettles v. Somerville*, 6 Tex. Civ. App. 627. *White v. Parks*, 93 Ga. 633. *Masters v. Lee*, 39 Neb. 374. *Muetze v. Tutner*, 77 Wis. 236. *Cleveland Retail Grocers' Assn. v. Exton*, 18 Ohio Civ. Ct. 145. *Patterson v. Evans*, 134 S. W. (Mo.) 1030. (*Inquiry from Iowa, Dec., 1916, Jl.*)

Circulation of unofficial statement of condition

502. Two banks are located in the same town, and the State Bank Department called for reports for March 4, 1919. Both banks filed reports as requested and

published same in the local paper. The other local bank distributed condensed statements to the public as late as March 20, 1919. The bank asks whether these statements so distributed by the other bank should not have been sent out on March 4, 1919, the date fixed for filing. *Opinion*: It is impossible to see how the second bank can be prevented from circulating a statement showing its condition at a later date than that on which its official report called for by the Department was made and published, provided there was no misrepresentation to the public in so doing. The injury to the first bank comes from the unequal comparison, the first bank publishing and circulating its report as of the official date when resources were lower than at the later date, while the second bank takes advantage of an increase of resources and makes an additional report of its condition at a later date. It seems the only way for the first bank to counteract this is to do the same thing. (*Inquiry from Ark., April, 1919.*)

Injury to customer on premises

503. An elderly lady, a patron of the bank, went to the rear of the bank and asked an employee for a drink of water. She was asked to wait in the safe-deposit room while the employee went for a drinking cup. In the interim the old lady opened a door leading from the safe deposit room to a darkened wash room, used only by employees of the bank. She apparently was searching for an electric light switch to turn on the light, and in so doing fell down a flight of stairs leading to the basement, and was injured. Bank desires to know if it is liable for damages for any injuries sustained by this old woman. *Opinion*: Where a customer of a bank was injured in the manner related above, having gone into the wash room without invitation, either express or implied, she was not an invitee but a mere licensee (*N. W. El. R. Co. v. O'Malley*, 107 Ill. App. 599) as to whom the owner of the premises owed no duty as to the condition of the premises, unless imposed by statute (*Rhode v. Duff*, 208 Fed. 115. *Scoggins v. Cement Co.*, 179 Ala. 213, 60 So. 175. *Purtell v. Coal, etc., Co.*, 256 Ill. 110, 99 N. E. 899. *Wilnas v. R. Co.*, 175 Iowa 101. *Austin v. Baker*, 112 Me. 267. *Dickie v. Davis*, 217 Mass. 25, 104 N. E. 567. *Bryant v. R. Co.*, 181 Mo. App. 189. *Barry v. Calvary, etc., Assn.*, 65 N. J. L. 378. *Larmore v. Crown Point Iron Co.*, 101 N. Y. 391. *Schiffer v. Sauer Co.*, 238

Pa. St. 550. *Machine Co. v. Fryar*, 132 Tenn. 612. *Lumber Co. v. Gresham* [Tex.] 151 S. W. 847) save that he should not knowingly let her run upon a hidden peril (*Vanderbeck v. Hendry*, 34 N. J. L. 467. *Cosgrove v. Hay*, 54 Pa. Super. Ct., 175. *Buhler v. Daniels*, 18 R. I. 563), or wantonly or wilfully to cause her harm (*Gibson v. Leonard*, 143 Ill. 182. *Patnode v. Foote*, 138 N. Y. S. 221. *R. Co. v. Littlejohn*, 44 Okla. 8, 143 Pac. 1. *Kay v. Penn. R. Co.*, 65 Pa. St. 269. *Cameron v. Polk* [Tex.] 177 S. W. 1178. *Kroeger v. Const. Co.*, 83 Wash. 68, 145 Pac. 63. *Strough v. R. R. Co.*, 209 Fed. 23), and as to whom the bank is not liable in damages for the injuries sustained. (*Louisville etc. R. Co. v. Sides*, 129 Ala. 399. *Robinson v. Md. Coal & Coke Co.* [Ala. 1916], 72 So. 161. *Etheridge v. Ga. R. Co.*, 122 Ga. 853. *Graham v. Pocasset Mfg. Co.*, 220 Mass. 195. *Hutchinson v. Cleveland, etc., Works*, 141 Mich. 346. *Mazey v. Loveland*, 133 Minn. 210, 158 N. W. 44. *Phillips v. Burlington Library Co.*, 55 N. J. L. 307. *Flannagan v. Atlantic etc. Co.*, 56 N. Y. S. 18. *Quantz v. South Ry. Co.*, 137 N. C. 136. *Nashville, etc., R. Co. v. Lovejoy*, 138 Tenn. 492. 198 S. W. 61. *Slough v. Ragley Lumber Co.* [Tex.] 76 S. W. 779. *Pierce v. Whitcomb*, 48 Vt. 127. *Peake v. Buell*, 90 Wis. 508. *Rhode v. Duff*, 208 Fed. 115). (*Inquiry from Ariz., April, 1920, Jl.*)

Savings bank and commercial bank in same room

504. New York legislation prohibits the doing of business in the same room by a bank and a savings bank. Massachusetts legislation includes the foregoing and further prohibits officers of savings bank from being officers of other banks. N. Y. Banking Law, Sec. 26, Subdiv. 7. Mass. Acts of 1908, Secs. 19 and 20, Ch. 590. (*Inquiry from Ind., Feb., 1911, Jl.*)

By-laws and resolutions

505. A bank submits several questions as to the meaning of by-laws and resolutions, the purport of which clearly appears below. *Opinion:* 1. A by-law is a rule or regulation established by a corporation as one of the incidents of its existence, for its internal government or for the government of its affairs as among themselves. (1 Thomp. Corp. Sec. 935.) It is distinguished from a resolution which is directed to the attainment of a particular object in a given cause. A resolution, it has been said, is not necessa-

rily a by-law, although a by-law may be in the form of a resolution. *Drake v. Hud. R. R. Co.*, 7 Barb. (N. Y.) 508. 2. By the principles of the common law every corporation aggregate possesses the inherent power to make all necessary rules and regulations for its government and operation, although such power may not be expressly conferred in its charter, in the statute of its creation, or in any other statute. (*Bornstein v. I. O. O. B.*, 2 Cal. App. 624. *People v. Erie Co. Med. Soc.*, 24 N. Y. 570 and there are similar decisions in various states. 3. The rule is well recognized that by-laws which are contrary to the charter or governing statute of the corporation are void. (*Brewster v. Hartley*, 37 Cal. 15. *New Orleans v. Philippi*, 9 La. Ann. 44 and other cases). 4. The by-laws or regulations authorizing committees of a bank, generally prescribe their personnel. The inherent powers of the president of a bank are very limited and most of the powers are conferred on him by the directors or usage of the bank. It is doubtful that it would be held that the president, ex officio, is a member of all standing committees of the bank. (*Inquiry from La., Sept., 1916.*)

Reserve against savings deposits

506. Under the banking law of Washington (Rem., Bal. Annot. Codes & Stat., 1910, sec. 3343) all banks are required to maintain a reserve of twenty per cent. of their demand liabilities. The state examiner holds savings deposits to be demand liabilities and the banks carrying savings deposits question this ruling, for while savings deposits are in a sense demand liabilities, they can be held subject to notice of withdrawal. *Opinion:* A construction of the law that a savings deposit subject to notice is not a demand liability is not unreasonable in view of the purpose for which reserve is required. The opinion of the Attorney General should be requested construing the law, or, in the event of an unfavorable opinion, the banking law should be amended expressly providing a separate and smaller reserve against savings deposits. The ordinary demand for such deposits does not warrant such a high percentage of reserve, and the bank is protected by its right to require notice of withdrawal. Wash. Code (Rem-Bal), Sec. 3343. (*Inquiry from Wash., April, 1912, Jl.*)

Note: The banking law of Washington has been amended (1915) so as to read: "Every bank and trust company doing

business under this act, shall have on hand at all times in available funds, not less than fifteen per cent. (15%) of its total deposits." (Chap. 35, Sec. 6.) By Chapter 80 Laws 1917 this section is made inapplicable to banks and trust companies which are members of the Federal Reserve System.

Chapter 175, Sec. 20, Laws of 1915 as to reserves of mutual savings banks provides that every mutual savings bank "may keep on hand or on deposit with any bank or trust company" in Washington "not exceeding 20% of the aggregate amount credited to its depositors."

Maturity of certificates of deposit of liquidated bank

507. Does the dissolution or absorption of one bank by another cause its outstanding certificates of deposit to mature? Is the state bank commissioner liable under his bond for allowing the surrender of the charter before payment of an unmatured certificate of deposit? *Opinion:* The status of a liquidated bank is illustrated by *Wilson v. First State Bank*, 95 Pac. 404, decided under the Kansas statute. It was held that, notwithstanding a bank had gone into voluntary liquidation, paid off its depositors surrendered its certificate of authority and ceased to transact any business except to collect debts and distribute the proceeds among its stockholders, it nevertheless continued to exist as a banking corporation, authorized to sue on a note due it.

Whether voluntary liquidation and absorption matures the bank's outstanding unmatured certificates of deposit has not been decided. It is doubtful if this result follows where there is no question of set-off of mutual debts. Suppose, for instance, the unmatured certificate carried a high rate of interest which the holder desired, continued until maturity, it is doubtful if the bank by its voluntary action could hasten the maturity of the certificate. And equally, it would seem the holder cannot call for payment before the date of maturity, where, however, there is danger that before maturity the assets will be distributed and ultimate payment endangered, equity will preserve the assets by appointment of a receiver. In *assets Realization Co. v. Howard*, 127 N. Y. Supp. 798, it is held that where one bank agrees to liquidate another and guarantees the liquidated bank from loss, the latter is not released from liability. See *Overstreet v. Citiz. Bank*, 12 Okla. 383, holding that a bank desiring to go out of business may transfer its accounts

to another bank and pay its depositors with borrowed money and pledge its assets for that purpose.

Where bank commissioner acts in good faith on sufficient prima facie affidavits in allowing a surrender of the charter, he is not liable on his bond. (*Inquiry from Okla., July, 1913.*)

Books and records

Production of books and records in court

508. In a suit by a bank against a depositor, the defense requested the bank to produce its books and records from 1890 to date for the use of the defendant's attorney for such time as he may take to prepare his defense. Upon the bank's refusal the defendant proposes to serve the process of subpoena *duces tecum*. *Opinion:* In suit by bank against depositor, bank officers served with subpoena *duces tecum* must produce books called for containing evidence relating to transaction, in absence of statute permitting authenticated copy—but if subpoena is unreasonable in its requirements bank may be protected under the search and seizure clause of the Fourth Amendment to the Federal Constitution. *Murphy v. Russell*, 8 Ida. 133. In re *Sheppard*, 3 Fed. 12. *Beebe v. Equitable Mutual Life Ins. Co.*, 76 Iowa 129. *U. S. v. St. Louis Terminal, etc., Assn.*, 148 Fed. 486. *Hale v. Henkel*, 201 U. S. 43. *Amey v. Long*, 9 East. 473. *Bull v. Loveland*, 10 Pick. (Mass.) 9. *U. S. Exp. Co. v. Henderson*, 69 Iowa 40, 28 N. W. 426. *Greenleaf Evid.* 469 a. (*Inquiry from Mich., Dec., 1918, Jl.*)

509. In a suit by a depositor against a bank, an officer served with a subpoena *duces tecum* must produce the books called for containing evidence relating to the transaction in the absence of a statute permitting an authenticated copy. Inconvenience to the bank or to the officer does not justify his refusal to obey the court order. (*Inquiry from Okla., March, 1915, Jl.*)

Use of loose leaf books

510. The Wisconsin legislature requires the books of original entry used in banks to be permanently bound and prohibits the card system as a substitute for a bank ledger. This is probably the only state legislation which prohibits the use of loose-leaf books in banks. *Wis. Laws, Sec. 2024-1.* (*Inquiry from Wis., Dec., 1914, Jl.*)

*Bound books vs. card system in
Wisconsin*

511. It is stated that many state banks of Wisconsin do not regard with favor the provisions of Chapter 94, Wisconsin Statutes (Sec. 2024-2) relating to "original entry books bound." Suggestions are asked as to the proper course to pursue to bring about an amendment of the present law eliminating the bound journal requirement. *Opinion:* The statute in question seems to be peculiar to Wisconsin. The remedy would be to procure a repeal by the legislature of the provision in question. The Committee on Legislation of the Wisconsin Bankers' Association in conjunction with the Secretary would probably be the best agency to procure this repeal, filing a memorandum in support of a bill to repeal same, in which could be stated the reasons why the statute is unjust and impracticable and the indorsement of the state bank department of such legislation would, of course, carry very great weight. (*Inquiry from Wis., Dec., 1916.*)

Preservation and destruction of old records

512. What should be the policy of a bank with respect to the retention of records for possible use in legal proceedings? What is the practice of the larger banks? *Opinion:* The subject of inquiry has apparently not been discussed or considered by any of the text writers on banking and not been considered judicially.

The test, would seem to be whether the further preservation of old documents and papers would be needed by the bank in the future for the assertion of any right or defense. It is better to be on the safe side and to retain old books, papers and records, unless the bank is absolutely certain that they are no longer needed in any particular case to maintain a right or defend against a claim.

A canvass of a number of New York institutions develops a tendency to preserve permanently all records, documents and vouchers, such as deposit ledgers, cancelled vouchers, deposits slips, etc. A majority of the officials interviewed stated that they have separate storage warerooms, vaults or lofts for the special storage, filing by classification, and preservation of such old books, records, etc. Thus a large trust company, acting on advice of counsel, has, through its board of directors, formulated a set of rules with respect to the preservation of the different classes of books, records,

correspondence, etc. For instance, deposit ledgers, and customers' cancelled vouchers are to be preserved indefinitely; deposit slips and correspondence relative to customers' accounts, indefinitely; own cancelled checks and drafts, 6 years; sealed instruments, such as bonds, trust agreements, etc., 20 years.

A large national bank has special vaults in warehouse for storage and preservation of bank records and documents; and, under advice of counsel, never destroys any records or documents relating to customers' accounts, such as deposit ledgers, customers' cancelled vouchers, deposit slips etc.

Another large national bank destroyed a lot of old miscellaneous correspondence and deposit slips over ten years old, about five years ago; but now has special warehouse storage space and will henceforth preserve practically all records indefinitely.

Another large national bank destroyed a lot of miscellaneous correspondence, books, etc., over fifteen years old, when it moved into new quarters, but nothing relating to customers' accounts, and the general policy is to preserve permanently everything relating to customers' accounts.

Still another large national bank has never taken any formal action through its board of directors, but its fixed policy is to preserve permanently all records, documents vouchers and vital correspondence in special loft space set apart for the purpose, in charge of a special file clerk.

A large trust company has adopted practically the same as the last stated national bank. (*Inquiry from Wis., June, 1920.*)

Destruction of old checks and drafts

513. A bank which is about to consolidate with another and go out of existence asks how long it should keep its record books, deposit tickets, cancelled checks of customers, the bank's own cancelled checks, certificates of deposit, drafts on its reserve accounts, letters, etc. *Opinion:* Because of the thorough discussion in opinion No. 512 it will be necessary only to add a statement as to cancelled checks of customers. A bank has a temporary right to the possession of paid checks of its customers as its evidence that their amounts have been paid, but the ultimate right of possession and property is in the depositor. The cancelled checks, the subject of inquiry, are presumably those not returned because the depositors have removed from the locality, or because of

similar reasons. The statute of limitations does not run against a general deposit until the depositor makes a demand. Suppose the last balancing of the account of John Smith indicates a balance of \$1,000, and that he moves away after having drawn checks to nearly exhaust this balance, which checks remain in the possession of the bank. Suppose after the cancelled checks are destroyed Smith claims a balance of \$1,000, and produces the pass book as evidence of his claim. Might there not be some possibility of liability, the bank having destroyed its evidence of payment? Of course, where a pass book is balanced, or a statement of account is rendered, there is in the course of reasonable time, an account stated, which would protect the bank; but it would seem safer to retain such cancelled checks of customers indefinitely. (*Inquiry from Conn., Nov., 1917.*)

Length of time of preservation

514. How long is it necessary to retain cancelled checks, deposit tickets, daybooks, teller's cashbooks, deposit ledgers, etc.?

Opinion: It is the practice of a number of banks to make a general cleaning out every seven years, and some wait for a period of ten years or longer. They act on the supposition that the six-year statute of limitations protects the bank. But the statute would not apply to checks held on inactive accounts where there has been no account rendered, and no return of cancelled checks. A deposit is not due until demanded, and the statute only begins to run from demand. So that destruction of such checks would be destruction of the evidence of payment of such deposits, and cases might arise in which there would be a liability. Probably the question resolves itself into whether the inconvenience of retaining old papers and documents does not outweigh the possible risk of some particular depositor turning up and enforcing some claim which had been discharged, but the evidence of which had been destroyed. Many banks seem to proceed on the theory that this risk is negligible. (*Inquiry from Conn., March, 1919.*)

BANKS, ETC.—NATIONAL BANKS

Control and supervision

Power of comptroller to require publication of salaries

515. What is the construction of U. S. Rev. St. Sec. 5211, with reference to the questions whether a report of aggregate compensation paid to officers and employees is a report of any part of the assets or liabilities of national banks and whether the comptroller of the currency has power to force the reporting banks to publish this confidential information? The grounds of objection to the publishing of amount of salaries are that in many sections of the country there is only one paid official in a national bank and the publication would reveal his salary, and in other instances information might be given to competing banks detrimental to the welfare of the reporting bank. *Opinion:* Sec. 5211 requires reports to the comptroller "according to the form which may be prescribed by him" and "each such report shall exhibit in detail and under appropriate heads, the resources and liabilities of the Association etc." The report must be published "in the same form in which it is made to the comptroller." *Cochran v. U. S.*, 15 U. S. Sup. Ct. Rep., declares that the object of

the section is "to apprise the comptroller of the currency and the public of the condition of each national bank at stated periods." A statement of salaries paid does not come within the spirit and meaning of the section; it is not the character of the information which the law requires shall be reported and published. It is not a statement of what the bank owns or owes—its resources and liabilities—and a report and publication of such salaries would in no way fulfill the object of the section as declared by the United States supreme court, quoted *supra*. The comptroller's authority is measured by law. A demand for the publication of additional information of a confidential character is without authority of law. Although Sec. 5211 also provides for special reports to enable the comptroller to acquire "a full and complete knowledge of its (the bank's) condition," and assuming the authority to require these special reports covers a wider latitude of information, there is no requirement for publication in such case. It would seem that the comptroller has not the power to force the publication of compensation paid to officers and employees. Concerning the penalty for failure to publish reports, *U. S. Rev. St.*, Sec. 5213, imposing a penalty of \$100 a day

for failure to make and transmit the report, contains no penalty for failure to comply with the provision of the act that the report must be published in the same form in which it is made to the comptroller. The only penalty for non-publication to the public (should the comptroller be held to have the disputed power) would be the general penalty provided by U. S. Rev. St., Sec. 5329 of forfeiture of the franchise, but a prerequisite to such forfeiture is a judicial decree in a suit brought for that purpose by the comptroller. (*Inquiry from D. C., Feb., 1921.*)

Reports to comptroller

516. A bank inquires as to how many reports are required to be made to the comptroller each year. *Opinion:* The law requires five reports "according to the form" prescribed by the comptroller, which must exhibit resources and liabilities in detail and "in the same form" shall be published in a newspaper. The comptroller also has power to call for special reports, with penalty for non-compliance and it might be held that this power to call for special reports, might be exercised at the same time and as part of his call for general reports. Nobody is able to tell what limitations the courts would place upon the comptroller's powers in regard to special reports, and the same can only be determined through a case brought for a violation thereof. (*Inquiry from Ind., April, 1916.*)

Reports of member banks to Federal reserve board

517. A bank which does not object to the Federal Reserve Bank knowing its reserve percentage but regards it a nuisance to furnish a report each month inquires whether it is compelled to comply with the requirement of the Federal Reserve Bank that it furnish a monthly report of such percentage. It also asks what is the penalty for failure to comply. *Opinion:* Federal Reserve Act, Section 11a, authorizes and empowers the Federal Reserve Board "to require such statements and reports as it may deem necessary" from each Federal Reserve Bank and each member bank. Under this the Federal Reserve Board would have power to call for reports of the kind mentioned. The act does not give Federal Reserve Banks express power to call for reports from member banks. Whether the Federal Reserve Board can confer upon a Federal Reserve Bank the power to call

for reports from a member bank is questionable. It might be held that the Board could call for such reports through the Federal Reserve Bank. There appears to be no specific penalty, however, for violation of the requirement of the Federal Reserve Board of such reports as it may deem necessary. (*Inquiry from Tenn., April, 1916.*)

Examination by revenue officer

518. The Collector of Internal Revenue of a certain district in New Jersey sent a man to examine the notes of a national bank to see if they were properly stamped. The bank officer refused him permission. *Opinion:* According to the decision of a Federal district court in Pennsylvania (contrary to the decision of another Federal district court), a national bank officer has no right to refuse permission to an internal revenue officer or agent, acting under Section 3177, Rev. Stat., to examine the notes in its possession to see if properly stamped, and the bank is not exempted because of Section 5241, Rev. Stat., limiting visitorial powers to the Comptroller and the courts, but only an officer or agent authorized by the statute has such power of examination, which cannot be delegated to a clerk or other person. Section 21 of the Federal Reserve Act has amplified Section 5241, Revised Statutes, and provides "No bank shall be subject to any visitorial powers other than such as are authorized by law, or vested in the courts of justice or such as shall be or shall have been exercised or directed by Congress, or by either House thereof, or by any committee of Congress, or of either house duly authorized." U. S. Rev. St., Secs. 3152, 3163, 3177, 5241. U. S. v. Rhawn, Fed. Cas. No. 16150. U. S. v. Parkhill, Fed. Cas. No. 15994. U. S. v. Mann, 5 Otto (U. S.) 580. Fed. Reserve Act, Sec. 21. (*Inquiry from N. J., Jan., 1919, Jl.*)

Federal jurisdiction

519. The United States courts had jurisdiction in cases brought by and against the Second United States Bank but not in cases by and against the First United States Bank. The Federal statutes formerly conferred jurisdiction upon the circuit court in all suits brought by or against national banks in the district, but this was repealed in 1882 and the statute now provides that the jurisdiction of suits by and against national banks, except suits between them and the United States or its officers and agents, shall

be the same as and not other than the jurisdiction of suits by or against banks not organized under any law of the United States. Bk. of U. S. v. Deveaux, 5 Cranch (U. S.) 61, 85. Osborn v. Bk. of U. S., 9 Wheat. (U. S.) 738, 816. Bk. of U. S. v. Northumberland Bk., 2 Fed. Cas. No. 931. U. S. Rev. St., Sec. 629, subd. 10. (*Inquiry from N. Y., Jan., 1914, Jt.*)

Extension of corporate existence

Time of shareholder's notice of withdrawal

520. A bank's charter was expiring on August 14, 1917, on which date it received a certificate of approval bearing date on that day, as required by the National Bank Act. On the morning of September 14th the bank received a letter from a stockholder, dated August 14th, giving notice to the board of directors of his intention to withdraw from the association. The bank asks whether the notice so given was a compliance with the act. *Opinion:* The Act of July 12, 1882, provides that "when any national banking association has amended its articles of association as provided * * * any shareholder not assenting to such amendment may give notice in writing to the directors within thirty days from the date of the certificate of approval of his desire to withdraw from such association, in which case he shall be entitled," to receive the appraised value of his shares. The certificate of approval in this case was dated August 14th, and the stockholder mailed the bank a letter giving notice of his desire to withdraw, which reached the bank on the morning of September 14th, the 31st day from the date of the certificate of approval. This was not "within thirty days" unless it should be held that the mailing of the notice, which was doubtless on the thirtieth day, constituted a giving of the notice although not received by the bank until the thirty-first. See for example, Deimel v. Obert, 20 Ill. App. 557. Batman v. Megowan, 58 Ky. (Metc.) 533. It appears, therefore, that the bank might successfully maintain that this notice was not in time and, therefore, not valid. Concerning the point that the notice was not in proper form because addressed to the bank and not "to the directors," it would undoubtedly be held that a notice to the bank was a notice to the directors who are the managers of the bank. (*Inquiry from Ga., Oct., 1917.*)

Liquidation and merger

Change of national into state bank

521. What steps are necessary to change a national bank into a state bank? *Opinion:* The general provisions of law are: that the owners of two-thirds of the stock vote to liquidate; that the action be taken at a meeting of shareholders duly assembled; that the notice of the meeting clearly indicate the business to be transacted and that the vote in favor of liquidation represent two-thirds of all the stock. The shareholders should adopt a resolution at the meeting that the national bank be placed in voluntary liquidation under the provisions of sections 2250 and 2251 of the U. S. Rev. St. The evidence to be furnished the comptroller of the currency of the fact of liquidation is a copy of the resolution of the shareholders certified by the cashier or president under seal of the bank that shareholders owning two-thirds of the stock have voted to place the bank in liquidation and a copy of the notice calling the meeting showing date of mailing or publication. Notice to shareholders and other creditors to present their claims for payment should be published as is required by Sec. 2251 of the U. S. Rev. St.

Sec. 5 of the Federal Reserve Act provides that when a member bank voluntarily liquidates it shall surrender all of its holdings of the capital stock of the Federal Reserve Bank and can be released from its stock subscriptions not previously called. The shares surrendered shall be cancelled and the member bank shall receive in payment therefor, under regulations to be prescribed by the Federal Reserve Board, a sum equal to its cash paid subscriptions on the shares surrendered and one-half per cent. per month from the period of the last dividend, not to exceed the book value thereof less any liability of such bank to the Federal Reserve Bank. (*Inquiry from Tenn., Jan., 1916.*)

522. (1) In case of a national bank relinquishing its national charter, two-thirds of stockholders concurring, for the purpose of reorganizing as a state bank, is the national bank compelled by law to liquidate in order to consummate the conversion? (2) May a minority stockholder demand the value of his stock in cash rather than take an equivalent, in the stock of the succeeding institution? *Opinion* (1) It would seem that the national bank is compelled by law to liquidate in order to reorganize as a state bank. There is no

provision in the National Bank Act, or of the Federal Reserve Act, under which a national bank may be converted into a state bank, retaining its existing organization. (2) The minority stockholder has the right to demand his proportionate share arising from the sale or disposal of the assets in cash, and is not compelled to take an equivalent in the stock of the succeeding institution. (*Inquiry from Md., May, 1915.*)

Note: The act of Nov. 7, 1918 provides a method by which two or more national banks may consolidate under the charter of either existing bank; but consolidation of a national bank with a state bank cannot be effected thereunder.

*Conversion of state into national bank
without cancellation of old stock*

523. The president of a South Dakota State Bank pledged stock of such bank as collateral to a bank in Minnesota, and subsequently, without the knowledge of pledgee, the bank was converted into a national bank and new stock issued, but stock in hands of pledgee was not called in for cancellation. Six months thereafter the national bank failed, and the pledgee seeks to hold the directors and officers for not recalling the stock. What liability, if any, attaches to these old officers and directors? *Opinion:* Had no new stock been issued, no liability would attach to the directors and officers, as the law does not require the calling in of the old and the issue of new stock, although such procedure is preferable; (*Casey v. Galli*, 94 U. S. 673. U. S. Rev. St. Sec. 5154. Rev. Code So. Dak. 1919, Sec. 8972) but new stock having been issued without requiring production and surrender of an outstanding certificate held in pledge, there might be a liability which might depend upon whether the transaction constituted a conversion of the pledgee's property in the shares, or was a mere ultra vires issue of a void new certificate, the old certificate still carrying full shareholder's rights. (As to first theory see: *Allmon v. Salem Bld. & L. Assn.* [Ill.] 114 N. E. 170. *Joslyn v. St. Paul etc. Co.* [Minn.] 46 N. W. 397. *Clark v. Edgar*, 12 Mo. App. 345. *Bruff v. Mali*, 36 N. Y. 200. *First Nat. Bank v. Lanier*, 11 Wall. [U. S.] 369. As to second theory, see: *Parker v. Almy*, [Mass.] 109 N. E. 733. *Pratt v. Taunton Copper Co.*, 123 Mass. 110. *Machinists Nat. Bank v. Field*, 126 Mass. 345. *Litchfield v. Henson* [Okla.] 157 Pac. 137.) (*Inquiry from Minn., Feb., 1920.*)

Federal reserve notes as reserve

524. A national bank raises the question whether Federal Reserve notes can be considered legal reserve and an opinion respecting same is requested. *Opinion:* The law requires the reserve to be "in lawful money of the United States." The term "lawful money" is understood to apply to every form of money which is endowed by law with the legal-tender quality. (See opinions of Attorney-General Vol. 17, page 123). National bank notes are non-legal-tender money and of course cannot be counted as reserve. It seems also true that Federal Reserve notes cannot be counted as part of the legal reserve. After the passage of the Federal Reserve Act a bill was introduced by Senator Owen, S. 6439, 63rd Congress which proposed to give the Federal Reserve Board power, among other things, "to permit member banks to count as part of their lawful reserves, Federal Reserve notes not exceeding 5 per centum of their net demand profits." This provision, it was explained, would have the effect of releasing additional gold which would pass into the Federal Reserve Banks and become more efficient there for banking purposes. But S. 6439 did not become a law. The above would seem to indicate, if there was any doubt on the subject, that Federal Reserve notes cannot be counted as part of the lawful money reserve of national banks under the present law. (*Inquiry from N. Y., April, 1915.*)

Retirement of circulation

525. Is there anything in the Federal Reserve Act which contemplates taking away the circulation privilege from national banks at a future date? *Opinion:* The Federal Reserve Act (Sec. 18) provides that member banks desiring to retire their circulation may apply to the U. S. Treasury, which will list the applications, and the Federal Reserve Board may at its discretion require the Federal Reserve banks to purchase bonds from the applying banks, but cannot purchase more than \$25,000,000 in any one year of such bonds, including bonds purchased in the open market. This provision contemplates the ultimate taking away of the circulation privilege from national banks. There are no provisions of law, however, which prohibit a national bank from increasing the amount of its outstanding circulating notes merely because it has withdrawn circulation under

the provisions of Section 18. (*Inquiry from Ohio, July, 1917.*)

Application of workmen's compensation law

526. A bank asks whether it is necessary under the Workmen's Compensation Act of Idaho for banks to procure insurance thereunder. *Opinion:* Assuming that the Act referred to which applies to all public employments and to employees of "public corporations" within the state, would be held to include within its application banking institutions, it is very doubtful if the provisions of law would be held applicable to national banks in the state, because these banks are created by Congress and are instrumentalities of the Federal Government. It is well established that the states cannot tax national banks, except as Congress permits and it seems the same principle or reasoning would apply in the case of a Workman's Compensation Law which compels the employer or his surety to pay compensation to the injured employee. As bearing on this question see *Southern Pacific Co. v. Jensen*, 224 U. S. 205. (*Inquiry from Idaho, May, 1920.*)

Deposits

Deposits with trust company permitted

527. The Federal Reserve Act permits a national bank to carry on deposit with a trust company to the extent of ten per cent. of its own paid-up capital and surplus. Fed. Reserve Act, 1913, Sec. 19. (*Inquiry from Ind., March, 1916, Jl.*)

Substitution of bond security for public deposits

528. A national bank to secure public deposits deposited United States coupon bonds with the Treasurer of the United States. The Treasurer without the consent of the national bank cancelled the coupon bonds and substituted registered bonds, thereby causing the bank an actual loss of \$350. *Opinion:* No statutory authority exists to convert the coupon bonds into registered bonds as in the case of bonds to secure circulation. In the absence of an authorizing statute or the express consent of the depositor of the bonds, the conversion would afford a basis of a claim for damages. (*Inquiry from Ky., May, 1916, Jl.*)

Branches and agencies

Distinction between branch bank and agency

529. (a) Is a national bank permitted to

operate a branch bank in a town of 10,000 inhabitants? (b) Under what conditions do national banks in towns of this size operate foreign departments, or do business in buildings other than their main banking room? *Opinion:* (a) A national bank is not permitted to operate a branch bank in the same city or town, whether it be a large city or a city with 10,000 population. National banks having a capital and surplus of \$1,000,000 or more, are authorized to establish branches in foreign countries (Sec. 25 F. R. Act), or to invest not exceeding 10% of capital and surplus in stock of one or more banking corporations chartered to do foreign banking. (b) While, as shown supra, national banks are not permitted under the law to establish domestic branches, there is an opinion of the U. S. Attorney General, which makes a distinction between a branch bank and an agency, (29 Op. Atty. Gen. 81) and is to the effect that a national bank may establish an agency in another place for a specific purpose such as dealing in bills of exchange. It is doubtful, however, if the comptroller of the currency would agree to this view. (*Inquiry from Pa., Aug., 1920.*)

530. Agency to receive deposits away from bank. Can a national bank accept deposits in any place other than its banking room? *Opinion:* In the present state of the law, if a national bank should establish an agency in another place in the same city to receive deposits, it is probable that the Comptroller of the Currency would hold such agency to be unlawful and beyond the powers of the bank, although the point is not free from doubt. Sec. 5134 U. S. Rev. St. provides that the certificate of organization must specify "the place" where its operations of discount and deposit are to be carried on, and Section 5190 provides that the usual business of such national banking association shall be transacted at an office or banking house "located in the place specified in its organization certificate." (See *Nat. Bank v. Pierce*, 18 Albany Law Jl. 16, [holding that it is unlawful for a national bank in New Jersey to have an agent receive deposits in Philadelphia]. See also *Cooke v. State Nat. Bank*, 52 N. Y. 96. *Nat. Bank v. Galland*, 14 Wash. 502. *Burton v. Burley*, 12 Leg. News 178, holding that the place named in the organization certificate fixes the locality of a national bank, and its general business must be done there; and *Nat. Bank v. Phoenix Bank*, 6 Hun. [N. Y.] 71, [holding

that a national bank in another state cannot have an office of discount or deposit in New York]; and *Armstrong v. Second Nat. Bank*, 38 Fed. 886 [holding that a national bank cannot make a valid contract for the cashing of checks upon it at a different place from that of its residence through the agency of another bank]). But it has also been held that a large and important part of the business of a national bank is unavoidably and lawfully done away from its office by correspondents or other agents. Thus, where a cashier bought gold and paid for it by certifying checks at the counter of another bank, it was held proper. (*Merchants Nat. Bank v. State Nat. Bank*, 10 Wall. [U. S.] 604; and see *A. B. A. J.*, April, 1919, p. 553, citing opinion of U. S. Attorney General, drawing a vital distinction between establishment of a branch bank wherein is carried on a general banking business, and establishment of an agency for transaction of a particular part of its business. The Attorney General expressed quite liberal views as to the power of a national bank, or banks generally, to establish agencies for some particular class of business, away from the banking house, and criticizing *Armstrong v. Second Nat. Bank*, 38 Fed. 886, quoted *supra*.) It will thus be seen that the question is not entirely free from doubt. It would be desirable to obtain, if possible, an official opinion from the Attorney General of the United States upon the whole question. (*Inquiry from Mo.*, March, 1920.)

Acceptance agency of National Bank

Note: The Federal Reserve Bulletin for August, 1920, contains a ruling of the comptroller of the currency under date of July 16, 1920, to the effect that a national bank located in California should not be permitted to appoint an agent in New York to accept in behalf of the bank drafts drawn on it payable in New York and to pay such drafts out of the funds deposited in New York under the control of the agent. The ruling quotes U. S. Rev. St., Section 5190, providing that "the usual business of each national banking association shall be transacted at an office or banking house located in the place specified in its organization certificate." The comptroller states that "this has been construed by the Attorney General and by the Solicitor of the Treasury to mean one place or house."

Agency in another town to receive deposits and pay checks

531. Opinion desired as to legality of national bank having an arrangement with a

merchant or lawyer in another town whereby he receives deposits and makes payments on account for bank. *Opinion:* A national bank cannot have branches. The law requires that the "place" where the business is to be carried on shall be stated in organization certificate. Comptroller of the Currency has ruled that a national bank cannot have a branch office. The word "place" means the local domicile of the corporation, of which it can have but one. The Solicitor of the Treasury rendered an opinion on August 10, 1899, on question of the right of a national bank to establish an auxiliary cash room at some point distant from its banking house, for the purpose of receiving deposits and paying checks, and held that this could not be done. (*Inquiry from Vt.*, June, 1918.)

Right to establish branches

532. Under the present Federal law, national banks are not permitted to establish branches, either in or outside of the city in which they are located. Except that Section 25 of the Federal Reserve Act authorizes national banks having capital of \$1,000,000 or more, upon permission of Federal Reserve Board, to establish branches in foreign countries or dependencies or insular possessions of the United States. Under the Massachusetts law a savings bank can establish branches for deposit only within a certain area and under certain restrictions. Mass. Savings Bank Act, Sec. 36. (*Inquiry from Mass.*, June, 1916, *Jl.*)

Real estate transactions

Mode of execution of real estate deed

533. The laws of Wisconsin prescribe that all conveyances of real estate, executed by a corporation organized under the laws of Wisconsin shall be signed by the president or vice-president and countersigned by the cashier or a clerk. Conveyances eligible for record are those executed in accordance with the state's requirements. Would a national bank conveyance signed by the president or cashier convey good title? Would it be eligible for record in Wisconsin? *Opinion:* Where the by-laws of a national bank in Wisconsin provide that conveyances of its real estate shall be signed by the president or cashier, and the statute of Wisconsin provides that conveyances of land owned by a corporation "organized under any law of this state" shall be signed by the president or other authorized officer

and countersigned by the secretary, assistant secretary, assistant cashier or clerk thereof, it would seem that such statute would not be held to apply to a national bank, and that a deed executed in accordance with its by-laws would be eligible for record. (Wis. Stat. Secs. 2216, 2218; U. S. Rev. St. Secs. 5136, 5137). (*Inquiry from Wis., Feb., 1921, Jl.*)

Loans on real estate security

534. A bank holds notes of a company secured by indorsers and the company has executed a trust deed to secure the indorsers with a right in the bank, if the indorsers do not pay, to demand that the trustees foreclose the trust and pay the notes. The bank asks whether the transaction is prohibited by the National Bank Act. *Opinion:* In *Union National Bank v. Matthews*, 98 U. S. 621, A gave his note to B secured by deed of trust, B assigned the note and deed to a national bank to secure a loan by the bank to him thereon. It was contended the loan was prohibited and the security unenforceable. The court pointed out that the loan was made upon the note as well as the deed and that the bank might have deemed the maker abundantly sufficient without the security and it said: "We find nothing in the record touching the deed of trust which in our judgment brings it within the letter or the meaning of the prohibitions relied upon by the counsel for the defendant in error." But even assuming that the loan was made upon real estate security within the meaning of the statute and considering the case in that aspect, the court held that the security was nevertheless enforceable and that a private person could not defend on the ground that the loan was *ultra vires*. The above case was followed by *National Bank of Genesee v. Whitney*, 103 U. S. 99. (*Inquiry from Tenn., June, 1918.*)

535. Is it permissible by law for a national bank, and member of the Federal Reserve System, to accept an assignment of a mortgage as secondary collateral? *Opinion:* Under an amendment of Sec. 24, Federal Reserve Act, of September 7, 1915, national banks not situated in central reserve cities are authorized to make loans secured by improved and unincumbered farm land within the Federal Reserve District, or within 100 miles of the bank; also to make loans secured by improved and unincumbered real estate, other than farm lands, within 100 miles of the location of the

bank. The farm land loans are limited to five years duration, and the real estate loans to one year. Loans in either case must not exceed 50% of the real estate security, and are limited in amount to 25% of the capital and surplus of the bank or one-third of its time deposits. Although a national bank can only make a loan on real estate for a period of one year, it has been ruled by the Federal Reserve Board that at the end of the year it may make a new loan upon the same security for a period of not exceeding one year. The old note must be cancelled and a new note taken, but the original mortgage may be so drawn as to cover possible future renewals. The bank cannot, however, obligate itself in advance to make a renewal. Aside from the above, a national bank is allowed to make loans to an individual borrower, irrespective of security, up to 10% of its capital and surplus; but a loan on real estate security would be figured as part of the 10%. Prior to the amendment to the Federal Reserve Act, it was generally held that a national bank had no power to take real estate security for contemporaneous loans. At present, however, it would seem that where a bank makes a loan to a borrower there would be no objection to accepting an assignment of a real estate mortgage as secondary collateral. In any event, the security would be valid, and only the Government could complain if it was not within the law. (*Inquiry from N. J., Dec., 1920.*)

536. A customer borrowed money from a national bank, and executed a mortgage as security. The customer later became bankrupt. *Opinion:* The security is valid as against the borrower and his creditors, and only the Government can attack the transaction as an *ultra vires* act. The bank can hold the security as against the trustee in bankruptcy of the borrower. *Nat. Bk. v. Whitney*, 103 U. S. 99. *Reynolds v. Crawfordsville Nat. Bk.*, 112 U. S. 405. (*Inquiry from W. Va., June, 1912, Jl.*)

Contracts and transactions in general

Power to purchase stock

537. Advice is asked as to whether a national bank has power to purchase for its own investment high class marketable stock. *Opinion:* The courts have held in several cases that a national bank has no power to purchase or deal in stocks or buy or sell them on commission. See, for example, *Barrow v. McKinnon*, 196 Fed. 933. But,

while national banks are impliedly prohibited from dealing in stocks, they may accept stock in corporations when transferred to them in satisfaction or payment or by way of compromise of debts due the bank, in which case there is a duty to dispose of the stock within a reasonable time. (*Inquiry from Pa., June, 1919.*)

Investment in stock of safe deposit company

538. A national bank asks whether it can hold stock in a safe deposit company located in its own building. *Opinion:* As a general proposition it is unlawful for a national bank to deal in stocks or to invest in stock of other corporations. This is held beyond the power of a national bank. But in *Fourth Nat. Bank v. Stahlman*, 178 S. W. (Tenn.), 942, it was held that where a national bank acts in good faith with a view to providing suitable quarters for the transaction of its business, it may acquire and hold stock in a building corporation. There seems to be no judicial precedent dealing with the question whether a national bank can hold stock in a safe deposit company located in its own building, but upon the same principle that the holding of stock in a building corporation to provide suitable quarters is permissible, it would seem that the holding of stock in a safe deposit company located in its own building, being in furtherance of the transaction of its legitimate business, would likewise be permissible. Concerning the matter of investing in safe deposit vaults, it appears that the Comptroller of the Currency has held that investment of a moderate amount for such purpose in cities where companies cannot be properly organized for the sole purpose of conducting this line of business is not open to criticism. The Comptroller adopts the view that the matter is one largely in the discretion of the directors of the bank. (*Inquiry from N. Y., March, 1919.*)

Purchase of stock and disposal by trust agreement

539. A bank is seeking some means whereby stock purchased by it as an investment, may be held under a trust agreement for the benefit of stockholders, and certificates issued in the form of a dividend for stockholders. *Opinion:* It seems the purpose desired might be carried out by a proper form of conveyance to a trustee to hold the stock in trust for the benefit of certain named beneficiaries, namely, the

holders of the stock of the bank and their assigns; the income from such stock and the principal, if a power of sale was to be included, to be paid over to the beneficiaries proportionately to their stock holdings, the details of all this to be specified in accordance with the particular intent as to the disposition of the income and principal of the trust property. Of course, while a national bank has no power to invest in bonds but only to loan on their security, only the Government can complain. It seems safe to suppose that, if the bank itself held these bonds, the Comptroller would compel it to sell them. But if it should, as suggested, convey the bonds to a trustee for the benefit of its stockholders, it is doubtful that the Comptroller could upset the transfer as it would be virtually nothing more than the bank taking so much money out of the assets and distributing it among its stockholders. (*Inquiry from Mass., Dec., 1914.*)

Syndicate to float stock of industrial corporation

540. Is there any restriction in the banking law prohibiting a national bank from joining a syndicate formed for the purpose of floating a stock issue of an industrial corporation? *Opinion:* The Supreme Court of the United States has repeatedly held that it is beyond the power of a national bank to deal in stocks. (*Bank v. Kennedy*, 167 U. S. 362. *First Nat. Bank v. Nat. Exch. Bank*, 92 U. S. 122. *First Nat. Bank v. Hawkins*, 19 Sup. Ct. Rep. 739.) From these cases it would appear that the power is not conferred upon a national bank to join with others in purchasing stock of an industrial corporation, presumably for the purpose of selling or marketing such stock. Such a transaction would, it would seem, be a dealing in stock, which is prohibited; it would not be making a loan on the security of stocks. (*Inquiry from N. Y., July, 1917.*)

Purchase of industrial bonds

541. A power company offers for sale fifteen year 6% first mortgage bonds of the company secured upon entire physical property rights and franchises of the company. Has a national bank power to invest in such bonds, and if so, how much? *Opinion:* There are early cases which hold that a national bank has no power to deal in stocks and bonds, and that prohibition is implied from failing to grant the power.

(Weckler v. First Nat. Bank, 42 Md. 581. First Nat. Bank v. Hock, 89 Pa. St. 324. Cal. Nat. Bank v. Kennedy, 167 U. S. 362) but there seems to be a broadening of judicial view in this regard. Thus, it has been held that national banks may deal in Government and municipal bonds. (Leach v. Hale, 31 Iowa 69. Newport Nat. Bank v. Board of Education, 114 Ky. 87. Junction City v. Bank, 96 Kan. 407. Yerkes v. First Nat. Bank, 69 N. Y. 383.) However, in the instant case, if a bank should purchase these bonds from the company, it would be virtually making a loan to the company for fifteen years upon real estate security. This would not be permissible as a loan, even to the 10% limit to any one borrower. But if the transaction were a purchase of the bonds, as distinguished from a loan, as in a case where the bonds were purchased from a third person, there would be no limit to the amount which could be purchased, if there was any power to purchase such bonds at all. If a bank should purchase a reasonable amount of these bonds, subject to the disapproval of the Comptroller of the Currency, there might be nothing to prevent their purchase, provided they could be marketed without a loss should the Comptroller compel the bank to get rid of them. However, it is doubtful, under the present condition of the law, whether a national bank can purchase, as an investment, bonds of an industrial corporation. (*Inquiry from Iowa, March, 1920.*)

542. A bank asks whether "—— & Co. Real Estate First Mortgage 4½% 30-year Gold Bond" is legal for a national bank investment. *Opinion:* It was held in a number of earlier cases that a national bank has no power to buy and sell stocks and bonds; that such transactions are ultra vires. See, for example, Wickler v. First Nat. Bank, 42 Md. 581. This rule, however, did not apply to Government bonds, and in some of the more recent cases the power of a national bank to purchase municipal bonds has been upheld. See, for example, Newport Nat. Bank v. Board of Education, 70 S. W. (Ky.) 186, wherein it was held that a national bank may purchase corporate bonds issued by the board of education of a city. There appears to be no reported case, nevertheless, where the question at issue has been the power of a national bank to purchase industrial bonds, such as those referred to in the instant case. At the same time if the power given in the National Bank Act to discount evidences of debt is

to be given a liberal meaning, industrial bonds are evidences of debt and as "discounting" is sufficiently comprehensive to include acquisition by purchase, (Morris v. Third Nat. Bank, 142 Fed. 25) it might be held that a national bank has this power. It would be well, however, to obtain a ruling from the Comptroller of the Currency before making such a purchase. (*Inquiry from N. Y., Oct., 1917.*)

Power to act as broker in sale of securities

543. Has a national bank power to act as broker in the sale of securities? *Opinion:* It has been held in several cases that a national bank has no power to deal in stocks and bonds or buy and sell them upon commission; that such operations are not incidental to the business of banking as defined in the statute. (Weckler v. First Nat. Bank, 42 Md. 581. First Nat. Bank v. Hock, 89 Pa. St. 324. First Nat. Bank v. Nat. Exch. Bank, 92 U. S. 122.) But a different rule applies to Government bonds, in which it is customary for national banks to deal. (Yerkes v. Nat. Bank, 69 N. Y. 383. Van Lenven v. First Nat. Bank, 54 N. Y. 671. Leach v. Hale, 31 Iowa 69) and it has likewise been held that a national bank has power to deal in municipal bonds. (Newport Nat. Bank v. Board of Education, 114 Ky. 87. Junction City v. Bank, 96 Kan. 407). (*Inquiry from Pa., March, 1920.*)

Increase of book value of banking house

544. A bank asks whether, in view of the fact that its banking house and land have greatly increased in value during the past ten years, it would be proper to increase this item on its general ledgers. *Opinion:* It would seem to be within the power of the board of directors to increase the book value thereof so that it will more nearly conform to the actual market value. It does not seem necessary to obtain the permission of the Comptroller of the Currency; in any case of over-valuation of assets, it would probably be reported to him by the examiner. At the same time it may not be out of place to write the Comptroller of the Currency, stating that the directors contemplate taking this step and asking if there is any objection. (*Inquiry from Tenn., June, 1916.*)

Sale of foreign exchange

545. Is a national bank authorized, under existing laws, to sell foreign exchange and steamship tickets? *Opinion:* A na-

tional bank has power to sell foreign exchange, but not the power to engage in the business of selling steamship tickets. *Augusta v. Earle*, 13 Pet. (U. S.) 60; U. S. Rev. St., Sec. 5136; U. S. Rev. St., Sec. 5197. (*Inquiry from Pa., June, 1920, Jl.*)

Power to donate services of clerk

546. The right and power of a national bank to furnish such gratuities as check books, pass-books, calendars and other articles of utility has never been brought into question. Should a dissatisfied stockholder complain, the furnishing of such gratuities to a reasonable extent would probably be held within the implied powers of the bank, as in case of gratuitous collections. It has been held an executive officer has no power to donate the bank's funds for erection of a paper mill. The donation of services of a clerk to assist in conduct of a public sale as a means of getting business for the bank might be within its implied powers; at all events not a serious abuse of power. *Robertson v. Buffalo County Nat. Bk.*, 40 Neb. 235. (*Inquiry from Ill., April, 1913, Jl.*)

Power to give cash bonus to officers and employees

547. It is the practice of national banks in large cities to give cash bonuses to their officers and employees? Is this permissible under the National Bank Laws? *Opinion:* (a) It is quite customary for many national banks in the larger cities to give cash bonuses around the holiday season to their employees. In the case of officers the custom does not seem to be well crystalized, though in some banks it is customary to make a "special payment" to officers, as well as a cash bonus to employees. (b) With respect to the legality of the custom, it would seem to be within the power of a national bank, and, therefore, legal, to donate a percentage of their salaries to officers and clerks, as an act which would fall within the implied powers of the bank which are necessary to carry into effect the powers specifically granted. National banks provide a number of facilities gratuitously for their customers, free check books, pass books, pocket diaries, calendars, etc., as well as making free collections. There is no specific power in the National Bank Act to do any of these things, but they fall within the implied powers of the bank. Equally, it would seem, the making of a bonus to officers and clerks, as an addition to their respective salaries, would clearly

fall within the implied powers of a national bank. (*Inquiry from Mich., Nov., 1919.*)

Payment of premium on bond of township treasurer

548. A bank inquires whether it would be beyond its power to pay the premium to a bonding company upon the bond of a township treasurer; and also asks if the bank should pay the premium for the bond, and pay no interest on the account, while advertising 2% on active accounts, would it be construed as being an illegal bonus? *Opinion:* It does not appear to be beyond the power of a national bank to pay the premium to a bonding company upon the bond of a township treasurer. It is to the interest of the bank to secure deposits and solicit and obtain all desirable deposit accounts possible, and if to this end it pays the premium upon the bond, as an inducement for him to make deposit of the funds of the township with the bank, it is doubtful that it would be held ultra vires. As to the second question: There appears to be no law in Pennsylvania which requires a township treasurer to deposit moneys in a bank which pays interest and it seems the bank could make such contract as it chose with reference to paying interest or not paying interest upon any particular deposit. (*Inquiry from Pa., Nov., 1917.*)

Loans in general

Loan on certificates of deposit

549. There is nothing in the National Bank Act to prohibit a bank from loaning money on the security of its own certificates of deposit. It cannot, however, loan on the security of its own shares of stock. *Fisher v. Continental Bk.*, 64 Fed. 707. (*Inquiry from N. J., March, 1910, Jl.*)

Two-name paper of directors

550. A bank inquires whether there is any law providing that national banks cannot loan to their directors except on two-named paper. *Opinion:* The National Bank Act contains no such provision, nor is there any amendment thereto or ruling whereby national banks cannot loan to their directors except on two-name paper. (*Inquiry from Tex., Nov., 1916.*)

Limitation of loans

Overdraft as excess loan

551. A national bank with a capital and surplus of \$90,000, having loaning

capacity of \$9,000 to any one borrower, discounted a note of a state bank for \$8,000 and allowed such bank to overdraw its account by \$2,500. *Opinion:* The national bank exceeded the legal limit of its loaning power. Sec. Nat. Bk. v. Burt, 93 N. Y. 233. (*Inquiry from Col., Nov., 1916, Jl.*)

Additional loan to stockholder

552. When the limit is loaned by a national bank to a corporation, an additional loan to a stockholder is not excessive unless corporation is maker or indorser on paper or loan to stockholder is for its benefit. The National Bank Act contemplates that no loan in excess of the limit shall be granted to any one interest. (*Inquiry from Ill., Aug., 1912, Jl.*)

Notes signed by 36 farmers

553. A bank states that its loaning limit is \$3,750 to any one individual or firm. The bank has been offered two notes for \$3,000 each, signed by 36 farmers. The same names appear on each note, but the order of signing is not the same. The bank asks if it can carry both of these notes without being charged with making excessive loans. *Opinion:* Irrespective of the order of names, as each farmer would be liable on both notes, it seems the ten per cent. limit would be exceeded. The Act provides that "the total liabilities to any association or any person * * * shall at no time exceed one-tenth, etc." In this case each farmer would be under a total liability, exceeding one-tenth. If the bank could arrange to have eighteen farmers sign one three thousand dollar note and the other eighteen farmers sign the other three thousand dollar note, that would be within the law, if the security was sufficient. (*Inquiry from Minn., Dec., 1916.*)

Meat packer's notes

554. A bank has a capital and surplus of \$200,000 which limits it in loaning to one person or concern to \$20,000. The bank purchased ——— & Company's notes, which mature in 1921. The Deputy Comptroller claims that this ——— paper is not commercial or business paper within the meaning of Section 5200 of the National Banking Act. The bank asks to be advised respecting same. *Opinion:* The Act provides that "the discount of commercial or business paper actually owned by the person negotiating the same shall not be construed as money borrowed" so as to be included within the ten per cent. limit. The question is

whether the ——— & Company's notes purchased by the bank would fall within this designation of commercial or business paper actually owned by the person negotiating the same. It does not seem that these notes are given in payment of goods purchased and negotiated by the payee, in which case they would not fall within the designation, but rather that they are notes issued against their general credit, upon which they are the sole parties liable and the purchase of which would virtually be a loan to ——— & Co. upon their notes. It seems that the contention of the Deputy Comptroller that this ——— paper is not commercial or business paper within the meaning of Section 5200 is correct. (*Inquiry from Neb., July, 1919.*)

Collateral security for excess loans

555. A bank desires to know if the only collateral that can be used to secure excess loans is Government securities? *Opinion:* Sec. 5200 U. S. Rev. St. excludes from the 10% limit of borrowed money (1) the discount of bills of exchange drawn against actually existing values; (2) the discount of commercial or business paper actually owned by the person negotiating the same; (3) the discount of notes secured by documents covering non-perishable staples, including live stock; (4) the discount of notes secured by bonds or notes of the Government issued since April 24, 1917, with certain limitations as to the amount. The Comptroller's circular of October 25, 1919, specifies the amounts loanable. (*Inquiry from Ohio, Jan., 1921.*)

Unaccepted drafts with b/l attached

556. Certain national bank examiners made a ruling that the purchase of drafts with bills of lading attached in excess of ten per cent. of the capital and surplus of the bank created an excess loan to the concern issuing the drafts; that such excess loan was a violation of Section 5200, United States Revised Statutes, unless the drafts are accepted by the drawee before the purchase by the bank. *Opinion:* Such ruling is not warranted by the law and will not be sustained by the courts. The Comptroller of the Currency concurs in the opinion that Section 5200, U. S. Revised Statutes, excepting from the 10 per cent. limit of indebtedness of any one person of money borrowed "the discount of bills of exchange drawn in good faith against actually existing values" does not require that such bills of exchange must be first

accepted before purchase. U. S. Rev. St., Sec. 5200. Sec. Nat. Bk. v. Burt, 93 N. Y. 233. Bk. v. Railroad Co., 20 Kan. 519. Ratzer v. Burlington & Co., 64 Minn. 245. (*Inquiry from N. Y., Feb., 1909, Jl.*)

Interest not included in fixing limit

557. Section 5200 U. S. Rev. Stat. limiting loans by any association to a single borrower to ten per cent. of capital and surplus, although not judicially passed upon is construed as not including liability of the borrower for the interest upon the principal sum loaned. (*Inquiry from N. Y., May, 1918, Jl.*)

Loan to A on note of B where latter has full borrowing limit

558. Where one party has his lawful borrowing limit at a national bank, and a second party discounts a note of the first party at the bank, does this constitute an excess loan to the first party? *Opinion:* U. S. Rev. St., Sec. 5200, provides that "the total liabilities to any association of any person * * * for money borrowed, * * * shall at no time exceed 10% of the amount of the capital stock of such association, actually paid in and unimpaired, and 10% of its unimpaired surplus fund," with specified exceptions. In the instant case the second customer is the borrower and the fact that he borrows on the note of the first customer, instead of making his own note, would not, it would seem, make the loan illegal as an excessive loan. The first customer, whose note is discounted, becomes indebted on such note to the bank, but not for money borrowed. The law does not limit the total indebtedness of a single person to 10%, but only the total indebtedness for money borrowed. It is lawful to loan A 10% and to loan B 10%, and, if after A has been loaned 10%, a loan is made to B within his 10% limit, by the latter discounting the note of A, there seems to be no reason why B should be deprived of the right to borrow up to his 10% (whether he does or does not discount the note of A), provided the bank is willing to loan him the money. (*Inquiry from Ohio, Jan., 1921.*)

Liability of firm included with that of partner

559. A national bank with a capital and surplus of \$50,000 loaned A and B as individuals \$1,500 and \$2,500 respectively. A and B as partners want to borrow in addition ten per cent. of the capital stock and surplus. *Opinion:* The National Bank

Act limits liability of any one borrower for money borrowed to ten per cent. of capital and surplus and includes in the liability of a firm the liabilities of the several members. The proposed loan would therefore be excessive. (*Inquiry from Pa., Oct., 1916, Jl.*)

560. A national bank loaned to a firm ten per cent. of its capital and surplus. An individual member of the firm asked for a further loan of ten per cent. *Opinion:* The further loan to such individual member of the firm would be excessive and violative of the National Bank Act. (*Inquiry from Tex., June, 1912, Jl.*)

Limit of loans on farm land

561. Can a national bank loan to any person money secured by farm lands when he has already borrowed ten per cent. of the bank's capital and surplus; if so, how much? *Opinion:* The National Bank Act provides a limit of loans to any one person of 10% of capital and surplus, in no event to exceed 30% of capital. The Federal Reserve Act (Sec. 24) provides that the bank may make farm land loans "in an aggregate sum equal to twenty-five per centum of its capital and surplus or to one-third of its time deposits." There has been no ruling on this question, but it would seem that the provision of the National Bank Act would apply, so that in making loans to any person upon farm lands up to the limit allowed by the Federal Reserve Act, the 10% of the National Bank Act would have to be figured in. To illustrate, take a national bank with \$25,000 capital and \$15,000 surplus, a total of \$40,000. Assume that A has already borrowed \$4,000 on his note, and should request a further loan of \$10,000 on farm land. It would seem that the \$4,000 would have to be figured in and that all that could be loaned in addition on the farm land would be \$6,000, making a total loan of \$10,000, which would be 25% of the bank's capital and surplus. There appears to be a tendency to construe the Act to keep the loanable limit to any one borrower down, and it is probable that when a person applied for a loan up to the limit on farm land, having already borrowed the 10% limit on his personal note, the Act would be construed as requiring such personal loan to be figured in. This is simply opinion, however, and the law may be construed otherwise. There would seem to be need of a positive executive or judicial ruling on this point. (*Inquiry from W. Va., July, 1914.*)

Note: On March 23, 1916, M. C. Elliott, General Counsel Federal Reserve Board, rendered an opinion to the Board holding that loans by a national bank on farm lands come within the limitation imposed by Section 5200 U. S. Rev. Stat.

562. Section 24 of the Federal Reserve Act empowering national banks to make loans on farm lands in an aggregate sum equal to 25 per centum of its capital and surplus does not modify Section 5200, U. S. Revised Statutes, limiting loans to a single borrower to 10 per cent. of capital and surplus and no national bank may loan to any person upon real estate more than 10 per cent. of its capital and surplus. Fed. Reserve Act, 1913, Sec. 24. U. S. Rev. St., Sec. 5200. (*Inquiry from W. Va., April, 1919, JI.*)

Accepted demand draft for price of cotton delivered

563. A purchaser of cotton accepts drafts on him by various sellers to their own order, payable on demand. These are indorsed by the sellers and held by a national bank until the buyer makes a shipment of cotton, at which time demand for payment is made and the drafts are taken up. May a national bank carry these drafts, with the single acceptor, in excess of 10% of its unimpaired capital and surplus? *Opinion:* Sec. 5200, U. S. Rev. St., containing the 10% loan limit on national banks, as amended in 1919, contains this proviso: "Provided, however, that (1) the discount of bills of exchange drawn in good faith against actually existing values, including drafts and bills of exchange secured by shipping documents conveying or securing title to goods shipped, and including demand obligations when secured by documents covering commodities in actual process of shipment, and also including bankers' acceptances of the kinds described in Section 13 of the Federal Reserve Act, (2) the discount of commercial or business paper actually owned by the person, company, corporation, or firm negotiating the same.... shall not be considered as money borrowed...."

The fact that the paper is payable "on demand" does not take from its character as a "bill of exchange." Negotiable Instruments Act, Sec. 126. It is questionable whether such drafts constitute loans to a single borrower, within Sec. 5200, where the proceeds of the discount in each case go to a different seller of the cotton who is both drawer and payee of the draft, merely be-

cause all such drafts are accepted by one concern in excess of that limitation. Assuming, however, that section 5200 applies to paper accepted by one person, the further question arises whether the drafts come within the proviso of the section above quoted. Before amendment in 1919 and when the law simply excepted from the 10% limit "the discount of bills of exchange drawn in good faith against actually existing values and the discount of commercial or business paper actually owned by the person negotiating the same," General Counsel Elliott of the Federal Reserve Board rendered an opinion (Nov. 27, 1916) to the effect that a bill of exchange discounted after acceptance is drawn against actually existing values where it is drawn against a delivery of goods sold within a reasonable time after such delivery. But section 13 of the Federal Reserve Act covering rediscounts provides among other things, that the aggregate of paper of any one borrower "rediscounted for any one bank shall at no time exceed ten per centum of the unimpaired capital and surplus of said bank; but this restriction shall not apply to the discount of bills of exchange drawn in good faith against actually existing values," and an opinion of the Federal Reserve Board, published in the Federal Reserve Bulletin for Nov. 1919, holds that "accepted demand bills on which the drawer is released from liability are not 'bills of exchange' within the meaning of section 13, and must, therefore, be included in determining the limits on the amount of paper of any one borrower which a Federal Reserve Bank may discount for any member bank." Hence, the Federal Reserve Board does not regard drafts, such as those submitted, as "drawn against actually existing values," so far as an analogous statute is concerned. The phrase added to Sec. 5200 in 1919: "including demand obligations when secured by documents covering commodities in actual process of shipment," also gives force to the contention that only those demand obligations which are secured by documents covering goods in process of shipment come within the definition of bills of exchange drawn "against actually existing values." The attitude of the comptroller's office seems to be to exclude accepted demand drafts, from the class of bills of exchange outside the 10% limit, on the theory that the commodity might be held by the acceptor indefinitely waiting a rise in price, by consent of the bank, consequently this is

not the character of obligation intended to be excluded from the 10% limit. The official rulings and interpretations as above indicated, may or may not be followed by the courts. (*Inquiry from S. C., Feb., 1921.*)

Limit of borrowing power from correspondent

564. A national bank suggests desirability of amendment to Federal Reserve Act so as to permit national banks to borrow reasonable amounts, or such amounts as may be needed to carry on their business, from their correspondents. *Opinion:* It is the consensus of opinion of the Committee on Federal Legislation of the American Bankers Association that no amendment of the Federal Reserve Act is needed. It was stated that the avenue was open to any national bank by rediscounting with its correspondent, instead of attaching the paper to bills payable, to obtain any needed amount irrespective of capital; that there was no limit upon the amount of paper which could be rediscounted with correspondents. It would seem, therefore, that the limitation of the borrowing power of a national bank from its correspondent to paid-in capital is one which applies more to the form than the substance of the transaction. If a bank makes its own note and attaches bills receivable thereto as collateral, it is incurring indebtedness which is limited to the amount of its capital. But if, on the other hand, it discounts its bills receivable with its correspondent, indorsing them over, this is not an incurring of indebtedness limited in amount to the amount of its capital. (*Inquiry from Ark., Oct., 1920.*)

Guaranty and suretyship

Guaranty of draft on third person

565. A bank received a telegram asking if it would pay a draft on John Jones "for costs of car, cows and calves shipped to him," to which the bank replied that it would pay draft for carload of cattle to John Jones. *Opinion:* It appears that the bank's promise to pay was on condition that the cattle were shipped to John Jones, and where no cattle were shipped, the condition on which the bank made the promise was not fulfilled. However this may be, there is considerable doubt whether a bank can be held liable at all for a promise to pay a draft drawn on a third person in which it has no interest. In *First Natl. Bk. v. Am. Natl. Bk. of Kansas City*, 173 Mo. 153 the court referred to and quoted the Federal rule "that a national Bank has no power, either

with or without a sufficient consideration, to bind itself that a draft of A upon B will be paid; that such agreement is a mere guarantee and is not within the powers conferred upon such banks, and that when sued upon such a contract, the bank can successfully interpose defense of ultra vires;" and this court (Mo.) said: "it will be of no profit in this case to consider the rules of law adopted by the several states bearing upon the power of banks organized by authority other than the Federal Government, to enter into such contracts, or to interpose the defense of ultra vires after the other party has fully performed it, for the decisions of the Federal courts treat all such contracts as void and unenforceable as to national banks and this court is in duty bound to defer to these Federal decisions." (*Inquiry from Mo., March, 1920.*)

566. Can a national bank lend its credit by guaranteeing the debt of another solely for his benefit? *Opinion:* By the weight of authority, a national bank cannot lend its credit by guaranteeing the debt of another solely for his benefit. (*Barron v. McKinnon*, 179 Fed. 759. *Flannagan v. Cal. Nat. Bank*, 56 Fed. 969. *Bank v. Pirie*, 82 Fed. 799. *Moscow First Nat. Bank v. American Nat. Bank*, 173 Mo. 153, 72 S. W. 1059. *Contra:* *Farmers etc. Nat. Bank v. Illinois Nat. Bank*, 146 Ill. App. 136. *Hutchins v. Planters' Nat. Bank*, 128 N. C. 72. *Merchants National Bank v. Dunn Oil Mill Co.* 157 N. C. 302.) (*Inquiry from Mo., May, 1919.*)

567. Has a national bank a legal right to guarantee a draft drawn upon one of its customers? *Opinion:* Notwithstanding the contrary decisions of a few state courts, (see *Farmers, etc., Nat. Bank v. Ill. Nat. Bank*, 146 Ill. App. 136. *Hutchins v. Planters Nat. Bank*, 128 N. C. 72), a great majority of the courts hold, and the Federal rule is to the effect that it is beyond the power of a bank to guarantee to pay the draft of A upon B. (*Flannagan v. California Nat. Bank*, 56 Fed. 959). Under the Federal Reserve Act, (Sec. 13), however, member banks are given the power to accept drafts drawn upon the bank growing out of domestic or foreign shipments. Instead of the bank attempting to guarantee the payment of a draft drawn upon its customer, the customer should arrange with the bank to have the draft drawn directly upon it. (*Inquiry from Mo., Dec., 1917.*)

568. A bank guaranteed payment of a

draft drawn by a person in payment of several car loads of potatoes. Had the bank legal power to do so? *Opinion:* The Federal courts hold that it is beyond the power of a bank to guarantee the payment of a draft drawn upon one of its customers, and refuse to enforce such contracts of guarantee. *First Nat. Bk. v. Am. Nat. Bk.*, 130 Mo. 153. *Nat. Bk. of Brunswick v. Sixth Nat. Bank*, 212 Pa. 236. Some of the state courts vary from this rule, holding that a bank promising to pay a draft on its customer is estopped to deny its want of power and is liable. *Oil etc. Co. v. Penn. Trans. Co.*, 83 Pa. 160; also *Hutchins v. Bank* 128 N. C. 72. (*Inquiry from N. C., Sept., 1918.*)

569. A national bank sent a telegram as follows: "We guarantee payment of draft John Doe on R. Roe Corn Co. for \$——— dollars ——— National Bank." A bank asks whether the guarantor bank can be held liable thereon. *Opinion:* While a few state courts hold a national bank liable on its promise to pay draft of A on B (*Hutchins v. Planters Nat. Bk.*, 128 N. C. 72. *Farmers & Merc. Nat. Bk. v. Ill. Nat. Bk.*, 146 Ill. App. 136) the Federal Courts and a greater number of state courts hold that a promise or guarantee by a national bank that A's draft upon B will be paid, is *ultra vires* and unenforceable. (See for example, *First Nat. Bk. v. Am. Nat. Bk.*, 173 Mo. 153. *Nat. Bk. of Brunswick v. 6th Nat. Bk.*, 212 Pa. 238. *First Nat. Bk. v. Monroe*, 69 S. E. 1123, Ga. Sup. Court). But if the bank should receive a sufficient deposit from or for the use of B for the specific purpose of paying A's draft on B, there appears to be no reason why it cannot obligate itself to pay such draft. The bank is every day receiving deposits from B for the purpose of paying his checks. The bank is debtor to B for such deposits and is his agent to pay such debt to the holder of B's checks. Equally, it may act as B's agent to pay B's specific deposit upon such drafts drawn by A on B as B may authorize and direct and its promise to a prospective purchaser of such drafts that it will pay the same based on an appropriation of the deposit to such purpose, would be binding. (*Inquiry from N. Y., July, 1912.*)

570. B in Tennessee drew on A in Ohio and a national bank in Ohio wired a bank in Tennessee that it would guarantee that B's draft would be paid. The Tennessee bank paid B the amount of the draft, but

could not collect from the national bank which was enjoined from making payment. *Opinion:* The national bank had no power to guarantee B's draft in which it had no interest and from which it derived no substantial benefit. The guaranty was *ultra vires* and unenforceable. The same underlying principle applies as well to state bank and trust companies. *First Nat. Bk. v. American Nat. Bk.*, 173 Mo. 153. *Nat. Bk. v. Sixth Nat. Bk.*, 212 Pa. 238. *Supply Co. v. Stockgrowers Bk.*, 173 Fed. 859; *Ayer v. Hughes*, 69 S. E. 657. *Bacon v. Farmers Bk.*, 79 Mo. App. 406. *Merchants Bk. v. Baird*, 160 Fed. 642. *Contra: Hutchins v. Planters Nat. Bk.*, 128 N. C. 72. (*Inquiry from Tenn., Sept., 1911. Jl.*)

Guaranty of loans to customer

571. A National Bank has insufficient capital and surplus to make all loans requested by its customers and its president makes an agreement by letter with the officers of B National Bank to send the latter some of such loans which he states are A1 and will be paid or taken off the hands of B bank by A bank at maturity. This agreement is kept for a time but finally A bank fails to take up certain notes at maturity and is closed by the Comptroller. The notes were not handled as rediscounts. Some of them were selected from the files of A bank; others were outside loans. Can B bank hold the receiver of A bank on these notes? *Opinion:* If A bank had originally made a loan upon or discounted the paper and then indorsed it to B bank, the latter could hold A bank or its receiver thereon; but if such paper was not originally acquired by A bank but was simply an outside transaction, the courts are quite unanimous in holding that a bank has no power to guarantee the debts of third persons in which it has no interest and the agreement by the president that the paper would be paid and taken off the hands of B bank at maturity would not be binding upon A bank. In *First Nat. Bank of Tallapoosa v. Monroe*, 69 S. E. (Ga.) 1123, a national bank had over-loaned to a private corporation, one of its customers. To procure additional accommodation for the corporation the cashier procured another bank to make a further loan to the corporation upon the guarantee of the national bank through the cashier and also of the cashier individually of the amount borrowed. It was held that a national bank in negotiating its own paper can bind itself for the payment by its indorsement thereon but cannot guarantee the payment of paper

of others or become surety solely for the benefit of another. The guarantee transaction in question was therefore *ultra vires*. See *Aldrich v. Chemical National Bank*, 176 U. S. 618. *Hanover National Bank v. First National Bank*, 109 Fed. 421. (*Inquiry from Pa., Jan., 1913.*)

Guaranty of note of warehouse company

572. A bonded warehouse company issued to A bank a six months note bearing indorsements. A letter from B, a national bank accompanied the note, stating that it would see that the note was liquidated or take it up. B bank received the money and credited it to the maker's account to cover an existing overdraft. Can the holder of the note (A bank) hold the guarantor B bank for the amount of the note? *Opinion:* Although B bank was without power to make such guaranty, it is liable for the reason that it received the proceeds of the note and applied it to an overdraft of the maker. *First Natl. Bk. v. Greenville O. & C. Co.*, 60 S. W. (Tex.) 828. *Citizens Nat. Bk. v. Appleton*, 216 U. S. 196. (*Inquiry from Tex., Nov., 1919.*)

Surety on bond of county official

573. A national bank has no power to become guarantor of the obligation of another person in which it has no interest. The individual members of the board of directors of a national bank desiring to become sureties on the bond of a county official have the power so to do, but cannot bind the bank upon such a contract. *Bowen v. Needles Nat. Bk.*, 87 Fed. 430, 94 Fed. 925. *Com. Nat. Bk. v. Pirie*, 82 Fed. 799. *Thilmany v. Iowa Paper Bag Co.*, 108 Iowa 333. *First Nat. Bk. v. American Nat. Bk.*, 173 Mo. 153. *Nat. Bk. v. Sixth Nat. Bk.*, 212 Pa. 238. *Bailey v. Farmers Nat. Bk.* 97 Ill. App. 66. (*Inquiry from Tenn., Sept., 1913, Jl.*)

Surety on indemnity bond covering duplicate for stolen collateral

574. A national bank as pledgee of certain stock certificates pledged as collateral becomes surety on an indemnity bond authorized by its directors to enable the owner to obtain duplicate for the stock collateral, which has been stolen from the bank. *Opinion:* The execution of such indemnity bond by the bank either as principal or surety was probably within the power of the bank and even if *ultra vires* the directors would not be held personally liable by reason

of such authorization. U. S. Rev. St., Sec. 5147. (*Inquiry from W. Va., May, 1912, Jl.*)

Trust powers of national banks

Right of exercise in various states

575. General Counsel of the American Bankers Association has received a large number of requests from various states with respect to the right of national banks to exercise trust powers. In view of the fact that they involve largely the same questions it has been thought best to put them all in the form of one composite opinion involving the different states. *Opinion:* The basic statute on this question is Federal Reserve Act Section 11 (k), as amended by Act of September 26, 1918, under which the Federal Reserve Board is authorized and empowered "to grant by special permit to national banks applying therefor, when not in contravention of State or local law, the right to act as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics, or in any other fiduciary capacity in which State banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located." It is to be noted under the terms of this subsection that a permit of the Federal Reserve Board is required before the trust powers can be exercised.

The phrase "when not in contravention of State or local law" in the original act was not at all clear, as will be subsequently shown, and because of this the amendment of September 26, 1918, added the following clause: "Whenever the laws of such State authorize or permit the exercise of any or all of the foregoing powers by State banks, trust companies, or other corporations which compete with national banks, the granting to and the exercise of such powers by national banks shall not be deemed in contravention of State or local law within the meaning of this Act." This, then is a statutory interpretation of the phrase "when not in contravention of State or local law."

575a. *Supreme court decision*—On June 11, 1917, prior to the amendment of the statute in 1918, the supreme court of the United States in *First National Bank v. Fellows*, 244 U. S. 416 held Section 11 (k) in its original form to be constitutional. The court recognized as the plain purpose of this provision the

enabling of national banks not to be at a disadvantage with state institutions in the same state, exercising trust powers, where those state institutions also exercised banking powers, and to put national banks on a par with state institutions in this respect. The court said that the phrase "when not in contravention of state or local law," means first where the right to perform trust functions is expressly given by state law, that is, by state statute; and secondly, or what is equivalent, where the right "is deducible from state law because that law has given the functions to state banks or corporations whose business in a greater or less degree rivals that of national banks, thus engendering from the state law itself an implication of authority in congress to do as to national banks that which the state law has done as to other corporations."

The supreme court makes it clear that the exercise by national banks of trust functions is not in contravention of state law because of the theory that the state regulates the subject of trusts and exercises control over trustees and that this is incompatible with its lack of power to regulate the conduct of national banks. So far as state regulations are reasonable and non-discriminatory between state and nationally chartered trustees, the supreme court points out that the conferring of these peculiar powers upon national banks carries with it an authority to the state to subject national and state trustees to like control; and that the Federal Reserve Board is given power to adopt such rules governing national bank trustees as will co-ordinate and harmonize their functions with the state law, so that the rules of the Federal Reserve Board and the state laws will make a harmonized whole and there will be no contravention.

575b. *Decision of Federal Reserve Board*—The Federal Reserve Board on August 26, 1916 (prior to the amendment of 1918 to the subsection) rendered an informal decision regarding "State Laws and Fiduciary Powers of National Banks." It listed the states which had enacted laws expressly authorizing national banks to exercise trust powers, to which list reference is made in the subsequent discussion of the right of national banks in the particular states to exercise trust powers. The Board stated that it had "adopted the policy a year ago last July (1915) of authorizing national banks, otherwise qualified, to exercise the powers conferred by section 11 (k), unless there is an express provision of the State

law either directly or by necessary implication prohibiting a national bank from exercising these powers. In pursuance of that policy the Board, upon advice of counsel, has determined that it would not be in contravention of the laws of the following States, in addition to those already mentioned, for a national bank to exercise the fiduciary powers authorized by section 11 (k)," listing the states.

The effect of the amendment of 1918 was not, of course, to limit the list of the states in which permits could be given; if anything, its effect was to extend the number of states in which national banks could be permitted to exercise fiduciary powers.

575c. *Jurisdiction of state court to decide "contravention"*—The U. S. supreme court, in *First National Bank of Bay City v. Fellows*, supra, said that "the state court was, if not expressly, at least impliedly authorized by Congress to consider and pass upon the question whether the particular power was or was not in contravention of the state law." In other words it is the function of the state courts to interpret the state law and determine whether or not the exercise of trust powers is in contravention of the state law. Since 1918, however, this authority must be exercised by the state courts in harmony with the interpretation of "when not in contravention of state or local law" by Act of Congress.

575d. *Capital and surplus*—Subsection 11 (k) as amended in 1918 ends with the proviso "that no permit shall be issued to any national banking association having a capital and surplus less than the capital and surplus required by state law of state banks, trust companies, and corporations exercising such powers." The prospective operation of this provision is clear. It, however, does not apply to national banks to which permits have been granted prior to the passage of the amendment.

575e. *Amount of surplus*—The question arose whether a national bank, otherwise eligible, could be granted trust powers where its surplus did not amount to 20% of its paid-in capital. Section 5199 U. S. Revised Statutes permits the declaration by a national bank of semi-annual dividends with the following proviso: "But each association shall, before the declaration of a dividend, carry one-tenth part of its net profits of the preceding half year to its surplus fund until the same shall amount to twenty per centum of its capital stock." The

Federal Reserve. Act contains no requirement that a national bank must have a surplus equal to 20% of its capital in order to be eligible, and the mere fact that it does not have such a surplus does not disqualify it from exercising trust powers, provided it has "the capital and surplus required by state law of state banks, trust companies and corporations exercising such powers."

575f. *Deposit of securities*—Section 11 (k) of the Federal Reserve Act, as amended September 26, 1918, provides that "Whenever the laws of a state require corporations acting in a fiduciary capacity, to deposit securities with the state authorities for the protection of private or court trusts, national banks so acting shall be required to make similar deposits and deposits and securities so deposited shall be held for the protection of private or court trusts, as provided by state law." Several states require such a deposit. In two states the Attorneys-General have ruled that state officers have no authority to receive deposits from national banks. In one of these states, New York, a statute (Laws 1919, Chapter 229, Section 39-a) was thereupon passed expressly authorizing the receipt of such a deposit. In the other state, Wisconsin, there has been no enabling act. If these opinions are sound, then either state legislation conferring authority upon state officers to receive such deposits or amendatory federal legislation doing away with the requirement will be necessary. If the federal requirement of deposit of securities is a condition precedent to the exercise of trust powers, then a national bank will not be qualified to act as trustee without compliance with such condition and the validity of its acts and transactions in a trust capacity may be questioned; but on the other hand, if the requirement is to be deemed directory and not mandatory as a condition precedent no such result follows.

575g. *State examination of trust departments of national banks*—The Federal Reserve Act, as amended September 26, 1918, provides that the books and records of the trust departments of national banks "shall be open to inspection by the state authorities to the same extent as the books and records" of trust corporations of the state. A national bank can comply with this requirement, even if the state does not authorize the state authorities to avail themselves of the permission.

California

576. The California Banking Act expressly authorizes corporations to do both commercial banking and trust business and in view of this it would seem that the grant of power by the Federal Reserve Act, as amended September 26, 1918, is all sufficient. Section 96 of the California Banking Act requires trust companies to deposit securities with the state treasurer and under the Federal Reserve Act as amended September 26, 1918, national banks must comply with this requirement. This raises a question discussed in the paragraph entitled, "Deposit of securities," *supra*. (*Inquiry from Cal., March, 1919.*)

Connecticut

577. Laws of Connecticut (1913) Chapter 194, Section 8 expressly authorizes a corporation designated as a state bank or trust company to "act as executor, administrator or trustee of the estate of any person, or as guardian or conservator of the estate of any ward but not of the person of any ward," and also to act as "agent, registrar, fiscal agent or trustee of any corporation or holder of bonds, notes or other securities and as depository of court and trust funds." Assuming the state institutions which exercise these powers compete with national banks then a Connecticut national bank, having sufficient capital, is eligible and a local judge of probate should not refuse to recognize it as possessing such powers.

In Connecticut there is apparently no statutory requirement that a trust company shall deposit securities with state authorities to protect the trust funds in its charge. This being so there is no obstacle to a national bank exercising trust powers in the state, if duly qualified. (*Inquiry from Conn., March, 1919.*)

Delaware

578. Delaware passed an act in 1917 making it lawful for national banks to act as executor, administrator, trustee and as registrar of stocks and bonds when authorized by the laws of the United States. (*Inquiry from Del., March, 1919.*)

Illinois

579. Notwithstanding the prior opinion of the Illinois supreme court (*People of state of Ill. v. Brady* 110 N. E. [Ill.] 864), that the exercise of trust functions by national banks would be in contravention of the state law, because the national banks

would not be subject to the visitatory and regulatory control of the state, the Attorney-General of Illinois reads from the subsequent opinion of the federal supreme court in the *Fellows* case, *supra* an overruling of the prior opinion of the Illinois court and concludes that there is no such contravention, and that such reasonable regulations as examination of national banks with respect to their trust business and requiring them to account or to report and so on, can be exercised by state authorities over the national banks subject to harmonious rules provided to cover the situation by the Federal Reserve Board. (*Inquiry from Ill., April, 1919.*)

Michigan

580. National banks in Michigan have the right to exercise trust powers. *First National Bank of Bay City v. Fellows*, 244 U. S. 416, 37 Sup. Ct. Rep. 734. (*Inquiry from Mich. Apr. 1919.*)

Minnesota

581. General Statutes of Minnesota Section 6340, as amended by Chapter 236, Laws 1915, prohibits corporations, other than savings banks, safe deposit and trust companies, complying with the provisions of the law relating to such companies, from using literature or advertising indicating that they are authorized to transact savings bank, safe deposit, or trust company business and also prohibits such corporations, among other things, from in any manner soliciting business or making loans or soliciting or receiving deposits or transacting business as a trust company. This legislation prohibiting other corporations from doing trust company business is inapplicable to national banks where such corporations are in competition with national banks. (*Inquiry from Minn., March, 1919.*)

New Hampshire

582. Laws 1917 (chapter 193) permits trust companies, or national banks duly authorized, to be appointed trustees and requires a surety company bond. (The amendment of Sept. 26, 1918 to Sec., 11 k provides that "national banks in such cases [when deposit of securities required] shall not be required to execute the bond usually required of individuals if state corporations under similar circumstances are exempt from this requirement. National banks shall have power to execute such bond when so required by the laws of the state.") Chap-

ter 193 Laws 1917 also requires any national bank desiring to be appointed trustee to first file consent to examination of its trust department by the state bank commissioners and to acknowledge itself amendable to the jurisdiction of the probate court of the state. The Act of March 28, 1919, provides that no corporation shall be appointed in any other fiduciary capacity than that of trustee, and contains other regulations concerning national banks acting as trustee. (*Inquiry from N. H., April, 1919, Jl.*)

New Jersey

583. Assuming trust companies in New Jersey exercise banking powers then national banks in the state are eligible to exercise trust powers under the Federal Reserve Act as amended September 26, 1918. There is apparently nothing to prevent the exercise of such powers by national banks, unless it be the provision of the Federal Law that whenever the state law requires trust corporations to deposit securities with the state authorities, national banks shall be required to make similar deposits. The trust company law of New Jersey does require of trust companies the deposit of securities with the register of the prerogative court in certain cases. This raises the question considered in the paragraph entitled "Deposits of securities," *supra*. (*Inquiry from N. J., March, 1919.*)

New York

584. Under the amendment of Section 11 (k) of the Federal Reserve Act of September 26, 1918, a national bank is eligible to exercise trust powers in New York, notwithstanding the statute of that state restricting such powers to corporations organized under the laws of that state. A national bank seeking a permit from the Federal Reserve board must have the capital required by state law for trust companies. Section 180 of the Banking Law of New York requires a trust company to have capital of \$100,000 where the population does not exceed 25,000; \$150,000 where the population exceeds 25,000 but does not exceed 100,000; \$200,000 where the population exceeds 100,000 but does not exceed 250,000 and \$500,000 where the population exceeds 250,000. The state law requires trust companies to deposit securities. For a time there was doubt whether the superintendent of banking had any authority to accept such deposits from national banks. That matter has been settled by the addi-

tion in 1919 of Section 39-a to the Banking Law, expressly authorizing the receipt of such deposits and for the examination of trust departments of national banks. By Chapter 159 Laws 1919 the superintendent of banks may, by special authorization, grant state banks the same trust powers as are possessed by trust companies, but no authorization can be issued where the bank has a capital less than that required for a trust company in the same place. Such banks are not required to give bond unless the court or officer making the appointment shall require it, in which event such banks shall have power to execute such bond. (*Inquiry from N. Y., March, 1919.*)

North Carolina

585. There is apparently nothing in the present law of North Carolina which would make the exercise of trust powers by national banks in contravention of the state law or which would render it necessary for the state to enact affirmative legislation supplementing the act of Congress. In 1915 (Chapter 196) the legislature passed an act to prohibit foreign corporations from doing a fiduciary business. But this act expressly applied only to corporations "organized under the laws of any other state" or "organized under the laws of any foreign country" and national banks do not come under either category. By expressly prohibiting these other corporations from exercising trust powers it would appear as if the legislature intended to allow national banks to exercise such powers by not referring to this class of corporation, as the Federal Reserve Act was then in force. Two national banks in North Carolina have already (1917) been granted permits to exercise trust powers. North Carolina is also included in the list of states, issued by the Federal Reserve Board in 1916, in which it would give permits to national banks to exercise trust powers. (*Inquiry from N. C., July, 1917.*)

North Dakota

586. In view of the fact that state banks in North Dakota have not been granted trust powers, the right of national banks in that state to exercise such powers depends upon whether the trust companies of the state compete with national banks, unless irrespective of such competition the exercise of trust powers are not in contravention of state law. The Trust Company Act of North Dakota expressly grants certain

banking powers, authorizing trust companies to receive deposits of money for general savings accounts and to loan money upon securities.

If trust companies receive checking accounts and discount commercial paper, then it is not in contravention of state law for a national bank to act as trustee, even assuming that the state law confines the exercise of trust powers to trust corporations organized under the law of the state. There is, however, no express provision confining trust powers to trust corporations.

Section 5207 Civil Code of North Dakota requires a deposit of securities by trust companies with the state treasurer and National banks exercising trust powers are required by the federal law to make similar deposits. This raises the question considered in the paragraph entitled "Deposit of securities," supra. (*Inquiry from N. D., Oct., 1919.*)

Ohio

587. Permissive statutory legislation authorizes national banks to exercise powers as trustee or registrar only and requires a capital of \$100,000. Presumably national banks cannot be empowered to act contrary to these restrictions unless state corporations are given privileges discriminatory against national banks. (*Inquiry from Ohio, June, 1919.*)

Oklahoma

588. A national bank in Oklahoma may apparently exercise all the powers listed in Section 11 (k) of the Federal Reserve Act, unless the provision in that section regarding the deposit of securities be an obstacle. Section 324 of the Revised Laws of Oklahoma requires trust companies as a prerequisite to qualifying as guardian, curator, executor, administrator, assignee, receiver or trustee, either by deed, will, or judicial appointment to deposit with the state treasurer \$50,000 in specified securities. This raises the question considered in the paragraph entitled "Deposit of securities," supra. (*Inquiry from Okla., March, 1919.*)

Pennsylvania

589. As trust companies in Pennsylvania which compete with national banks are permitted to exercise trust powers under the laws of Pennsylvania, it would seem under the amendment of September 26, 1918, to section 11 (k) of the Federal Reserve Act that the exercise of trust powers, such as

those of trustee, executor, administrator, and registrar of stock and bonds does not conflict with State laws.

The Pennsylvania law apparently does not require trust companies to make deposits of securities with the banking department, and hence a national bank need not make such a deposit. (*Inquiry from Pa., March, 1919.*)

South Dakota

590. In view of the amendment to Section 11 (k) in 1918 and of the fact that the South Dakota Law of 1911 authorizes trust corporations to "do a banking business" the exercise of trust powers by a national bank in South Dakota seems not to be in "contravention" of state law, although that law prohibits the use of the word "trust" by corporations other than those authorized by the Act and prohibits any corporation from executing any trust unless it shall have complied with the provisions of the act. In other words, a national bank is subject only to the national law and the state law is not binding on a national bank, except to the extent that the national law makes the national bank subject to the state requirements. As the national law expressly provides that the exercise of trust powers by national banks shall not be deemed in contravention of state or local law, whenever the laws of a state authorize state institutions which compete with national banks to exercise trust powers, it seems clear that the exercise of trust powers by national banks in South Dakota is not in contravention of the state law within the meaning of the Federal Act.

The capital of the national bank must not be less than that of a trust company doing business in the locality, namely, \$50,000 in cities of not less than 5,000 inhabitants and \$100,000 in cities of more than 5,000.

The trust company laws of the state require a deposit of securities by trust companies. Under the Federal Reserve Act national banks are bound by such a provision. This raises the question considered in the paragraph entitled "Deposit of securities," supra. (*Inquiry from S. D., March, 1919.*)

Wisconsin

591. Assuming that trust powers are exercised by state institutions in Wisconsin and that these institutions compete with national banks, the amendment of September 26, 1918, to the Federal Reserve Act,

Section 11 (k) makes national banks eligible to exercise such powers provided the requirements of state law, to which the Federal Act makes national banks subject, are complied with. The Wisconsin statute for the organization of trust company banks provides (Sec. 2024-77 i) that the capital stock of any such corporation "must be at least \$100,000 and not to exceed five million dollars, except that in cities of less than 100,000 inhabitants it may be less than \$100,000 but it shall not be less than \$50,000. A national bank must comply with this statute in order to qualify to exercise trust powers. Under the Federal Reserve Act, Section 11 (k) a national bank must comply with the state statute requiring trust companies to make deposits of securities. The opinion of the Attorney-General of the state that the state bank commissioner is not authorized to receive deposits from national banks is referred to in the paragraph entitled "Deposits of securities," supra. (*Inquiry from Wis., March, 1919.*)

Words "trust company" as part of title

592. In *Fidelity National Bank & Trust Company of Kansas City v. Enright*, 264 Fed. 236 the Federal district court in Missouri sustains the right of a national bank in Missouri, which has received a grant of trust powers from the federal reserve board, to use the words "trust company" as a part of its corporate name, with the approval of the comptroller of the currency, notwithstanding state statutes to the contrary. The principle applied is that a state law must yield to a federal statute. The court said: "The name of a national bank must be approved by the Comptroller of the Currency. It can be changed, or its use interfered with, by no other authority." (*Inquiry from Mo., June, 1920, Jl.*)

National bank as trustee of bank building

593. Can a national bank act as trustee of a bank building, in which it owns a one-third interest? *Opinion:* In the opinion of the Comptroller of the Currency a bank should not act as trustee in such connection, as it is always objectionable for any party or corporation to occupy the dual position of trustee and cestui que trust, such course being held illegal by some of the courts. A disinterested qualified party should be chosen. (*Inquiry from Kan., Nov., 1919.*)

Exercise of trust powers in other states

594. Inquiry is made as to the right and extent a national bank having been

vested with trust powers can exercise functions of executor and trustee in states other than the state where it is located. *Opinion:* Congress has now granted national banks, when permitted by the Federal Reserve Board, and when not in contravention of state or local law, "the right to act as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics or in any other fiduciary capacity in which state banks, trust companies or other corporations which come into competition with national banks are permitted to act under the laws of the state in which the national bank is located." Section 11 K, Federal Reserve Act, as amended September 26, 1918. It would seem to follow from this that whenever a trust company or other corporation is empowered by the laws of the state in which a national bank is located, or has the power by general grant without restriction as to place, to exercise the functions of executor or trustee in a state other than that of its location, the national bank, if otherwise eligible, would have like power, subject, of course, to the restrictions, limitations or prohibitions imposed by the laws of such other state upon the exercise by foreign corporations of trust powers within its borders. Assuming that a trust company in any state and consequently a national bank granted equivalent trust powers has the power to exercise the function of executor and trustee outside the state, then the ability to exercise such functions in another state would depend the restrictions, limitations or prohibitions imposed upon foreign trust corporations, if any, by the laws of such state. 29 Opin. U. S. Atty. Gen. 81. *Augusta v. Earle*, 13 Pet. (U. S.) 519. *City Bk. v. Beach*, Fed. Cas. No. 2736. U. S. Rev. St., Secs. 5134, 5190. *Merchants Bk. v. St. Bk.*, 10 Wall. (U. S.) 604. *Armstrong v. Second Nat. Bk.*, 38 Fed. 886. Fed. Reserve Act (Amend. Sept. 26, 1918), Sec. 11 K. *Avery's Est.*, 92 N. Y. S. 974. *N. Y. Bank, Law*, Sec. 223. *Farmers Loan, etc., Co. v. Smith*, (Conn.) 51 Atl. 609. *Laws Conn.*, 1913, Ch. 194. *Cal. Bank Act*, Sec. 7. (*Inquiry from Mo., April, 1919, Jl.*)

Effect on trusteeship of conversion of trust company into national bank

595. Does a trust company that reincorporates under a national charter jeopardize the trusts enjoyed by it? In other words, where a trust company holds a number of trusts the exercise of which will

extend over a long period of years and converts into a national bank, the limit of whose existence unless extended is twenty years, could a beneficiary ask for substitution as trustee of a state institution which has a perpetual charter, on the ground that the extension of the corporate existence of the national bank beyond twenty years is contingent on approval of the comptroller of the currency, enabling legislation, etc? *Opinion:* It is a general principle of law that a trust never fails for want of a trustee and when a trustee dies or becomes incapacitated in any way, it is always within the power of a court of equity to appoint a trustee. It is very doubtful that a court would hold that it was sufficient ground to deprive the bank of trusteeship of a long term trust, where it has converted from state to national, because the period of its existence is only twenty years and yet there might be sufficient doubt upon the question to make it desirable to urge an amendment of the Federal law granting charters to national banks not limited to twenty years. Of course, all charters, both state and national, are subject to revocation by the legislature, all state constitutions containing provisions reserving such right of revocation. (*Inquiry from Ohio, Dec., 1920.*)

Preference of trust estate on failure of national bank administrator

596. A customer of a bank is interested in an estate in Colorado of which a national bank is administrator. The bank is insolvent. Information is desired as to standing of customer's claim as against that of a depositor? The bank is acting without bond. *Opinion:* Where a national bank trustee fails, the beneficiaries of the trust would be preferred over a depositor. The Federal Reserve Act requires a national bank, acting as an administrator or any other trust capacity to segregate the trust assets from the general assets; and funds deposited or held in trust by the bank awaiting investment are not to be used by the bank in the conduct of its business unless it shall first set aside U. S. bonds or other approved securities, and in event of failure of such bank, the owners of the funds held in trust shall have a lien of such securities so set apart, in addition to their claim against the estate of the bank. (Fed. Reserve Act, Sec. 11 [k]). This section of the Act likewise provides that where a state law requires corporations acting in a fiduciary capacity to deposit securities with the

state authorities for protection of private or court trusts, national banks so acting shall be required to make similar deposits; and that national banks in such cases shall not be required to execute the bond required of individuals if state corporations are exempt under similar circumstances. (*Inquiry from Wash., Dec., 1920.*)

Trustee for participating owners of government bonds

597. A Pennsylvania national bank contemplates the holding of certain government bonds or notes in trust for participating owners who invest therein in small amount of \$10 against which the bank is to issue trust certificates reciting that it holds in trust a participating interest of \$10 in government bonds, etc. Is this permissible? *Opinion:* Assuming that this would be a lawful trust to be exercised by a trust company in the state of Pennsylvania, a national bank has an equal right to exercise such trust without conflicting with state laws. (*Inquiry from Pa., March, 1920.*)

Savings departments of national banks

Invalidity of state prohibitory law in California

598. May a national bank in California open savings accounts? *Opinion:* The California Banking Act prohibits other than savings banks from advertising for savings or from soliciting or receiving deposits as savings banks. It is more than doubtful whether this law can control or prevent national banks from operating savings departments. The Comptroller of the Currency has ruled that there is nothing in the National Bank Act which prohibits the operation of a savings department by a national bank and while the attorney for the state bank department has rendered an opinion that the California statute is valid and prohibitory in its application to national banks, there have been contrary opinions by other attorneys. (*Inquiry from Cal., April, 1919.*)

Right to install in New Jersey

599. May a national bank install a savings department? *Opinion:* Under the broad authority to "receive deposits" conferred by the National Bank Act there appears to be sufficient grant of power to a national bank to receive deposits under rules similar to those adopted by savings banks respecting the time and manner of

withdrawal, interest, etc. (*Inquiry from N. J., May, 1919.*)

Investment of funds

600. Does the national or the state law govern the investment of funds in the savings department of a national bank? *Opinion:* Such funds must be employed in the modes prescribed by the National Bank Act. (*Inquiry from N. J., May, 1919.*)

601. What effect has a state law segregating assets and limiting the investment of saving deposits on a national bank having a savings department? *Opinion:* Such a state law is apparently not applicable to a national bank having a savings department. Deposits in a national bank must be invested in the modes prescribed by the national bank act. *State v. Peoples National Bank, (N. H.) 70 Atlantic 542.* (*Inquiry from Wash., March, 1917.*)

Right to use words "Savings Department" in New York

602. Does the Federal Reserve Act authorize a national bank to use in its business the words "savings department?" A deputy attorney-general of the state of New York rendered an opinion in December, 1916, to the effect that the Federal Reserve Act does not authorize a national bank to do a savings bank business nor use the word "savings". Section 279 of the state Banking Law provides that "No bank, national banking association, etc., other than a savings bank or a savings and loan association shall make use of the word 'saving' or 'savings' or its equivalent, in its banking business, or advertise or put forth any advertising literature or sign containing the word 'saving' or 'savings' or its equivalent, nor shall any individual or corporation other than a savings bank in any way solicit or receive deposits as a savings bank." The statute provides a penalty for every day such offense shall be continued. The question is whether the above provision is in conflict with section 19 of the Federal Reserve Act so that it may be said to be superseded by the congressional legislation. This section provides that "Demand deposits within the meaning of this act shall comprise all deposits payable after thirty days, and all savings accounts and certificates of deposit which are subject to not less than thirty days' notice before payment." *Opinion:* Notwithstanding the opinion of the Deputy Attorney-General it seems that a national bank has the right to use the words

"savings department." The original New York statute prohibited a bank or corporation from advertising or putting forth a sign as a savings bank or in any way soliciting or receiving deposits as a savings bank. A trust company solicited and received deposits in substantially the same manner as a savings bank and carried on the business of a savings bank as a branch of its banking operations. An action was brought to recover the penalty, but the court of appeals held that the act did not forbid the carrying on of a business substantially as that of a savings bank, but only forbade the conducting of such business under claim or pretense of being a savings bank. *People v. Binghamton Trust Co.*, 139 N. Y. 191. Later the act was amended to its present form. Long prior to the Federal Reserve Act, national banks all over the country, both in states where the use of the word "savings" was prohibited as well as in other states, were actually operating and advertising savings departments under the broad authority to "receive deposits" and the Federal Reserve Act, recognizing this custom, incorporated in its provision as to reserves required for time deposits, a definition of time deposits as comprising "all savings accounts . . . subject to not less than thirty days' notice before payment." The right of national banks under the national law to receive savings accounts and operate savings departments would seem to have been established before the Federal Reserve Act, which Act, in recognition of such right, simply classifies savings accounts subject to not less than thirty days' notice before payment, among time deposits with reference to the amount or reserve to be maintained. In view of the *Binghamton Trust Company* decision, *supra*, there is nothing in the law as it stands which prohibits other state institutions from doing a savings bank business if they do not pretend to be savings banks, but they cannot use the word "savings" or its equivalent. So far as national banks are concerned, however, their right to receive savings accounts and operate savings departments under the national law being exercised prior to the Federal Reserve Act, and the right to receive savings accounts and necessarily make public the fact that they do so receive them being expressly recognized by the Federal Reserve Act, it would seem to follow that the right to advertise for savings accounts and to use the words "savings department" would be beyond the control of the state law.

A suggested distinction by the Deputy Attorney General between a national and a savings bank, that the former is a commercial institution with the relation to the depositor of debtor and creditor while the relation between a savings bank and its depositor is that of trustee and cestui que trust, is not borne out by the decisions which uniformly hold that the latter relationship is that of debtor and creditor. *People v. Mechanics & Traders Sav. Inst.*, 92 N.Y.7.

The question will not be positively settled until decided by a court of last resort and if there is any fear of violating a state law and of incurring a penalty of \$100 a day, it is for national banks to consult their own attorneys upon the proposition. (*Inquiry from N. Y., Feb., 1917, J.L.*)

603. Has a national bank the power to establish and advertise a savings department free from the control of state laws. *Opinion:* In previous opinions which have been rendered, the conclusion has been reached that a national bank has power, under the broad authority to "receive deposits", to receive savings deposits and operate savings departments free from the control of state laws regulating savings. This conclusion is fortified by a recent New York decision in respect to trust powers of national banks.

In October, 1919, the Supreme Court of New York decided in *re Mollineau*, 179 N. Y. Supp. 90, that since the enactment of section 11 (k) of the Federal Reserve Act as amended by the Act of September 26, 1918, a state no longer has the power to prohibit the exercise of trust powers by national banks when the laws of that state permit the appointment of competing state corporations in trust capacities. In the opinion Mr. Justice Kapper says: "Any prior state legislation which limited the exercise of specified powers to certain specified state corporations or agencies became inoperative when Congress clothed Federal corporations and agencies of a rival character with like powers."

The prohibitive provisions as to trust powers being held inoperative as to national banks where Congress has clothed national banks with like powers, equally it would seem that the prohibitive provisions as to the use of the word "savings" by other than savings banks would be held inoperative where Congress has clothed national banks with the power to receive savings deposits. That Congress has clothed national

banks with such power is evidenced not alone by the broad grant of power to "receive deposits" but is specifically recognized by the provision of Section 19 of the Federal Reserve Act which provides for the inclusion of savings accounts subject to not less than thirty days before payment in the category of time deposited. (*Inquiry from N. Y., Dec., 1920.*)

*Advertising for "savings" accounts
in New York*

604. A national bank about to establish a savings department asks if there is any state law prohibiting it from using the words "savings department" or "savings" in advertising in this connection. *Opinion:* The conclusion seems warranted, despite state laws prohibiting other than savings banks from using or advertising the word "savings" or from transacting business as a savings bank, that it would be held within the power of a national bank, free from control of state laws, to establish and advertise a savings department for savings accounts (in so doing necessarily using and advertising the word "savings"), and to carry on such department in the same manner that a savings bank carries on its business subject, of course, to national laws and regulations of the Federal Reserve Board. The question will not be positively settled until decided by the court of last resort. While there may be danger of violating a state law and of incurring a penalty of \$100 a day, it is for the national banks to consult their own attorneys upon the proposition. Laws N. Y. 1882, Ch. 409, Sec. 283. People v. Binghamton Tr. Co., 139 N. Y. 191. N. Y. Bank, L., 1905, Sec. 131. N. Y. L., 1914, Ch. 369. N. J. Sav. Bk. Act (April, 1876), Sec. 46. Barrett v. Bloomfield Sav. Inst. (N. J.) 54 Atl. 542, 57 Atl. 1137. Fed. Reserve Act, 1913, Sec. 19. (*Inquiry from N. Y., Nov., 1916, Jl.*)

605. Is it contrary to law for a national bank in New York to advertise time deposits as "savings accounts"? The question seems to hinge on the right of any bank aside from a New York State savings bank to use the word "savings" in any of its advertising. *Opinion:* As the Federal Reserve Act of 1913 (as amended in 1918) expressly recognizes the right of national banks to carry savings accounts, it would be within the power of a national bank, free from the control of state laws, to establish and advertise a savings department. In re Mollineaux, 179 N. Y. Suppl. 90; (*Inquiry from N. Y., Dec., 1920, Jl.*)

*Stipulation governing withdrawals in
savings pass book*

606. May a national bank issue savings books with the following stipulation printed therein and take advantage of it if there should be an unnatural demand? "Withdrawals of deposits are subject to 60 days notice. If funds are not available at such time, withdrawals are to be paid in the order such applications for withdrawals are received as receipts permit." *Opinion:* National banks in many states are operating savings departments with rules providing for notice of withdrawal of deposits. The national banks are given by the National Bank Act the broad authority to "receive deposits" and it has been the policy of the Comptrollers of the Currency to construe this as permitting a national bank to receive deposits on time as well as on demand and to contract for their repayment subject to a notice of withdrawal. There are no judicial decisions inconsistent with this policy.

There appears to be no reason why the proposed stipulation would not be valid. (*Inquiry from Ohio, Sept., 1913.*)

BANKS, ETC.—TRUST COMPANIES

Trust companies with branches as members of Federal Reserve system

607. Information is desired in reference to the Regulations and Restrictions of the Federal Reserve Act respecting the establishment of foreign and domestic branches by state banks and trust companies in New York state, members of the Federal Reserve System. *Opinion:* The Federal Reserve Board, under date of August 1915, announced the adoption of certain conditions to be

made a part of certificates of approval of applications of state banks and trust companies. Among these is the following condition to be inserted in all cases where the applying bank or trust company is authorized by its charter or the laws of the state in which it is located to establish branches: "That the establishment of additional branches, domestic or foreign, be subject to the approval of the Federal Reserve Board." It was announced that

this condition would not be inserted unless the applying bank has the legal right to establish branches at the time of admission. If, however, the state law subsequently authorizes branch banks, the member bank could not at that time avail itself of the privilege except with the approval of the Federal Reserve Board, because another condition inserted in all certificates of approval provides that there shall be no change in the broadening of the functions of the bank or trust company, except with the approval of the Federal Reserve Board. In an informal ruling of the Board, dated July 29, 1915, it was said: "It would not be the intention of the Federal Reserve Board, should you accept the proposed conditions, to deny to you or any other institution the right to add additional branches, except for reasons similar to those set forth by you which might influence your State Banking Department to withhold consent." In another informal ruling, dated June 12, 1915, it was held that a trust company having branches, is eligible for membership, and that a trust company as a member may maintain its branches as at present. (*Inquiry from N. Y., Sept., 1918.*)

Power to issue annuities

608. A savings and trust company asks whether it has power to issue and sell annuities. *Opinion:* A corporation may be authorized by its charter to grant or dispose of annuities. See *Cahill v. Maryland L. Ins. Co.*, 90 Md. 333. *McCollister v. Bishop*, 78 Minn. 228. In the absence of an express grant of power, however, it is very doubtful whether a trust company possessed of the usual powers granted such corporations would be held to have the power of granting annuities. There seems to be no decision in which the question of such power has been at issue; nor any source of information wherein such a question has been discussed. (*Inquiry from Ind., Oct., 1917.*)

Limitation on investment in stock of other banks

609. Is there any limitation on trust companies in New York State in their investments in stock of other banks either in the state or out of the state? *Opinion:* Section 185 of the Banking Law provides "that in addition to the powers conferred by the general and stock corporation laws every trust company shall, subject to the restrictions and limitations contained in

this article have the following powers * * * (9) to purchase, invest in and sell stocks, bills of exchange, bonds and mortgages and other securities * * * " Section 190 provides that "a trust company subject to the provisions of this article * * * (10) shall not invest or keep invested in the stock of any private corporation an amount in excess of ten per centum of the capital and surplus of such trust company; nor shall it purchase or continue to hold stock of another moneyed corporation if by such purchase or continued investment the total stock of such other moneyed corporation owned and held by it as collateral will exceed ten per centum of the stock * * * provided, however, that this limitation shall not apply to the ownership of the capital stock of a safe deposit company the vaults of which are connected with or adjacent to an office of such trust company." (*Inquiry from N. Y., June, 1918.*)

Power to act as treasurer of a society

610. A trust company was requested to act as treasurer of a society incorporated under the laws of New York. Can it legally do so? *Opinion:* The powers of a trust company depend on the terms of its charter. Indeed, if one were called upon to enumerate the powers of such company, the power to act as treasurer for a society would seem to suggest itself as one of the normal and natural functions of such a company. A trust company is usually equipped with all the facilities necessary to the performance of the duties of a treasurer of a society—more so than the ordinary individual—and where the assumption of such duties is not expressly declared to be, or obviously rendered, *ultra vires* on the part of the trust company, it would seem to be safe to declare them clearly within the scope of its designed and intended normal activities (*Inquiry from N. Y., July, 1915.*)

Fees of fiduciaries

611. In view of the intention to propose legislation in Georgia to make the fees of executors, administrators, guardians, trustees, etc., more clearly defined, the question is asked concerning the fees of fiduciaries in other states? *Opinion:* In California there is an arbitrary rate of compensation for executors and administrators, dependent on the size of the estate, although the compensation of the executor may be fixed by the terms of the will. Code Civ.

Proc. (1909) Chap. 10, Art. I, Sec. 1618. In Illinois a maximum rate of compensation to executors and administrators is fixed. Hurd's Rev. Stat. (1908) Chap. 3, Sec. 132.

In Massachusetts there seems to be no statutory regulation.

In New York there is an arbitrary rate of compensation, for executors and administrators, dependent on the size of the estate, although the compensation of the executor may be fixed by the terms of the will, in which case no allowance will be made by the surrogate, unless the specific compensation be renounced. Code Civ. Proc. (1912) Sec. 2730.

In Pennsylvania, in the absence of statute, the matter is one for judicial discretion. Five per cent seems to be the standard, although in a particular case the rate may be smaller or larger. Pusey v. Clemson, 9 Serg. & R. 209, cited with approval in Lilly's Estate, 181 Pa. St. 478. There is a statutory prohibition against double commissions as executor and trustee. Brightly's Purdon Penn. Dig. Vol. I, p 616, Sec. 239. (*Inquiry from Ga., Dec., 1912.*)

Recommendation of schedule of fees not violation of anti-trust law

612. Would it be a violation of the Federal Anti-Trust Law if a number of trust companies should agree at a convention to recommend a schedule of charges? *Opinion:* An opinion has been rendered to the effect that the rules of the New Orleans Clearing House fixing minimum charges for the collection of out-of-town items was not a violation of the Federal Anti-Trust Act. See Opinion No. —. This opinion, in principle covers the question submitted and there would be even less ground for holding a violation, because the New Orleans Clearing House—and the same is true of many other clearing houses in the country—have agreements binding on their members, while in the present case it is proposed merely to recommend certain charges as fair and reasonable. A resolution of recommendation that a certain schedule of fees be charged by trust companies will not violate the Anti-Trust Act. (*Inquiry from N. Y., March, 1920.*)

Savings or interest departments of trust companies

Cross Reference: For Savings Depart-

ments of National Banks, see National Banks.

Use of word "savings" in advertising by trust company in New York

613. May a trust company in New York state which is a member of the Federal Reserve System use the word "savings" in advertising its Savings Department, in spite of the section of the New York State Banking Law reading to the contrary? *Opinion:* This question is distinct from that relating to national banks. Apparently state banks and trust companies, even where they are members of the Federal Reserve System, have no right to use the word "savings" because they are subject to the law of the state in this respect. (*Inquiry from N. Y., Dec., 1918.*)

Use of words "save," "accumulate" and "thrift" by New York trust company

614. A trust company which conducts an interest department asks if it can use the word "save", "accumulate" and "thrift" in its advertising without violating Sec. 279 of the New York Banking Law. *Opinion:* The New York State Banking Law in Sec. 279, prohibits the use of the word "savings" or its equivalent by a trust company in connection with its banking business and its advertising. The words "or its equivalent" were added by the amendment of 1914. The Court of Appeals in *People v. Birmingham Trust Co.*, 131 N. Y. 191, rendered a decision which was prior to this amendment, in which it was expressly held that the law was not intended to prevent an institution other than a savings bank from doing a savings bank business, but only forbade the conducting of such business under claim or pretext of being a savings bank. Whether or not the word "save," "accumulate" or "thrift" would be interpreted as the equivalent of the word "saving" or "savings" within the meaning of this amendment is a question for the courts to decide. If the reasoning in the case of *People v. Birmingham Trust Co.* is followed notwithstanding the amendment which was subsequently made, it would seem that the use of the words in question would not be in violation of the law. However, before taking this risk, it would be better for the trust company to consult the Bank Superintendent. (*Inquiry from N. Y., Feb., 1921.*)

BANK OFFICERS, DIRECTORS AND EMPLOYEES

Election of directors

Transaction of other business where notice of meeting only for election of directors

615. A bank states that its articles of association do not require publication of notice of annual meeting although it did give notice thereof, stating that the meeting was to be held for the purpose of electing directors. At the meeting a resolution was introduced giving the Board of Directors express authority and power to enter into a contract with responsible parties by which the bank may sell, transfer and assign any property, bills, notes, or other obligations belonging to the bank, etc. At the meeting there were represented 4769 shares, viz., in person 1881, by proxy 2888. Those appearing in person, and also by proxy, voted for the resolution. The bank asks whether business other than the election of directors could properly be brought up at the meeting. *Opinion:* It is customary to send each shareholder written or perhaps printed notice thirty days in advance so as to avoid any question as to the legality of the meeting. This was done in the present case. The notice, however, simply stated that the purpose of the meeting was to elect directors and the proxies were for that purpose. It seems to be the rule that, at the annual meeting no business can be transacted without due notice being given that other business will be transacted; otherwise the ratification of action taken must be obtained from shareholders not present. It seems, therefore, that the resolution adopted would be binding on the 1881 shares personally represented, but not on the shares not represented nor on those represented by proxy, as the proxy did not give authority to vote on this question. There would seem to be two courses of procedure, (1) obtain a ratification of the resolution from all shareholders not personally represented, or (2) issue a new notice of meeting for transaction of this business, giving thirty days' notice. (*Inquiry from Ky., Jan., 1916.*)

Appointment by proxy of substitute at election of directors

616. Inquiry is made as to whether the holder of a proxy to vote at a meeting for election of directors, may appoint another person to act in his stead. *Opinion:*

After careful search, no reported case can be found which would serve as a direct precedent for allowing such course. Going back to the general law of principal and agent, it is the rule that an agent cannot delegate his authority where the act involves exercise of judgment or discretion. But where, as in the present case, the agent or proxy is expressly instructed to vote for a certain man as director and appoints an agent to exercise the power of so voting in his stead by reason of his unavoidable absence, such act would seem valid under general principles. (*Inquiry from N. Y., Nov., 1914.*)

Power and duty of directors

Agreement by several banks to jointly indemnify bank if loss sustained in purchasing weak bank

617. A, B, C, D, E and F are separate state and national banking institutions in a West Virginia town. F becomes weakened by questionable management, and A agrees to take over the assets of F and pay all deposit liabilities on agreement with the other banks that they will assume and pay to A their proportion of any loss on account of the failure of F, beyond capital liability, based on capital of banks participating. The bank asks whether a board of directors has authority to pledge the unlimited assets of a bank for such purposes. *Opinion:* It is a general rule that no corporation has the power, by any form of contract or indorsement, to become a guarantor of the debt of another, and an agreement of the other banks with A bank to proportionately share any loss incurred by A bank by reason of taking over the assets of F bank and paying its debts, would seem to be guaranteeing the debt of another and not within the authority of the directors. Another doubtful question is the right of one bank or a group of banks to purchase the assets and assume the debts of a tottering bank. See *Missouri State ex rel Hadley v. Bankers' Trust Co.*, 138 S. W. 669. (*Inquiry from W. Va., Nov., 1915.*)

Procedure where directors refuse to call meeting

618. In case directors refuse to direct secretary to send out notice that increase in number of directors or increase of capital stock are to be voted on, and he is requested to send out such notice by the owner of a majority of the stock, what is the proper

procedure? *Opinion:* A writ of mandamus would lie where there was shown to be a specific legal duty on the part of the directors to do the act sought to be compelled, and clear proof of a breach of that duty on their part. (Ohio etc. R. Co. v. People, 120 Ill. 200. In re Trenton Water Power Co., 20 N. J. L., 659. People v. Brooklyn Heights R. Co., 172 N. Y. 90. Northern Pac. R. Co. v. Washington Ter., 142 U. S. 492.) (*Inquiry from N. J., Nov., 1916.*)

Powers of cashier

Transfer of stock and issue of new certificate

619. Inquiry is made whether a cashier of a state bank in Georgia, by reason of his official position, is the proper officer to transfer stock upon the books of the bank and to issue new certificates of stock. *Opinion:* It is generally held that the cashier is the proper officer to make a transfer of stock on the books of the bank. Nat. Bk. v. Watson town Bk., 105 U. S. 217. Nothing can be found in the general statutes of Georgia on the subject. Some times by-laws regulate the matter of transfer. Assuming there is nothing in the by-laws of the inquiring bank to the contrary, the cashier is the proper officer to transfer stock upon the books of the bank and to issue new certificates. (*Inquiry from Ga., June, 1915.*)

Acceptance of note with renewal privilege

620. A bank holds the unsecured note of John Doe for \$1,000, made payable to it, dated January 2, 1919, payable December 1, 1919, after date with interest at 7 per cent. per annum payable semi-annually, and on the margin, under the title "security" is indorsed "one year renewal privilege." The note was taken by a former cashier of the bank before its sale to its present owners. Opinion is desired whether the bank is obliged to renew the note; and if the notation is binding, is it obliged to renew at the same rate of interest; and is it obliged to accept maker's unsecured note, or can bank insist on being secured? *Opinion:* Where an unsecured note is accepted by the cashier of a bank containing a provision entitling to privilege of renewal for one year and the bank is afterwards sold, the new purchasers cannot, in the absence of fraud in the transaction in which the note was given, relieve themselves from the obligation to renew such note on the same terms; for, presumably, the original con-

tract was within the scope of authority of the cashier, and, in any event, having been ratified by the bank, cannot be questioned. by the new owners in the absence of fraud. First Nat. Bank v. Livermore (Kan.) 133 Pac. 734. Vanderford v. Farmers, etc., Bank (Md.) 66 Atl. 47. Citizens Bank v. Douglass, (Mo.) 161 S. W. 601. (*Inquiry from Mont., Jan., 1920, Jl.*)

No power to relieve makers of notes from liability

621. Directors of a bank gave their personal notes to the bank to replace certain objectionable paper held by the bank, to placate the bank examiner. They now claim to have been absolved from all liability on these notes by the then acting cashier, particularly as they never received any consideration for the notes. Is their contention correct? *Opinion:* The general rule is that the president, cashier or other similar executive officer of a bank has no authority, simply by virtue of his office, to bind his bank by an agreement, made with the makers or indorsers of commercial paper payable to the bank, that their liability on such paper will not be enforced. (Hilliard v. Lyons, 180 Fed. 685. Thompson v. McKee, 7 Dak. 172. Gray v. Farmers Nat. Bank, 81 Md. 631. Davuss v. Sav. Assoc., 63 Mo. 24. Bank v. Rudolph, 5 Nebr. 527. Lumberton First Nat. Bank v. Lennon [N. C.], 86 S. E. 715. Cochecho Nat. Bank v. Haskell, 51 N. H. 116. Hodge v. Richmond First Nat. Bank, 22 Gratt. [Va.], 51. New Martinsville First Nat. Bank v. Lowther Kaufman Oil Co., 66 W. Va. 505.) Where the board of directors of a bank, whose capital stock was impaired by bad loans, deem it advisable to charge off these bad loans and substitute in lieu thereof notes executed and indorsed by individual members of the board, it was decided in an action upon a note so executed and indorsed brought by the receiver of the bank that the directors were estopped to set up want of consideration. (State Bank v. Kirk [Pa. 1907] 65 Atl. 932.) (*Inquiry from Mo., March, 1919.*)

No power to relieve indorser from liability

622. The cashier of a bank allowed its depositor an overdraft of \$1,000. To cover this amount the cashier accepted its depositor's note, which was indorsed and guaranteed by A, upon the cashier's statement that A would not be held liable to the bank upon his guaranty, and that the note

was only temporary to cover the amount during the presence of the bank examiner. *Opinion:* A is bound by his guaranty. A bank cashier has no authority by virtue of his office to promise an indorser on a note to the bank that he will not be liable upon his indorsement. *Bk. of U. S. v. Dunn*, 6 Pet. 51. *Bk. of Metropolis v. Jones*, 8 Pet. 6. *Thompson, Receiver, v. McKee*, 5 Dak. 172. *St. Bk. v. Forsyth*, 108 Pac. (Mont.) 914. *First Nat. Bk. v. Lowther, etc., Co.*, 66 S. E. (W. Va.) 713. (*Inquiry from S. C., April, 1911, Jl.*)

Competency of officer in other capacities

Officer as attesting witness

623. An officer, not a stockholder, of the payee bank is competent to subscribe to the mark of the maker of an instrument as attesting witness. Where the officer is a stockholder it is unwise for the bank to act upon the assumption of such competency. *Willoughby v. Moulton*, 47 N. Y. 205. *Ky. Civ. Code, Sec. 732, Subdiv. 7.* *Vanover v. Murphy's Admr.*, 15 S. W. (Ky.) 61. *Jackson v. Tribble*, 47 So. 310. *Farnsworth v. Rowe*, 33 Me. 263. *Chadwell v. Chadwell*, 98 Ky. 643. *Siebold v. Rogers*, 110 Ala. 438. *Donovan v. St. Anthony & Dakota Elevator Co.*, 8 N. Dak. 585. *Fisher v. Porter*, 77 N. W. 112. *Dail v. Moore*, 51 Mo. 589. (*Inquiry from Mo., July, 1909, Jl.*)

Disqualification of judge who is bank officer

624. A vice-president of a bank, engaged in other business, and not active in the management of the bank, is justice of the peace in the township. Opinion requested as to whether it would be legal and proper for the bank to bring small suits in his court. *Opinion:* A Justice of the Peace who is vice-president of a bank is disqualified from acting as judge in a suit in which the bank is a party. (*Ferrell v. Keel*) [Ark.], 146 S. W. 494. *Adams v. Minor* [Cal.], 53 Pac. 815. *King v. Thompson*, 59 Ga. 380. (*Inquiry from Ark., Jan., 1921, Jl.*)

Liability to bank for negligence

Neglect of directors to examine bank

625. By reason of the neglect of certain directors of a Mississippi bank in holding regular examinations of the bank, the stockholders suffer a loss. The directors disclaim liability because they were not paid for their services. *Opinion:* The fact that the bank directors received no compensation did

not relieve them from liability for neglect of duty. *Mobile Branch Bk. v. Scott*, 7 Ala. 107. *Blue v. Capital Nat. Bk.*, 145 Ind. 518. *Bolles on Banks*, p. 281. *Charitable Corp. v. Sutton*, 2 Atkyns (Eng.) 405. *Trustees of Mutual Bldg. Fund v. Bosseixux*, 3 Fed. 817, 838. (*Inquiry from Miss., Sept., 1913, Jl.*)

Supervision of employees by officers

626. A bank makes inquiry concerning recent decisions in United States Court holding bank president liable for loss caused by the speculations of a bookkeeper. *Opinion:* The case referred to (*Bates v. Dresser*, 40 Sup. Ct. Rep. 247 holding estate of deceased president liable for defalcations of bookkeeper) was unusual in that the president had been warned of the irregular practices of the bookkeeper and yet, without investigating same, kept him in the employ of the bank. Having knowledge of suspicious circumstances, it was his duty to make inquiry. With respect to the liability of a bank officer, the general rule is that a bank officer is not an insurer of the honesty and fidelity of those holding subordinate positions, and, therefore, is liable only for failure to exercise reasonable diligence in supervising their work. There are numerous decisions in both the Federal and State Courts so holding. For example, see *Briggs v. Spaulding*, 141 U. S. 132. *Williams v. Brady*, 221 Fed. 118. *Thomas v. Taylor*, 24 U. S. 73. *Wynn v. Talapoosa Bank*, 168 Ala. 469. *Nortonville F. St. Bk. v. Morton*, 146 Ky. 287. *Davenport v. Prentice*, 110 N. Y. Suppl. 1056. (*Inquiry from Mo., Feb., 1919.*)

Mistaken payment of raised check

627. A bank officer or minor official is not personally liable for a mistake in paying a raised check in absence of gross or inexcusable neglect. *Belknap v. The Nat. Bk. of North America*, 100 Mass. 380. *Union Bk. v. Knapp*, 3 Pick. (Mass.) 96, 108. *Union Bk. v. Clossey*, 10 Johns (N. Y.), 271. *Bolles "Modern Law of Banking,"* p. 383. (*Inquiry from Me., March, 1909, Jl.*)

628. Bank teller, who, in violation of instructions not to pay over \$100, pays check raised from \$5 to \$250 is personally liable to the bank. (*Inquiry from N. Y., Dec., 1908, Jl.*)

Mistaken payment to wrong person

629. A bank asks who is the loser where an employee of the bank pays out money through an error to the wrong person from whom the bank cannot collect. *Opinion:* The general rule is that a bank officer or clerk must be diligent, faithful and skillful. *Commercial Bank v. Ten Eyck*, 48 N. Y. 305. *Apperson v. Exch. Bk.*, 10 S. W. (Ky.) 801. His implied contract is for reasonable skill and care. *Pryse v. Farmers Bank*, 33 S. W. 532. And it has been held that he is responsible to the bank for negligence or want of reasonable skill and care. In *Dougherty v. Poundstone*, 120 Mo. App., 300, a cashier was held liable for paying out money on unauthorized checks. And in *Western Bank v. Coldeway*, 120 Ky., 776, a cashier was held liable for allowing overdrafts without the consent of the Board of Directors. If such a question should get into court, it would be for a jury to decide whether there was want of reasonable care. (*Inquiry from W. Va., March, 1920.*)

"O K" of overdraft by bookkeeper without verifying balance

630. Where a bookkeeper in a bank puts his "O.K." upon checks drawn by a depositor without verifying the checks of the depositor with his balance on the books, thereby permitting an overdraft by the depositor, can the bookkeeper be held for such loss due to his negligence? *Opinion:* Where a bookkeeper, whose duty it was to verify checks presented through the clearings by ascertaining from the books the sufficiency of the balance, and if found good place thereon a "sufficient fund and paid stamp" O.K., stamped as O.K. the checks of a customer without verification, erroneously believing that his balance was sufficient, the bookkeeper, being under duty to use reasonable skill and care, would probably be held negligent under the circumstances and liable to the bank for the amount of the overdraft, if it chose to enforce same against him (*Com. Bank v. Ten Eyck*, 48 N. Y. 305. *Apperson v. Exch. Bank*, [Ky.] 10 S. W. 801. *Dougherty v. Poundstone*, 120 Mo. App. 300. *Pryse v. Farmers' Bank*, [Ky. 1895] 33 S. W. 532. *Western Bank v. Coldeway*, 120 Ky. 776.) (*Inquiry from Tex., Sept., 1920, Jl.*)

Bank officer allowing overdraft

631. A bank inquires as to the personal liability of bank officers who authorize pay-

ment of overdrafts of customers. *Opinion:* The question of the personal liability of a bank officer for allowing an overdraft, has not been passed upon by the Louisiana Courts. In several of the other states, however, decisions have been rendered on the subject. In *Wynn v. Tallapoosa Co. Bk.*, 53 So. (Ala.) 228, it was held that a cashier is not absolutely liable for an overdraft if it is really a loan on sufficient security and if the directors vest the cashier with the duty of carrying on the bank's business and they as a body or committee thereof fail to meet or to instruct, help and supervise him and thus put on him the whole burden, in such case neither they nor the bank can hold him responsible for not consulting with them as required by the by-laws, as to discounts and loans. It was further held that bank directors have the power to authorize the cashier to allow overdrafts. In *Benham v. First Cit. Bk.*, 78 S. E. (W. Va.) 656, it was held that if the cashier knowingly made bad loans or permitted overdrafts with knowledge of the insufficiency of the security, he was liable for the losses resulting. (*Inquiry from La., April, 1919.*)

*Liability to bank for misconduct**Deriving personal profit and wrongfully declaring dividend*

632. A bank wishes opinion on civil and criminal liability of bank officers for transactions such as deriving personal profit from sale of real estate owned by the bank, and declaring a dividend when the profits were insufficient to meet same. *Opinion:* A president or other officer of a bank is liable for a loss resulting to the bank from his abuse of his authority, or from neglect of his duties. (*Hinsdale v. Larned*, 16 Mass. 65. *Austin v. Daniels*, 4 Den. (N. Y.) 299. *Kalb v. Amer. Nat. Bank*, 21 Ohio Cir. Ct. 1. *McVeigh v. Old Dominion Bank*, 26 Gratt. [Va.] 188. See also *Blanton v. Bank [Ark.]* 206 S. W. 745). Likewise the cashier of a bank is liable for losses resulting from his illegal, fraudulent, or tortious acts. (*Wynn v. Tallapoosa County Bank*, 168 Ala. 469, 53 So. 288. *Fort Scott First Nat. Bank v. Drake*, 29 Kan. 311. *Knapp v. Roach*, 62 N. Y. 614. *Pullman First Nat. Bank v. Gaddis*, 31 Wash. 596, 72 Pac. 460. *Merchants Bank v. Jeffries*, 21 W. Va., 504. *Bank v. Goolsby*, 129 Ark. 416, 196 S. W. 803). The rule is elementary that the officers of a bank are not permitted to make an individual profit by reason of transactions pertaining to the business of the bank; the

bank may avoid such transactions, and may hold the officer liable for any profits so made, notwithstanding they have acted in good faith. (*Morgan v. King*, 27 Colo. 539, 63 Pac. 416. *Bank v. Free*, [Mich. 1919] 171 N. W. 464. *Millsaps v. Chapman*, 76 Miss. 942. *Mt. Vernon Bank v. Porter*, 148 Mo. 176. *Leonhardt v. Citizens Bank*, 56 Neb. 38. See also *Gund v. Ballard*, 73 Neb. 547, 103 N. W. 309). In quite a number of jurisdictions it is a criminal offense to declare a dividend from other than profits. See *Cabaniss v. State*, 8 Ga. App. 129, 68 S. E. 849. Rev. Laws Minn., 1905, Ch. 58, Sec. 2884. (*Inquiry from Minn., Dec., 1920.*)

Criminal liability

Embezzlement by bank officer

633. The cashier of Bank A took his own note and that of several of his friends which he discounted with bank B and placed the proceeds to the credit of Bank A, bank B supposed that it was rediscounting the paper for bank A. The cashier then appropriated the credit so obtained to his own use. Would bank A be liable to bank B, and would the cashier of bank A be liable for embezzlement? *Opinion:* There seem to be no parallel reported cases. In the present case, however, the cashier of bank A fraudulently misrepresented that the notes were the property of bank A, caused them to be discounted by bank B, and he withdrew and misappropriated the credit therefor given to bank A. It appears, therefore, that the facts disclose a case of embezzlement. On the question of liability of bank A to bank B, it is generally held that the cashier has power to rediscount commercial paper, and in this case he had actually exercised the power with the knowledge of the Board of Directors. While the paper was not owned by bank A, the cashier so represented it, and his representation in the exercise of this function would probably bind the bank. Furthermore, the proceeds were placed to the credit of the bank. Under such circumstances it seems bank A would be liable for the money and the theft or embezzlement by the cashier was from bank A and not from bank B. (*Inquiry from Pa., Sept., 1914.*)

Unlawful overdraft by director

634. The director of a bank in pursuance of his oral order received from the bank certificates of deposit which were in excess of his account. A New Jersey statute makes it criminal for a director to overdraw

his account. *Opinion:* This transaction constituted a violation of the statute, for the director made an oral order which was virtually a draft upon his account in excess of his credit and received payment in the bank's negotiable certificates of deposit, which were the equivalent of money. Comp. Stat. N. J. 1910, Sec. 171. *State v. Stimson*, 24 N. J. L. 478. *Norton v. U. S.*, 205 Fed. 593. (*Inquiry from N. J., Oct., 1916, Jl.*)

Liability of bank for wrongful acts of officer

Fraudulent negotiation of notes

635. Without the knowledge of the directors of a bank, and as a part of a fraudulent transaction the cashier of the bank made up several notes secured by chattel mortgages all of which were on the same property and sold them in the name of the bank with an agreement, also in the name of the bank, to repurchase them at maturity. Can the bank be held liable on the agreement? *Opinion:* It would seem that the bank can be held liable for the act of the cashier in negotiating and agreeing to repurchase the described notes, which act was a fraud on the different purchasers. The bank would be liable on the ground that it received the proceeds of the notes (assuming that it did receive them) or, in any event under the general rule that a corporation is liable for torts committed by its servants or its agents precisely as a natural person. Phila., etc., R. R. v. Quigly, 21 How. 202. *Hindmay v. First Nat. Bank*, 112 Fed. 931. (*Inquiry from Mont., Feb., 1921.*)

Misappropriation of deposit by cashier

636. A bank submits a check payable to S. S. W., indorsed by him "Pay only to my account in the Bank of ———", bearing indorsement of said bank with guaranty of prior indorsement; also indorsed by the P. Bank, guaranteeing prior indorsements. It appears that this check was mailed to the cashier of the C. Bank, but that the latter did not deposit it to the credit of S. S. W., but applied it to his own use. The bank asks upon whom the liability rests. *Opinion:* It seems the C. Bank, having through its cashier received this check for deposit and the check having been collected upon the official indorsement of the C. Bank, the latter would be liable for the proceeds to S. S. W., the payee of the check. The indorsements throughout indicate that the check was received by and the proceeds

collected by the C. Bank. The fact that W., the cashier of that bank, applied the proceeds to his own use, would not, it seems, relieve the C. Bank from liability. The C. Bank is liable, just as it would be liable to any other depositor where an employee or agent has been guilty of misappropriation or diversion of funds. S. S. W. was a depositor in the C. Bank and the relation of debtor and creditor existed between them. (*Inquiry from W. Va., Jan., 1919.*)

Fraudulent bond of indemnity for duplicate stock certificate

637. The cashier of a bank without the authority, knowledge, or consent of the board of directors, executed a bond to indemnify a corporation against loss in issuing a duplicate certificate of stock. The cashier falsely represented that the original certificate of stock had been held by the bank as collateral and had been lost, but in fact, such original had never been in the bank's possession. *Opinion:* The cashier had no inherent power to execute such a bond, and his act being without actual authority and not within the scope of his implied powers did not bind the bank. *Knickerbocker v. Wilcox*, 83 Mich. 200, 47 N. W. 123. *Watson v. Bennett*, 12 Barb. (N. Y.) 196. (*Inquiry from W. Va., June, 1910, Jl.*)

Interlocking directorates

Director in national and state bank

638. A bank states that, in the town in which it is located there is a national bank and a state bank, and some of the stockholders have stock in each, and a director in the national wishes also to become a director in the state bank. The bank desires information relative thereto. *Opinion:* Sec. 8 of the Clayton Act passed October 15, 1914, prohibited a director from being in more than one national bank where either had capital and deposits exceeding \$5,000,000; also prohibited a director of a state bank having capital and deposits exceeding \$5,000,000 from being a director of any national bank; also a further provision applicable to cities of 200,000 or more prohibiting interlocking directorates. This Act was amended by Act approved May 15, 1916, which permitted a director of a national bank, who first procured the consent of the Federal Reserve Board, to be a director in not more than two other banks, either national or state. The above is the law. Applying it to the present case, the bank is not in a city of over 200,000, and it is pre-

sumed neither the national nor state bank have capital and deposits aggregating \$5,000,000. If so, there is nothing in Section 8 prohibiting the course desired to be pursued upon first applying for the consent of the Federal Reserve Board. (*Inquiry from Ill., May, 1917.*)

Director in national bank and trust company

639. A bank asks whether a national bank with capital, surplus and undivided profits of \$300,000, is prevented from having a director of a trust company located in the same city, serve on its board of directors. *Opinion:* In view of the fact that the bank is located in a city having less than 200,000 inhabitants, and the additional fact that the bank's deposits, capital, surplus and profits do not exceed the sum of \$5,000,000, your bank does not come within the prohibition specified in the Federal Interlocking Directorate Act of October 15, 1914 (as amended May 15, 1916 and May 26, 1920). There is, therefore, nothing to prevent the bank from having as a director, the director of a trust company located in the same city. (*Inquiry from Me., July, 1920.*)

Director of national bank in non-member state banks

640. The right of an officer and director of a national bank with resources exceeding five million dollars, located in a city of over two hundred thousand inhabitants, to be an officer and director in any number of non-member state banks, elsewhere located and none having resources equaling five million which right exists under the Clayton Act, is not restricted by the provisions of the Kern Act which are cumulative and additionally permit such officer, upon consent of the Federal Reserve Board, to be in not more than two other banks not in substantial competition, from which, but for the Kern proviso, he would be excluded. (*Inquiry from Minn., Nov., 1916, Jl.*)

Director of national bank as trustee of savings bank

641. A director of a national bank located in New York is eligible to become trustee of a savings bank in the same state, provided a majority of the board of trustees of the savings bank is not composed of directors of the national bank. N. Y. Banking Law, Secs. 267, 260. (*Inquiry from N. Y., Feb., 1919, Jl.*)

BANK OFFICERS, DIRECTORS AND EMPLOYEES— NATIONAL BANKS

Increase of directors

642. What is the method, and when may the number of directors in a national bank be increased? *Opinion:* Directors of national banks are elected by the stockholders. (U. S. Rev. St. Sec. 5144). While the statute provides that the minimum number of directors in a national bank shall be five, it fails to prescribe or limit the maximum number; such matter being regulated either by the articles of association or by the by-laws which the directors are empowered to adopt (U. S. Rev. St. Sec. 5145. Com. Nat. Bank v. Weinhard, 193 U. S. 243). As to the time of election, all elections after the first one, are to be held annually on such day in January as may be authorized by the articles of association. (U. S. Rev. St. Sec. 5149 [Sec. 9687 U. S. Comp. St.]. Rankin v. Tygard, 198 Fed. 795). Where the election is not held on the day designated by the articles of association, or the articles fail to fix such day, then the board of directors—or, in case of their failure to act, two-thirds of the stockholders—may designate any subsequent day for the election, thirty days' notice thereof having in all cases been given in a newspaper in the city, town or county where the association is located. There being no statutory inhibition of the increase in the number of directors, it would seem that, in the absence of a rule on the subject incorporated in the articles of association, the number of directors might be increased at the pleasure of the stockholders ad libitum. As to whether the meeting for the election of such additional directors would have to be held in January, or might be held at some other time of the year, to be fixed by the directors or stockholders, quære. (*Inquiry from N. J., Nov., 1916.*)

Eligibility of directors

Single or married women as directors

643. A bank is preparing its list for election of directors. It has several women who are holders of shares of stock, and desires to know if it is necessary to put their names on the list; also whether a woman can hold a directorship of a national bank? *Opinion:* A woman, whether married or unmarried, possessing the qualifications of directors required by U. S. Rev. Stat. Sec. 5146 (Act. Feb. 28, 1905, Ch. 1163, 33 St. L.

818), can hold directorship in a national bank provided that in case of a married woman the laws of the state do not prohibit or incapacitate her from owning stock. (Christopher v. Norvelle, 201 U. S. 216). Under the laws of Pennsylvania there is no such incapacity. (See Peter Adams Paper Co. v. Cassard, 206 Pa. St. 179.) (*Inquiry from Pa., Oct., 1920, Jl.*)

Cashier may but need not be a director

644. The cashier of a national bank need not but may be a director. U. S. Rev. Stat., Secs. 5236, 5145, 5150. (*Inquiry from Tex., Apr., 1915, Jl.*)

Powers and duties of officers

Cashier as real estate agent for customer

645. Is the acceptance of a commission by a cashier of a national bank for effecting the sale of real estate of a customer of the bank in violation of the banking law? *Opinion:* It is not unlawful for the cashier of a national bank to act as agent for one of the bank's customers in selling his real estate to another customer, and to receive a commission therefor. (*Inquiry from Colo., Apr., 1920, Jl.*)

President of national bank as bond broker

646. A national bank president acted as bond broker and in his personal capacity sold a bond to B and at the same time verbally promised B that the bank would take up the bond should B desire to cash it. B seeks to compel the bank to take up the bond. *Opinion:* A national bank has no power to act as broker in stocks and bonds, and its president who sells bonds in a personal capacity has no authority to bind bank by promise that bank will take up bonds thus sold. First Nat. Bk. of Allentown v. Hoch, 89 Pa. 324. Weckler v. First Nat. Bk., 42 Md. 581. Grow v. Cockrill, 63 Ark. 418. City Electric Co. v. First Nat. Bk., 65 Ark. 543. (*Inquiry from Ore., Jan., 1912, Jl.*)

Power to borrow money for use of bank

647. It is now well settled that the executive officers of national banks may legitimately in the usual course of banking business, and without special authority from their board of directors, rediscount

their own discounts or otherwise borrow money for the bank's use. It is likely that such officers would have like authority to bind the bank by an independent blanket guaranty of payment covering all the notes transferred, the notes themselves being indorsed without recourse. *Western Nat. Bk. v. Armstrong*, 152 U. S. 346. *Cherry v. City Nat. Bk.*, 144 Fed. 587, aff'd in 208 U. S. 541. *Auten v. U. S. Nat. Bk.*, 174 U. S. 125, 141. *Aldrich v. Chemical Nat. Bk.*, 176 U. S. 618, 627. *First Nat. Bk. of Huntington v. Arnold*, 156 Ind. 494. *Thomas v. City Nat. Bk. of Hastings*, 40 Neb. 501. (*Inquiry from Wash., Mar., 1913, Jl.*)

Power of vice-president to assign or satisfy mortgage

648. Can a vice-president of a national bank sign a satisfaction of a mortgage, or an assignment of a mortgage, or a warranty deed, on behalf of his bank? *Opinion:* Unless specifically authorized by by-law or resolution of the board of directors, the vice-president of a national bank has no implied or inherent power to assign or satisfy a mortgage, or execute a warranty deed on behalf of the bank. (*Western Nat. Bank v. Armstrong*, 152 U. S. 346. *Arbogast v. American Exch. Nat. Bank*, 125 Fed. 518. *Warner v. Penover*, 91 Fed. 587; *Monmouth First Nat. Bank v. Brooks*, 22 Ill. App. 238. *St. John's Nat. Bank v. Steel*, 135 Mich. 165. *Bank v. Bennett*, 159 Mo. App. 1, 139 S. W. 219. *Robertson v. Buffalo Nat. Bank*, 40 Neb. 235. *Hanson v. Heard*, 69 N. H. 190. *Ziegler v. Allentown First Nat. Bank*, 93 Pa. St. 393. *Nat. Bank v. Thomas*, 30 R. I. 294. See also *Peoples Bank v. National Bank*, 101 U. S. 181, and *Armstrong v. Chemical Nat. Bank*, 83 Fed. 556). (*Inquiry from Wis., Jan., 1921, Jl.*)

Duty to deface counterfeit money

649. The Federal law requires United States and national bank officers to deface counterfeit notes, but makes no similar requirement as to counterfeit coins. Some clearing house rules require defacement of both counterfeit coins and notes and such would seem the proper procedure for all banks, national and state. U. S. Comp. L. (1918), Secs. 6568, 10342. (*Inquiry from Iowa, Oct., 1916, Jl.*)

Eligibility of officers

President serving in army

650. A bank's president is serving in the army stationed in New York City. The

bank asks whether he can serve as such president while so serving; also asks if he fills out his unexpired term, he can be re-elected at the annual meeting in January. *Opinion:* There seems to be no legal objection so far as the Banking Law is concerned to the president of the bank holding his position in the bank while at the same time serving in the army stationed in New York City. There are many presidents of national banks who are inactive at the bank and still hold the office. There is nothing in the National Bank Act which would prevent the holding of this position and his re-election to this position on the next January as President if the Board of Directors so chooses. (*Inquiry from N. J., Oct., 1918.*)

Officer cannot act as proxy

651. A bank asks whether an officer of a bank is prohibited from acting as proxy. *Opinion:* The National Bank Act provides as follows: "In all elections of directors, and in deciding all questions at meetings of shareholders, each shareholder shall be entitled to one vote on each share of stock held by him. Shareholders may vote by proxies duly authorized in writing, but no officer, clerk, teller, or bookkeeper of such association shall act as proxy; and no shareholder whose liability is past due and unpaid shall be allowed to vote. (U. S. Rev. Stat. Sec. 5144 [U. S. Comp. Stat. 1913, Sec. 9682])." (*Inquiry from N. Y., Jan., 1919.*)

Loans to officers

Written application unnecessary

652. Is there any provision in either the Federal Reserve Act or the National Bank Act which requires a written application from an officer or director of a national bank when requesting loans from institutions with which they are connected either as officers or directors? *Opinion:* There is no provision in either the Federal Reserve Act or the National Bank Act which requires a written application from a director or officer of a national bank when requesting a loan from his institution. (See Sec. 22 Federal Reserve Act, as amended by Act September 26, 1918). (*Inquiry from N. J., March, 1919.*)

Criminal liability of officer for unauthorized loan to himself

653. A national bank requests an opinion as to criminal liability of its former president who borrowed money from the

banks on unsatisfactory security without the knowledge or consent of the board of directors resulting in loss to the bank. *Opinion:* The question is whether Section 5209 U. S. Rev. Stat's, which punishes embezzlement and willful misapplication, would make him criminally liable. The following authorities are pertinent: While bank officers who make loans or discounts in good faith and without fraud incur no

criminal liability, even though the transaction may be injudicious and unsafe, and may actually result in loss or damage to the bank (U. S. v. Youtsey, 91 Fed. 864. U. S. v. Harper, 33 Fed. 471) yet an officer who knowingly makes a loan for his own private gain is guilty of willful misapplication. Flickinger v. U. S., 150 U. S. 1. U. S. v. Fish, 24 Fed. 585. (*Inquiry from Fla., Oct., 1919.*)

BANKRUPTCY AND INSOLVENCY

Cross references—For insolvency of collecting bank, see Collection. For set-off in bankruptcy, see Set-off

Enforcement of secured and unsecured claims

Right of creditor of bankrupt to apply surplus of collateral on secured note upon second unsecured note

654. On June 30th, 1917, a bank loaned a manufacturing concern \$1,700 on a collateral demand note, with bonded warehouse receipt covering goods in storage. The company had financial trouble, as a result of which involuntary bankruptcy followed on January 2nd, 1918. The bank asks whether it can sell the security under the collateral note, which would amount to about \$600 more than the face thereof, and apply the balance upon an unsecured note of the company which is dated August 27th, 1917 and due February 27th, 1918. To further protect its interest should the bank on maturity of the note demand payment of the indorser, who is solvent, and bring suit to enforce the claim? *Opinion:* Under the Bankruptcy Law, the bank can hold the collateral for both notes. See *In re Searles*, 200 Fed. Rep. 893. It is stated by the bank that the collateral will more than satisfy its claim, but it would do no harm to further protect its interests, namely, demand payment on the second note at its maturity and notify the solvent indorser and thereby preserve recourse upon him as an additional security. (*Inquiry from Ill., Jan., 1918.*)

Proof by holder of secured claim under general assignment

655. A bank asks whether under a general assignment for the benefit of creditors, where there are both secured and unsecured claims, the holder of a secured claim must first realize upon and exhaust the security, and then present the

balance due on his claim for his distributive share of the unencumbered assets. *Opinion:* It seems that the question presented has not been passed upon by the Missouri courts, and what their attitude would be in view of the conflicting line of decisions, cannot be foreseen. According to the weight of authority, the creditor who has security may prove up his whole claim, undiminished by the value of the security or the amount realized thereon after the assignment, but where he realizes on his security before proving his claim, he must deduct the amount received and future dividends will be based on the claim at the time proven. In some jurisdictions the rule is that a creditor who holds collateral security must either surrender the collateral or first exhaust it, or have its value determined by the court and have his claim allowed only for the difference between the proceeds or the value of collateral and the amount of his claim. See 5 Corpus Juris, 1280. (*Inquiry from Mo., March, 1916.*)

Proving claim in bankruptcy on (1) secured and (2) guaranteed note

656. A bank holds a protested collateral note made by W, secured by bank stock. The note empowers the bank on non-performance to sell the collateral at public or private sale, without notice. The bank also holds another note made by W's wife, which he indorsed in connection with a guaranty of payment by a third party. W has been adjudicated a bankrupt. The bank asks how it should proceed in the premises. *Opinion:* As to the first note secured by bank stock collateral, if the same exceeds in value the amount of the note, it seems unnecessary to make any proof of claim. In *Yeatman v. Sav. Inst.*, 95 U. S. 764, it was held that the pledgee is entitled to the possession of the collateral notwithstanding a subsequent adjudication of bankruptcy and failure of the pledgee to appear and

prove his claim forfeits only his right to participate in the bankrupt's estate. There are other cases to the same effect. See also Sec. 57 of the Bankrupt Act. Concerning the note upon which the bankrupt is indorser, if payment has been refused by the maker and the liability of the indorser fixed and the guarantor fails to pay upon demand, the note should be proved as a claim against the indorser's estate. If the guarantor pays the note he would be subrogated to the bank's rights and entitled to make proof of claim. (*Inquiry from N. J., Dec., 1915.*)

Remedy against insolvent Nebraska corporation and officers

657. A Nebraska corporation with a paid-up capital of \$15,000, gave a note for \$2,500 to one bank and one for \$3,500 to another bank, the corporation having no other debts at that time. The company, through mismanagement and accidents, incurred debts which now greatly exceed its resources, and also the two-thirds limit placed on indebtedness for corporations under Nebraska law. Would creditors on above named notes have a prior right to the assets in the proportion that the total of said notes (\$6,000) bore to the two-thirds limit placed on corporation indebtedness which would be \$9,000? Would the fact that the officers of said corporation permitted the company to become indebted in excess of the two-thirds limit set by law, make the officers and stockholders liable, inasmuch as the violation of this law operated to remove the protection which creditors should have had? *Opinion:* Where a Nebraska corporation incurs indebtedness beyond the statutory limit and becomes insolvent because of mismanagement, creditors to whom indebtedness was first incurred are not preferred, but there is probably a common law liability of officers and directors for mismanagement, enforceable at suit of a receiver, and there is also a statutory liability of stockholders, to the extent of their stockholdings, in event of failure of the corporation to publish the required annual notice of indebtedness, and a further statutory liability of officers and directors for any deception practiced, to any person injured thereby, for double the damages sustained. Rev. St. Neb., 1913, Art 11, Par. 569, Sec. 21. Ibid. Par 577, Sec. 29. Ibid. Sec. 33. First Nat. Bank v. Cooper, 89 Neb. 632. (*Inquiry from Neb., March, 1920, Jl.*)

Status of claim of copartner against bankrupt partner

658. A and B were partners in business. Finally B's estate was thrown into bankruptcy, at which time A held B's checks and drafts to the extent of about \$30,000. The bank asks whether A is obliged to wait until all creditors of B are paid before sharing in his estate. *Opinion:* It seems that A, being a partner of B, could not make claim against B's estate in advance of satisfaction of claims of all other creditors. It is stated that B carried on the local transactions in his individual name, incurring debts upon paper made by B individually. Assuming there is sufficient evidence to constitute a partnership transaction, the firm name may be the individual name of any partner. Theilen v. Hann, 27 Kan. 778. Rochester Bank v. Monteath, 1 Den. (N. Y.) 402. (*Inquiry from Ore., Sept., 1920.*)

Discharge as bar to unlisted claim

659. A bankrupt owing a bank on a claim intentionally omitted to list the bank as a creditor in his schedules, because he intended to pay the claim. He obtained his discharge and now refuses to pay the claim. *Opinion:* The bank can recover the full amount of its claim against the bankrupt, provided it had no notice or knowledge of the bankruptcy proceedings prior to the discharge. National Bankruptcy Law, 1898, Secs. 17, 65, 15. Birkett v. Columbia Bk., 195 U. S. 345. Heim v. Chapman, 171 Mass. 347. Webster v. City Steel Radiator Co. v. Chamberlin, 115 N. W. (Iowa) 504. (*Inquiry from Miss., March, 1911, Jl.*)

Property inherited after adjudication

660. Where a bankrupt inherits property after the adjudication of his bankruptcy, the creditors have no claim against such after acquired property. National Bankruptcy Act, Sec. 70. Conley v. Nelin, 128 S. W. 425. In re Woods, 133 Fed. (Pa.) 82. (*Inquiry from N. Y., March, 1912, Jl.*)

Status of innocent purchaser of negotiable paper transferred by bankrupt

661. A bankrupt's estate, from the date of filing of petition against him, being in custody of the court, the bankrupt is without power to thereafter transfer same and such filing being notice to all the world that the bankrupt's power of disposal is at an end, it has been held that the innocent pur-

chaser of negotiable paper, transferred by the bankrupt after filing of the petition is not a bona fide holder, but is charged with constructive notice. But this rule is not firmly established, and in view of the inequity and impolicy of charging innocent purchasers of negotiable paper with constructive notice in such cases, it is fair to assume that future courts will create an exception of innocent purchasers of negotiable paper from the doctrine of constructive notice because of the filing of a petition in bankruptcy against a prior transferor, as has already been done in protection of bank which has innocently paid its customer's check in ignorance of prior filing of petition in bankruptcy against such customer. *Acme Harvester Co. v. Beekman Lumber Co.*, 222 U. S. 300. *In re Duncan*, 148 Fed. 464. *In re Lake*, Fed. Cas. No. 7992. *In re Zotti*, 186 Fed. 84. *Watson, Trustee v. European American Bk.*, 32 Sup. Ct. Rep. 522. *Lord v. Seymour* 83 N. Y. S. 88, aff'd in 177 N. Y. 525. (*Inquiry from Ill.*, Oct., 1918, *Jl.*)

Preferences

Substitution of mortgage collateral within four months not a preference

662. A note secured by a real estate mortgage was past due, although part payment had been made by a sale of a part of the mortgaged premises. The mortgagee desires a new note, secured not only by a new mortgage on the premises covered by the old mortgage, but also by additional new security. In case of the mortgagor's bankruptcy within four months of the renewal the mortgagee questions the right of the creditors to the mortgaged property. *Opinion*: Substitution of new mortgage within four months on same property covered by old mortgage would not be a preference, but taking of additional security would be a preference to extent of such security. National Bankruptcy Act, Sec. 60 b. *Citizens Nat. Bk. v. Bruce*, 109 Fed. 69. *Neill v. Barbaree*, 70 S. E. (Ga.) 638. *Sawyer v. Turpin*, 91 U. S. 114, 120. *In re Reese v. Hammond Fire Brick Co.*, 181 Fed. 641. *St. Bk. of Williamson v. Fish*, 120 N. Y. S. 365. (*Inquiry from Ala.*, Oct., 1912, *Jl.*)

Renewal of collateral note and increase of loan within four months

663. A bank holds notes with collateral which it renews from time to time for 60 and 90 days. The bank asks (1) whether bankruptcy would imperil collateral because current notes bear dates less than four

months prior thereto; and (2) would an increase in the amount of a loan of this nature in less than four months bar its being a preferred claim on collateral? *Opinion*: It does not seem there would be any voidable preference in the transaction described. The collateral being pledged more than four months prior to the bankruptcy of the pledgor the fact that he renewed the notes within four months would not be the creation of any preference. It is not as if the indebtedness was created beyond the four months and collateral pledged therefor within the four months. Furthermore, if the amount of loan secured by this collateral was increased within the four months, this would be simply the giving of so much new or present consideration by the bank, secured by collateral. There appears to be nothing which would imperil the collateral, because of preference, either in the renewing of the notes within the four months or increasing the loan within that period. (*Inquiry from Miss.*, Nov., 1912.)

Substitution within four months for previously surrendered collateral

664. More than four months prior to the bankruptcy of a firm a bank loaned money to said firm on pledge of collateral. Within the four months the bank released the collateral on the promise of the firm to substitute farmers' notes later. The farmers' notes were afterwards substituted for most of the loan and the balance was paid by check. A month later the firm was forced into bankruptcy, but the bank had had no reason to believe that the firm was not entirely solvent. The question was raised whether the settlement of the loan by the firm by substituted collateral and check constituted a preference. *Opinion*: While a substitution of new collateral within the four months in exchange for collateral of equal value relinquished at the same time would not be a preference, it is doubtful whether it would be so held where new collateral was afterwards substituted for most of the loan pursuant to a prior promise, the balance being paid by check. *In re Reese v. Hammond Fire Brick Co.*, 181 Fed. 641. *Sawyer v. Turpin*, 91 U. S. 114. *In re Dismal Swamp Cont. Co.*, 135 Fed. 415. (*Inquiry from Okla.*, Oct., 1911, *Jl.*)

Payment of note by insolvent within four months

665. A bank holds a note of a maker who has no account with the bank. The maker

paid it in full, at which time he was insolvent. The bank asks whether the trustee in bankruptcy can compel the bank to return the money received in payment of note; and also asks what would constitute knowledge of insolvency. *Opinion:* In the case stated, where the insolvent pays the bank in full the amount of a note which he owes within four months of bankruptcy, the bank's liability to refund would depend upon whether, at the time of receiving payment, the bank had reasonable cause to believe that a preference was intended. The following recent cases are cited wherein the question as to what constitutes reasonable cause, has been dealt with. *Healy v. Wehrung*, 229 Fed. 686. *Rosenthal v. Bronx Nat. Bk.*, 231 Fed. 691. *Grandison v. Robertson*, 231 Fed. 785. (*Inquiry from Ohio, June, 1917.*)

Fraud of insolvent bank in incurring debt as ground for preference

666. On April 30, 1913, Bank A was taken in charge by the public examiner of the state. Prior to said date Bank A had procured from the inquiring bank several loans for which it placed various notes as collateral to secure the indebtedness. After the bank examiner had taken charge, it was discovered that some of the collateral so given was forged, or that there were no such persons as the purported makers in existence. The loans were made in reliance on the truth of representations made by the president of the defunct bank that the collateral given was a valid and legal obligation of the makers thereof. The bank asks if, under the circumstances, it is entitled to a preference. *Opinion:* It is doubtful whether, under the facts stated, the bank would be held entitled to a preference on the ground that the insolvent bank was a trustee of the money fraudulently obtained. Fraud would ordinarily entitle the lending bank to immediately cancel the loan and reclaim its money and if the money could be traced into the assets of the bank and it could be shown that the assets, increased thereby, went into the hands of the public examiner, it might be possible to maintain a claim in full; but otherwise not. See Decision in *Stilson v. First St. Bk. of C.*, 129 N. W. (Iowa) 70, for statement of the law and citation of authorities on this point. (*Inquiry from S. D., June, 1914.*)

Assignment "for present consideration"

667. W. Construction Co. has a contract

with a railroad to erect an office building. The W. C. Co. procured a loan from N. Bank to which it gave an assignment of moneys to be paid by the railroad and the same was accepted by the railroad. For several months the railroad paid to the bank the amounts due to the construction company, thereby liquidating the loan then due to the bank. A few days after a monthly payment had been made to the bank by the railroad the contractor went into bankruptcy which payment was applied as a credit on the loan due the bank by the contractor. The bank asks whether the receiver in bankruptcy can force it to return the last payment made to it for the benefit of the sub-contractors, some of whom have not been paid. *Opinion:* Under the authorities, there would seem to be no preference involved in the transaction. The bank loaned the construction company a sum of money, and for its own protection and security took an assignment of moneys due and to become due to said company from the A. R. R. Co. This assignment was made "for present consideration" and does not, therefore, come within the inhibition of preferences in the Bankruptcy Act. (*Inquiry from Va., Oct., 1915.*)

Transfer of securities within four months as preference

668. A debtor gave security for a past due note within four months of his bankruptcy. Is the transfer voidable? *Opinion:* The transfer of securities within four months of bankruptcy to secure a past due note would be a voidable preference, provided the creditor had reasonable grounds to believe that a preference was intended. *Aronin v. Security Bank of New York*, 228 Fed. 888. *English v. Ross*, 140 Fed. 630. *In re Graham*, 6 Am. Bankr. Rep. 750. If, however, the bank did not know of the insolvency and had no reasonable cause to believe that a preference was intended; that is, if it received the securities under circumstances which would not naturally cause an ordinary person to believe that the debtor intended to give a preference; then it would seem that the bank could retain the securities. *In re Block*, 142 Fed. 674, 15 Am. Bankr. Rep. 750. *Off v. Halses*, 142 Fed. 364, 15 Am. Bankr. Rep. 699. *Hastings v. Fithrain*, 13 Am. Bankr. Rep. 676. (*Inquiry from Kan., March, 1921.*)

Mortgage notes assigned "for present consideration"—Surplus payable to trustee

669. A bank holds mortgage notes on

real estate transferred to it as collateral security within four months of bankruptcy for a present consideration, the collateral being pledged at the time notes were given. The bank asks whether it can be compelled to bring them to hotchpot, and if not, does the law compel sale of collateral when notes are due, and the balance paid into general fund for creditors. *Opinion:* Under the stated case the transfer would not constitute a preference. See Sec. 67-d of the Bankrupt Act. Concerning the further question, 57-h provides that "The value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors or by such creditors and the trustee, by agreement, arbitration, compromise or litigation as the court shall direct, and the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance." Assuming the value of the mortgaged security is in excess of the amount due the bank, the balance upon sale would have to be paid over to the trustee. (*Inquiry from Miss., May, 1912.*)

*Payment (by assignment of accounts)
within four months of bankruptcy*

670. One of bank's customers paid his note to it by assignment of good accounts, and within four months thereafter the customer's creditors forced him into bankruptcy. The bank inquires whether it can be compelled to refund the money as a preferential payment. *Opinion:* In the case submitted, the payment or assignment of the account was made within four months of the bankruptcy. If the customer was insolvent at the time it was made and if the facts are such as to indicate that there was reasonable cause to believe the payment would result in the bank receiving more than other creditors, the trustee in bankruptcy might be able to compel the bank to refund the amount. But if the customer was not insolvent at the time or if there was no reasonable cause to believe a preference would result, the assignment of the accounts would not be a preferential transfer. The case depends largely upon the particular facts. (*Inquiry from Neb., Sept., 1917.*)

Mortgage within four months as preference

671. A mortgage was put on record January 7th, 1921. Default was made in February upon one of the notes, secured

by the mortgage which, by the terms of the mortgage, gives the right to foreclose. The mortgagor is indebted to other persons and the mortgagee is advised that if the mortgage is foreclosed, he will go into bankruptcy. Is the mortgagee safe in foreclosing under these circumstances? *Opinion:* A mortgage given for a prior indebtedness within four months of bankruptcy is a voidable preference. It would be better to wait for four months from the time the mortgage was recorded before taking steps to foreclose. Then if bankruptcy does not intervene, the bank is secure. (*Inquiry from N. C., Feb., 1921.*)

*Collateral previously received but collected
within four months of bankruptcy*

672. A bank received a number of notes as collateral upon a loan due December 1, 1910. The notes were collected and applied on the indebtedness on January 5, 1911. The borrower became a bankrupt April 28, 1911. *Opinion:* The assignment of the notes as collateral more than four months prior to the bankruptcy was not a preference, although the notes were not collected until within the four months. *Lowell v. Internat. Tr. Co.*, 158 Fed. 781. *In re Bird*, 180 Fed. 229. National Bankruptcy Law, 1898, Sec. 57 h. (*Inquiry from Idaho, Oct., 1911, Jl.*)

When judgment a preference

673. A judgment obtained more than four months prior to the filing of a petition in bankruptcy is a valid and enforceable lien against the bankrupt's estate, but when obtained within four months, it is void where the debtor is adjudged bankrupt. National Bankruptcy Law, 1898, Sec. 67 f. *In re Burrus*, 97 Fed. 926. *In re Richards*, 96 Fed. 935. *U. S. Fidelity, etc., Co. v. Murphy*, 4 Ga. App. 13. *Metterford v. Helming*, 139 Iowa 437. *Smith v. Musenheimer*, 104 Ky. 753. *Kinmouth v. Braeutigam*, 65 N. J. L. 165. *Hillyer v. Le Roy*, 179 N. Y. 369. *In re Dunavant*, 96 Fed. 542. *Metcalf v. Barker*, 167 U. S. 165. (*Inquiry from N. J., May, 1918, Jl.*)

Depositories for estates in bankruptcy

674. National Bankruptcy Law does not restrict deposits of money of bankrupt estates to national banks and the courts of bankruptcy may designate, by order, state banks as depositories. National Bankruptcy Law, 1898, Sec. 61. (*Inquiry from N. C., Feb., 1911, Jl.*)

BANK STOCK AND STOCKHOLDERS

Assessment upon impairment of capital

Liability of transferee after assessment

675. A bank states that some time ago its stockholders were assessed to make up a loss occasioned by non-payment of some notes. Directly after the assessment and before it had been paid by all the stockholders, one of them sold his stock. The bank asks who is liable, whether the person who owned the stock at the time of the assessment or the purchaser of the stock. *Opinion:* Under the law, the person who owned the stock at the time the debt was incurred and at the time the assessment was levied, is liable therefor, and not his transferee. See *Golden v. Cervenka*, 116 N. E., Rep. (Ill.) 273, upon the general proposition. (*Inquiry from Ill., Jan., 1919.*)

Power of majority to assess minority for losses

676. Can bank stockholders representing 51% of the total holdings vote to assess all stockholders in order to take care of losses incurred through robbery? *Opinion:* There is no statute in Iowa giving such right. There is, however, an Iowa statute which provides that, should the capital stock of any state or savings bank become impaired by losses or otherwise, the Auditor of the State may require an assessment upon the stockholders, and shall address an order to the several members of the board of directors of such bank, fixing the amount of the assessment required; and it then becomes the duty of such directors to cause such deficiency to be made good by a ratable assessment upon the stockholders for the amount of stock held by them. (Code of Iowa, 1897, Chap. 12, Sec. 1878.) (*Inquiry from Iowa, Nov., 1919.*)

Assessment where stock in hands of pledgee

677. X, a stockholder owning ten shares in bank Y, in North Dakota, procured a loan from an Iowa concern giving as collateral the ten shares of Y bank stock. Later the Y bank met with reverses making necessary an assessment on all stock 100%, and if not paid within a specified time the stock to be advertised and sold. X was unable to pay assessment, nor was he able to pay his note for which he had given his bank stock as collateral. However, the bank officers neglected to sell this stock although two years have expired, and neither the assess-

ment nor the note has been paid. Who has prior lien on this stock? *Opinion:* It seems that the assessment on the stock constitutes a debt by the owner to the bank, and the bank by statute has a prior lien on such stock for the indebtedness. Although the assessment was not levied at the time the stock was pledged it would, it appears, attach to the stock in the hands of the pledgee and the bank would have the right to appropriate all dividends declared upon such stock to such indebtedness. (Compiled Laws N. D. 1913, Chap. 5160). Concerning enforcement of the bank's lien, the stock being outstanding in the hands of the pledgee, probably the proper procedure would be an action in equity against the registered owner and the pledgee to procure a decree for surrender of the stock and settlement of the rights and liabilities of the parties. While the pledgee is not legally bound to pay the assessment, he holds subject to the paramount lien of the bank. See *Corbin Banking Co. v. Mitchell*, 132 S. W. (Ky.) 426, where the court said: "If the pledgee does not want to pay the assessment, he ought not to be allowed to hold the stock and have its value increased by the payments made by shareholders other than the pledgor. If he wishes to enjoy the advantage of the increased value of the stock, he ought to, contribute his share to the fund that increases its value. This he can do through the shareholder and as between him and the shareholder, will have a lien on the stock to indemnify him for the amount paid." (*Inquiry from N. D., Jan., 1920.*)

Double liability of stockholders for debts

No double liability in Arkansas prior to new banking law

678. A person called at an Iowa bank and presented a sight draft drawn on an Arkansas bank, for which he asked credit. Before giving him credit the bank wired the Arkansas bank, and received a reply that draft was good, on the faith of which the person was given credit for part and cash for the balance. Later the Iowa bank learned that the Arkansas bank was in the hands of a receiver, but before such discovery, the person had withdrawn all money to his credit and disappeared. The Iowa bank asks if the stockholders of the insolvent bank are liable for the loss.

Opinion: The Arkansas bank would be liable to inquiring bank for its agreement by wire to accept and pay the draft. *Oil Well Supply Co. v. MacMurphy* (Minn. 1912), 138 N. W. Rep. 784. Concerning the question of stockholders liability for debts of the bank, at common law they were not liable. By the constitution of Arkansas of 1869, each stockholder was made liable, over and above the stock owned by him, to a further sum at least equal in amount to such stock. But the constitution of 1873, which superseded the constitution of 1868, contains no such provision, and there is no statute in Arkansas which imposes a liability upon stockholders of a corporation for its debts, except a statute that, where the capital of a corporation has been withdrawn and refunded to the stockholders before the payment of all debts, the stockholders are liable to any creditor to the amount refunded to them respectively. See Sand. & Hill's Dig., Ark. Stat., Chap. 47, Sec. 1348. There has been a recent banking law passed the present year which provides such double liability of stockholders, but it is assumed the transaction in the present case took place before the passage of this act. At the time of the transaction in question, therefore, there was no stockholders' liability for debts of the bank which renders unnecessary consideration of the further question, if such liability existed, whether the creditors or only the receiver could sue the stockholders. (*Inquiry from Iowa, March, 1913.*)

Double liability in Arkansas

679. What is the stockholders' liability in case of the bank's insolvency? *Opinion:* Section 36 of the new Arkansas Banking Act provides that "the stockholders of every bank doing business in this state shall be held individually responsible, equally and ratably and not one for another, for all contracts, debts and engagements of such bank, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such stock" * * *. This measures the extent of the liability of the stockholders. (*Inquiry from Ark., Aug., 1916.*)

Double liability in Mississippi

680. A became the owner of certain fully paid non-assessable stock issued by a Mississippi bank at a time when the law provided for no double liability of stockholders. Under the Mississippi Banking

Act of March, 1914, A has been assessed equal to the par value of his stock. *Opinion:* A's stock is subject to the assessment. Although the law under which the bank was organized provides no double liability of stockholders, the legislature may amend the law and create such liability where the state constitution, as in Mississippi, reserves power to the legislature to amend the law of incorporation. Constitution of Miss., Art. 7, Sec. 178. Miss. Banking Act, March, 1914, p. 135. (*Inquiry from Miss., Aug., 1916, Jl.*)

Law of Oregon as to double liability

681. Are the stockholders in Oregon banks subjected to double liability? *Opinion:* Stockholders of trust companies in Oregon are by statute subjected to double liability. General Laws of Oregon, 1920, Sec. 6261. A definition of a trust company is found in Sec. 6227. A search does not reveal any statutory provision in Oregon for double liability of stockholders of state banks, and, of course, in the absence of such statute there is no such liability. (*Inquiry from Wis., Feb., 1921.*)

Double liability in Pennsylvania

682. A trust company asks whether the laws of Pennsylvania impose a double liability on stockholders in case of failure. *Opinion:* By Act of May 11th, 1874, Section 1, the Pennsylvania legislature imposed a liability on all stockholders in banks, banking companies, savings fund institutions, trust companies and all other incorporated companies doing the business of banks for all debts and deposits to double the amount of capital and stock held and owned by each. There was a proviso that, in case of banks already chartered, the liability should not accrue until the stockholders should declare at a meeting their intention to be bound by its provisions. Furthermore, the Banking Act of 1876 for the incorporation and regulation of banks of discount and deposit, provides (Sec. 5) that the shareholders of any corporation formed under this Act shall be individually responsible, equally and ratably, but not one for the other, for all contracts, debts and engagements of such company to the amount of their stock therein and the par value thereof in addition to the par value of such shares. (*Inquiry from Pa., Dec., 1914.*)

Double liability in Washington

683. Is the stock of a state bank of Washington assessable again after being

assessed up to the full amount of 100%? *Opinion:* Section 3327 of the Washington Code provides that stockholders of every bank shall be individually liable, equally and ratably and not one for another, to the amount of their stock at par value thereof, in addition to the stock held by them. See also Section 4266. Under this provision where a stockholder has paid up his stock in full and has been assessed up to the full amount of 100% in addition, he is not liable to further assessment. (*Inquiry from Wash., March, 1920.*)

Double liability of national bank stockholders

Meaning of "in addition to the amount invested in such stock"

684. Section 23 of the Federal Reserve Act provides in part: "The stockholders of every national banking association shall be held individually responsible for all contracts, debts and engagements of such association, each to the amount of his stock therein, at the par value thereof *in addition to the amount invested in such stock.*" The question is raised as to the meaning of the underscored phrase; whether it means the price that is paid for the stock in the open market. *Opinion:* In event of failure, stockholder loses the amount invested in the stock and in addition is liable for debts, pro rata with other stockholders, up to the amount of the par value of his stock. If the stockholder has bought stock in an open market above par and thereafter the national bank goes into the hands of a receiver, he loses the amount invested in such stock, namely, the market price paid for it, and is also liable to assessment to the extent of the amount of his stock at the par value thereof. Fed. Reserve Act, Sec. 23. U. S. Rev. Stat., Sec. 5151. U. S. v. Knox, 102 U. S. 422. Studebaker v. Perry, 184 U. S. 258. Kennedy v. Gibson, 8 Wall (U. S.) 498. Deweese v. Smith, 106 Fed. 438 Aldrich v. Yates, 95 Fed. 78. (*Inquiry from N. J., March, 1919, Jl.*)

Liability of stockholder who receives for debt

685. A national bank held stock of the B national bank as security for a loan and bid in the stock, having it transferred to its own name upon the books of the B bank. Thereafter B bank failed and A bank is charged with payment of the statutory assessment of 100 per cent. *Opinion:* The A bank is liable for the assessment. The

fact that it became owner of the stock by necessity and not by choice would not change the result. Germania Nat. Bk. v. Case, 99 U. S. 628. Anderson v. Phila. Warehouse Co., 111 U. S. 479. Pauly v. St. Loan & Tr. Co., 165 U. S. 606. Rankin v. Fidelity Ins., Tr. & S. D. Co., 189 U. S. 242. Ohio Valley Nat. Bk. v. Hulett, 204 U. S. 162. (*Inquiry from Utah, Feb., 1919, Jl.*)

Liability of stockholder after transfer

686. A sold B in good faith ten shares of his stock in a national bank. Within one year after the sale the bank failed. The question was raised whether A was subject to liability. *Opinion:* If the transfer was made in good faith and was properly registered on the books, the transferor was not liable to assessment when the bank subsequently failed, even though the bank was insolvent at the time of the transfer. Richmond v. Irons, 121 U. S. 127. McDonald v. Dewey, 202 U. S. 510. Fowler v. Crouse, 175 Fed. 646. Earle v. Carson, 188 U. S. 42. Stuart v. Hayden, 169 U. S. 1. Whitney v. Butler, 118 U. S. 655. Bowden v. Johnson, 107 U. S. 251 Nat. Bk. v. Case, 99 U. S. 628. (*Inquiry from N. D., Aug., 1911, Jl.*)

Dividends

Stockholders transferring stock after declaration, entitled to dividend

687. After a dividend was declared and became payable, the stock was transferred to a holder without any agreement as to the dividend. *Opinion:* The dividend belongs to the owner of the stock at the time it was declared and does not pass with a subsequent transfer of the stock unless by express contract. Clark v. Campbell, 23 Utah 569. Livingston Co. Bk. v. First St. Bk., 121 S. W. (Ky.) 451. Price v. Morning Star Min. Co., 83 Mo. App. 470. (*Inquiry from Neb., July, 1912, Jl.*)

Assignment of dividends—Right of assignee

688. A has four share of stock in his bank standing in his name. He owes a national bank which is now in the hands of a receiver, and had assigned dividends on his stock to this bank. A writes the bank which issued the stock to send dividends to him, and the receiver of the national bank also claims that he is entitled thereto under the assignment, the debt to the insolvent bank being still unpaid. To whom can the bank legally pay the dividends

Opinion: It would seem from the statement made that the receiver is entitled to the dividends under the assignment until the debt is paid. As the bank's stockholder has assigned these dividends and the debt is not fully paid, there appears to be no ground on which he can make claim thereto. He certainly has no right to cancel the assignment. It may be there is some dispute between the parties as to whether or not the debt has been fully paid. Of course, if there is any reasonable doubt upon this point, the bank to protect itself could deposit the money in court and require the respective claimants to interplead. (*Inquiry from N. C., July, 1918.*)

*Proving claim on dividend check of
failed national bank*

689. A bank acquired by indorsement a dividend check drawn by a national bank payable to one of its stockholders. Before the check was presented the national bank failed, and the receiver takes the position that the claim on the dividend check must be made by the original stockholder-payee, and no assignment of the check can be recognized because such stockholder may be liable to assessment on his stock. The bank holding the check seeks to file a proof of claim. *Opinion:* The indorsee for value of the check, acquiring the same before the failure of the bank, has a right to prove its claim thereon against the receiver free from counterclaim by the receiver against the original payee for assessment on stock. The position taken by the receiver ignores the fact that such dividend check is a negotiable instrument. If the receiver disallows the claim the bank's remedy is by action to establish claim by judgment. *First Nat. Bk. of Bethel v. Nat. Pahquique Bk.*, 14 Wall. 383. U. S. Rev. Stat., Secs. 5204, 5242. *McDonald v. Williams*, 174 U. S. 397. *McDonald v. Chemical Nat. Bk.*, 174 U. S. 610. (*Inquiry from Fla., Oct., 1917, Jl.*)

Stock dividends by national banks

690. May national banks issue stock dividends? *Opinion:* Acting Attorney-General Frierson rendered an opinion to the Secretary of the treasury Oct. 26, 1920, to the effect that national banks may not declare stock dividends. The following is a digest of this opinion. The right must be determined by an examination of the acts of

Congress providing for the organization and regulation of the business of national banks. There is no express authority to declare stock dividends, although there is express authority to declare dividends. Rev. St. 5199. "Since, however, a stock dividend cannot be declared without increasing the capital stock, and since the Acts of Congress contain explicit provisions as to the manner in which the capital stock may be increased, a stock dividend cannot be lawful unless the stock so issued may be provided for through an increase of the capital in accordance with the terms of these provisions." U. S. Rev. St. Sec. 5142 and amendatory act of May 1, 1866 provide that no increase of capital stock shall be valid unless the amount "has been duly paid in as part of the capital of such association." This is coupled with an express prohibition against the increase of capital in any other manner. The issuance of a stock dividend, it has been held, does not make the stockholder richer or the corporation poorer. It simply changed the evidence of the stockholder's title of what he already owns. *Towne v. Eisner*, 245 U. S. 418, 426, *Eisner v. Macomber* 252 U. S. 189. It would seem, therefore, that the mere conversion by a corporation of earnings which it already owns into capital stock, thus keeping in its business permanently what it previously was at liberty to distribute among stockholders, is not equivalent to paying in an equal amount of money as a part of the capital of the corporation. No part of it is paid into the corporation. The result of declaring a stock dividend may not be different from the result accomplished by declaring a cash dividend, which is used by the stockholders to pay for additional stock, but Congress has expressed an intention that it shall be done in the one way and not the other. A good reason which may have moved Congress to make the distinction is the effect of the double liability of stockholders; it may very well have been considered unwise to permit two-thirds of the stockholders to increase this liability of the minority by increasing the capital stock through the issuance of stock dividends. The uniform construction of the statutes by the comptrollers of the currency to the effect that stock dividends could not be declared would be sufficient to decide the question, were it doubtful. (*Inquiry from Ohio, Dec., 1920, Jl.*)

Lien on bank stock by state banks*Lien of Arkansas bank for stockholder's indebtedness*

691. The stockholder of an Arkansas bank owed his bank on an overdraft but had transferred to another his stock, upon which the bank claimed a statutory lien. After the stockholder died the bank transferred the stock to the purchaser but applied part of the dividends to payment of the overdraft and paid the balance of the dividends to the decedent's administrator. *Opinion:* By statute in Arkansas a bank has a lien on the stock and dividends of its stockholder for an indebtedness to the bank, superior to the claim of the transferee. The transferee, however, can recover from the bank the balance of dividends paid to the administrator in view of the due notice to the bank of the transfer of the stock. Dig. Ark. Stat. (1904), Chap. 31, Sec. 853. (Mansf. Dig. 1884, Chap. 29, Sec. 975.) *Oliphant v. Bk. of Commerce*, 60 Ark. 198. *McIlroy Banking Co. v. Dickson*, 66 Ark. 327, 331. *Springfield Wagon Co. v. Bk. of Batesville*, 68 Ark. 234. (*Inquiry from Ark., March, 1913, Jl.*)

Lien of Iowa savings bank on stock

692. A bank desires to know whether or not the stock of a savings bank in Iowa in the hands of a pledgee as security for a loan is subject to any claim of lien by the issuing bank. *Opinion:* At common law a corporation has no lien upon its stock for the indebtedness of a shareholder, but in many states a corporation is given a lien by statutory authority, either expressed by general law, or by the act of incorporation, or by by-laws made under such authority. (*Union Bank v. Laird*, 2 Wheat. [U. S.] 390. *Brent v. Bank of Washington*, 10 Pet. [U. S.] 596. *McDowell v. Bank of Wilmington*, 2 Del. 1. *Cummings v. Webster*, 43 Me. 192. *Leggett v. Bank of Sing Sing*, 24 N. Y. 283. *Steamship Dock Co. v. Geron*, 52 Pa. St. 280.) In Iowa, while the statutes do not expressly give to a corporation a lien upon its stock for indebtedness of a stockholder, such lien may be created by the articles of incorporation, or even by the by-laws, although in the latter case, such lien does not affect a third person without notice. Before loaning money on such stock, the prospective lender should make investigation as to the existence of a lien, and whether the stockholder is indebted, and upon making the loan, should notify the

corporation of the transfer for collateral security. *Dempster Mfg. Co. v. Downs*, 126 Iowa 80, 101 N. W. 735. *Jewell v. Nuhn*, 173 Iowa 112, 155 N. W. 174. *Des Moines Nat. Bank v. Warren County Bank*, 97 Iowa 204. *Farmers' & Traders' Bank v. Haney*, 87 Iowa, 101. Iowa Code 1897. Sec. 1626. (*Inquiry from Minn., Feb., 1920, Jl.*)

Enforcement of lien of Kansas bank and rights as against pledgee

693. One of the stockholders of a bank is indebted to it on a note and it becomes necessary for the bank to enforce the lien on his stock, but he has thus far refused to deliver same. The bank inquires whether an order can be procured from a court directing the cancellation of the present stock and issuance of a new certificate. Further, whether the fact that the certificate is held as collateral by a third party is an obstacle, and would it matter whether the stock was pledged before the creation of indebtedness to the bank. *Opinion:* The Kansas statute provides that no transfer of the stock of an incorporated bank shall be valid against such bank as long as the registered holder thereof shall be liable as principal debtor, surety or otherwise to the bank for any debt which shall be due and unpaid, nor in such case shall any dividend, interest or profit be paid on such stock so long as such liabilities continue; but all such dividends, interests or profits shall be retained by the bank and applied to the discharge of such liabilities, and no such stock shall be transferred on the books of any bank without the consent of the board of directors, where the registered holder thereof is in debt to the bank for any matured and unpaid obligation. (Kans. Laws 1897, Chap. 47 Sec. 52 [Genl. St. 1901, Sec. 458] Gen. St. 1915, Sec. 570). It would seem that the statute above referred to would give the bank ample protection. The statutory lien takes priority of other liens subsequently created by pledge of the stock and even though the stock was pledged before creation of indebtedness to the bank, the bank's lien is superior in the absence of notice thereof. Where a pledgee claims his lien is superior, the burden of proving notice to the bank is upon him. *Curtice v. Crawford Co. Bank*, 110 Fed. 830. If the bank desires immediate collection of the note it may enforce the lien by appropriate proceedings. (*Inquiry from Kan., Feb., 1920.*)

694. The Kansas Banking Law protects a bank against a transfer of bank stock so long as the registered holder is indebted to the bank, and provides that all dividends, interest or profit shall be retained by the bank and applied to the debt. The bank cannot sell the stock, unless authorized by a court order granted in a proper case. Kansas Banking Law, Sec. 52. (*Inquiry from Kan., Feb., 1913, Jl.*)

Lien of Michigan bank covers debt of stockholder's firm

695. Has a bank a lien on its stock as against the heirs and creditors of a deceased stockholder for a debt due from a firm of which the stockholder was a member? *Opinion:* The Michigan statutes give a bank a lien on its stock for the indebtedness of its stockholders, and such lien extends to the stockholder's liability to the bank for a debt of the firm of which he is a member. Citizens State Bank v. Kalamazoo County Bank, 111 Mich. 313. The bank is therefore protected in the case stated. (*Inquiry from Mich., Oct., 1917.*)

Copy of New York statutory lien must be printed on certificate

696. The stockholder of a state bank in New York pledged his stock to a national bank as collateral for a loan. The stockholder was indebted to his own bank. The national bank claimed the right to sell the stock to secure themselves, while the state bank claimed a prior lien on the stock pursuant to a provision of its by-law giving it a secret lien. *Opinion:* The state bank has no lien on its stock and cannot refuse to transfer it. Section 51 of the Stock Corporation Law of New York gives a bank or other corporation a lien on its stock or right to refuse to transfer while the stockholder is indebted to the bank, provided a copy of the section is printed on the certificate—where not so printed, a lien for indebtedness created by the by-law is not effectual against a purchaser of the stock for value without notice. Bk. of Attica v. Manuf. & Traders Bk., 20 N. Y. 501. Lyman v. St. Bk. 81 (N. Y.) App. Div. 367 aff'd in 179 N. Y. 577. See citations in Opinion No. 697. (*Inquiry from N. Y., Nov., 1913, Jl.*)

697. A bank holds its stockholder's note of \$1,000. He has not paid his indebtedness and claims he has sold his certificate of stock to a third person. The bank refused to transfer the stock until the note was paid. The certificate contains no provision claim-

ing a lien for the indebtedness of the stockholder. *Opinion:* Where stockholder indebted to state bank in New York has assigned his stock, bank may refuse transfer to assignee until stockholder's indebtedness is paid, provided section of statute declaring lien is printed on certificate; otherwise not. Stock Corp. Law (N. Y.), Sec. 51. Union Bk. v. U. S. Exch. Bk. (1911), 143 App. Div. 128, 127 N. Y. S. 661. Strahmann v. Yorkville Bk. (1911), 148 App. Div. 8, 132 N. Y. S. 130. (*Inquiry from N. Y., Jan., 1918, Jl.*)

Lien of Ohio bank on stock

698. By statute in Ohio, a bank has a lien on the stock owned by its debtors and may refuse to transfer the same until the indebtedness is satisfied. Utica Bk. v. Smalley, 2 Cow. (N. Y.) 77. Merchants Bk. v. Shouse, 102 Pa. 488. New Orleans Nat. Bk. v. Wiltz, 4 Woods (U. S.) 43, 10 Fed. 330. Duncan v. Biscoe, 7 Ark. 175. Farmers Bk. v. Haney, 87 Iowa 101. Mohawk Nat. Bk. v. Schenectady Bk., 151 N. Y. 665. Cecil Nat. Bk. v. Watsontown Bk., 105 U. S. 217. Mobile Mut. Ins. Co. v. Cullow, 49 Ala. 558. Mechanics Bk. v. N. Y., etc., R. Co., 13 N. Y. 599. Brent v. Wash. Bk., 10 Pet. (U. S.) 596. Rev. Stat. Ohio (1905), Sec. 6184. Stafford v. Produce Exch. B. Co., 61 Ohio St. 160. Downer v. Zanesville Bk., Wright (Ohio) 477. Franklin Bk. v. Commercial Bk., 5 Ohio Dec. (Reprint) 339. Stafford v. Produce Exch. B. Co., 16 Ohio Cir. Ct. 50, 80 C. D. 483. Bellevue Bk. v. Higbee, 20 C. D. 512, 4 Ohio Cir. Ct. 222. (*Inquiry from Ohio, May, 1913, Jl.*)

Statutory prohibition of lien by state banks in Pennsylvania—Effect of stock transfer act

699. A borrower pledged as collateral for a loan the stock of a national and of a state bank. The stockholder is indebted to the banks which claim a prior lien. *Opinion:* A national bank has no lien on the stock for the indebtedness of its stockholder, and in Pennsylvania there is a statutory prohibition (Act of 1901) of a lien by state banks. The Uniform Stock Transfer Act passed in Pennsylvania in 1911 provides that no corporation shall have a lien upon its shares or restrict their transfer unless notice is imprinted on the certificate. It is doubtful if this would be construed as repealing the Act of 1901 prohibiting banks from acquiring liens upon their stock. Bk. v. Lanier, 11 Wall. (U. S.) 369. Third Nat. Bk. v. Buffalo German Ins. Co., 193 U. S. 58.

Gen'l Banking Act (Pa.) 1850, Sec. 10; Act of 1876. Sec. 21; Act of 1895; Act of 1901, Sec. 2. Merchants Bk. v. Shouse, 102 Pa. 488. Bk. of Millvale v. Ohio Valley Bk., 82 Atl. 1115. Uniform Stock Transfer Act. (Pa.), Sec. 15. (*Inquiry from Pa., Aug., 1915, Jl.*)

Lien on bank stock—national banks

No lien of national bank on stock

700. The stockholder of a national bank owed the bank on several notes which matured after his death. The bank questions its right to claim a lien on its stock for the indebtedness or to refuse to transfer its stock to another upon the sale by the executor. *Opinion:* The national bank has no lien and cannot refuse to transfer the stock should the executor see fit to sell it to another. See citations in opinion No. 701. (*Inquiry from Md., Aug., 1913, Jl.*)

701. A national bank has no lien on its stock for the indebtedness of its stockholder. Where such stock is in the hands of a pledgee as security for a loan it is not subject to any claim of lien by the issuing bank. U. S. Rev. Stat., Sec. 5201. Bk. v. Lanier, 11 Wall. (U. S.) 369. Third Nat. Bk. v. Buffalo German Ins. Co., 193 U. S. 581. (*Inquiry from Mich., Nov., 1914, Jl.*)

702. A stockholder of a national bank is indorser on a note payable to it, the maker of which is irresponsible. The stockholder himself has been adjudged insolvent. May the bank refuse to transfer the stock? May it cancel the stock and issue new stock to another person and thereby apply the amount of the stock on the note? *Opinion:* The rule is well settled that a national bank cannot acquire a lien on its own stock held by persons who are its debtors, or prohibit transfers by its debtors, even by provisions framed with a direct view to that effect in its articles of association, or by direct by-laws and notice in the certificate of stock. Buffalo Third Nat. Bank v. Buffalo German Ins. Co., 193 U. S. 581. Smith v. Marietta First Nat. Bank, 115 Ga. 608. Hagar v. Union Nat. Bank, 63 Me. 509. Del., etc., R. Co. v. Oxford Iron Co., 3 N. J. Eq. 340. Bridges v. Troy Nat. Bank, 185 N. Y. 146. Goodbar v. City Nat. Bank, 78 Tex. 461. Peckheimer v. Nat. Exch. Bank, 79 Va. 80. (*Inquiry from Tex., Feb., 1921.*)

Attachment of shares in hands of stockholders

703. A stockholder of a national bank borrows money of the bank without security.

When the note falls due, he fails to pay it. The bank asserts a lien on his stock for the indebtedness. *Opinion:* A national bank has no lien on its stock for the indebtedness of a stockholder and cannot refuse to transfer his stock until the debt is paid. But it would seem that the National Bank Act would not prevent the bank attaching the shares for his indebtedness, where in possession of the stockholder at the time of the attachment. See citations in Opinion No. 701. Bullard v. Bk., 18 Wall. (U. S.) 589. Hager v. Union Nat. Bk., 63 Me. 509. (*Inquiry from Mo., Jan., 1911, Jl.*)

704. A bank requests advice as to what procedure should be taken to cancel the stock of a stockholder who is indebted to the bank; that, so far as known, the stock has not been pledged to an innocent third party. *Opinion:* Evidently the bank does not realize that a national bank cannot make a loan on the security of its own stock nor acquire a lien thereon, and restrict its transfer, because the stockholder is indebted to it. Sec. 5201 U. S. Revised Statutes. Under said statute it has been held that a national bank cannot acquire a lien on its stock and that any provision in its articles or by-laws or in the certificate prohibiting a transfer until the liability of a stockholder to the bank is paid is wholly void. Bank v. Lanier, 11 Wall., 369. But it has been held that this section does not forbid the shares of the stockholder being attached for his indebtedness to the bank. Hogan v. Union Nat. Bank, 63 Me., 509. (*Inquiry from N. Y., Jan., 1918.*)

Inspection of books

Inspection of books by minority stockholder

705. What privileges has a minority stockholder, who is not an officer, or on the board of directors, in a state bank in Alabama to inspect the books? *Opinion:* The general rule is that stockholders of a bank have a right to inspect the books of the bank at all reasonable times. Such a right is a common law right, and not of statutory origin. (Ranger v. Champion Cotton Press Co., 51 Fed. 61. Robertson v. Owensboro Sav. Bank Co., 150 Ky. 50. State v. New Orleans Gaslight Co., 49 La. Ann. 1556. State v. Laughlin, 53 Mo. App. 542. Gerner v. Mosher, 58 Neb. 135. Huyler v. Cragin Cattle Co., 40 N. J. Eq. 392. Deaderick v. Wilson, 8 Baxt. [Tenn.] 108. State v. Pacific, etc., Brew. Co., 21 Wash. 451. See Gen. Acts Ala., 1911, Act No. 84). So there

would seem to be no doubt as to the common law right of a minority stockholder in a state bank, say in Alabama, to inspect the books of the bank on proper occasions and at proper times, and where such a right is improperly withheld, the court would, upon proper application, enforce such right by means of mandamus. (*Inquiry from Ala., Jan., 1919.*)

National bank stockholder's right of inspection

706. Has a stockholder of a national bank the right to inspect its books and with the aid of an expert make extracts from them? What if the stockholder is an officer of a competing institution? If the motive of the stockholder is to discredit the management, should the request be denied? *Opinion:* At common law a stockholder is given the right to inspect the books and papers of the corporation at proper times and for proper purposes. In some states the courts will enforce the statutory right of inspection regardless of the motive of the stockholder; in others they will refuse relief when the motive is improper. The right of inspection exists in the case of stockholders of banking as of other corporations; and national banks, being deemed citizens of the state in which located, are held in a number of cases to come within state statutes granting the right of inspection. See, for example, *Winter v. Baldwin*, 89 Ala. 483 and *Peo. v. Consol. Nat. Bank*, 105 App. Div. 409, 94 N. Y. Supp. 173. Pennsylvania cases concerning corporations other than national banks are equally applicable to such institutions. *Com. v. Pennsylvania Silk Co.*, (1920) 267 Pa. 331, 110 Atl. 157, holds that the right may be exercised through an agent, attorney or expert and that the corporation has no right to dictate as to who the agent or attorney shall be. *Kuhbach v. Irving Cut Glass Co.*, 220 Pa. 427, 69 Atl. 981 and *Hodder v. George Hogg Co.*, 223 Pa. 196, 72 Atl. 553, are to the effect that the fact that the stockholder is interested in a competing corporation is not enough to cause mandamus to be denied. *Drovin v. Lehigh Coal & Nav. Co.*, (1919) 265 Pa. 447, 109 Atl. 128, enforced the common law right of inspection. In *Rochester v. Indiana County Gas Co.*, 246 Pa. 571, 92 Atl. 717, the court states that "the right of a stockholder to an inspection of the books and papers of a corporation, in a proper case, is clearly established, and it would be an affectation

of learning to cite authorities in support of the proposition." The court makes this quotation from *Phoenix Iron Co. v. Com.*, 113 Pa. 563, 6 Atl. 75: "Such a right is, of course, not to be exercised to gratify curiosity, or for speculative purposes, but in good faith, and for a specific honest purpose, and where there is specific matter in dispute, involving and affecting seriously the rights of the relator as a stockholder." *Schondelmeyer v. Columbia*, 219 Pa. 610, shows that the granting of a writ of mandamus on behalf of a stockholder rests in the sound discretion of the court.

Other cases, outside of Pennsylvania, involve specifically the right of a stockholder to inspect the books of a national bank. *People v. Consol. Nat. Bank*, 105 App. Div. 409. 94 N. Y. Supp. 173 holds that under both the federal (Rev. St. Sec. 5210) and the state statute (now Sec. 32, Stock Corp. Law) a national bank is bound to keep its stock book open for the inspection of its shareholders, whose right includes that of making copies, and that when the purpose is legitimate, the right of inspection is mandatory. *Matter of Tuttle v. Iron Nat. Bank*, 170 N. Y. 9 upholds the right of inspection of the books of a national bank, including that of making extracts, for a legitimate purpose, and holds that the method of enforcing the right is by peremptory writ of mandamus. *People v. Nat. Park Bank*, 122 App. Div. 635, 107 N. Y. Supp. 369, holds that the statutory right to inspect the stock book of a corporation includes national banks and that mandamus will lie, but the writ may be denied where the application is not in good faith but for an ulterior purpose. The right to deny the writ was reaffirmed in *Peo. v. Am. Press Assoc.*, 148 App. Div. 651, 133 N. Y. Supp. 216 (not involving national bank directly). *Harkness v. Guthrie*, 27 Utah 248, 75 Pac. 624 holds that a state statute authorizing inspection of corporate books by stockholders as applied to national banks is not within the prohibition of U. S. Rev. St. 5241 that no national banking association shall be subject to any visitorial powers, etc. This case was affirmed in 199 U. S. 148 on the ground that there was a common law right of inspection for proper purposes under proper regulations. The supreme court stated that the examination should not be granted for speculative or improper purposes. See 7 A. B. A. Jl., 690. (*Inquiry from Pa., March, 1921.*)

Stockholder can inspect stock book but cannot compel bank to furnish list of stockholders

707. Can a stockholder compel a bank to furnish him a list showing the names of all stockholders and the amount of stock held by each? *Opinion:* The right of a stockholder in a bank to inspect the stock book and to make extracts therefrom, provided the inspection is sought at a proper time, and for proper purposes, is well settled. (Tuttle v. Iron Nat. Bank, 170 N. Y. 9. Irving Cut Glass Co., 220 Pa. St. 427. Harkness v. Guthrie, 27 Utah 248 [aff'd in 199 U. S. 148.]) But there appears to be no case in which it has been held that a bank is compelled to furnish a stockholder with a list of the names of all stockholders, and the amount of stock owned by each. And it would not seem that the courts would compel a bank to do this work for the stockholder. The stockholder's right of inspection would seem to be sufficient, and that a bank could not be compelled to perform this onerous and gratuitous labor for the stockholder. (*Inquiry from Tenn., Nov., 1915.*)

Depositor has no right of inspection

708. *Opinion:* A depositor as distinguished from a stockholder has no such interest in the bank as would give him the right to inspect its books and records. The contrary statement in two early cases that on all proper occasions a depositor has a right to inspect the books of the bank is a mere expression of opinion, not having the force of law. If any right of inspection exists in the depositor, it would at most be confined to his particular account and could not extend to the accounts of other customers or to the general business of the institution. Michie on Banks & Banking, Sec. 119 (4). Union Bk. v. Knapp, 3 Pick. (Mass.) 96. Morse on Banking, Sec. 294. Watson v. Phoenix Bk., 8 Metc. (Mass.) 217. (*Inquiry from Pa., Feb., 1915, Jl.*)

Increase in bank stock

Status of authorized but unsubscribed capital

709. A bank says that the state charter authorizes a capital of \$25,000 and only \$10,000 has been paid in. The bank inquires as to the necessary steps to increase its paid in capital, as it desires to sell this other stock to new subscribers. *Opinion:* As gathered from your letter, you do not propose to increase the bank's capital which has already been authorized at \$25,000 but, as only \$10,000 has been paid in, what the bank proposes to do is to obtain additional

subscriptions. It seems that as its charter already authorizes an issue up to \$25,000, all that would be necessary to exercise the power already conferred by the charter would be a resolution of the board of directors. It is doubtful in such a case that it would be obligatory upon the bank to offer the new stock to its present stockholders before offering it to the public at large. In Reese v. Montgomery Co. Bank, 31 Pa. 78, it is held that where all the stock is not at first subscribed for, the balance is held by the bank in trust for all subscribers and not simply for those who subscribed at the beginning. It might be well to write to the Secretary of State and ask if there is any fee required in such cases; also whether certificate is required to be filed under the case stated. There appears to be nothing in the South Carolina statutes regulating this particular subject. (*Inquiry from S. C., Oct., 1919.*)

Right of existing stockholders to subscribe to increase

710. A bank is contemplating an increase of our capital stock from \$25,000 to \$50,000, declaring 50% stock dividend to present stockholders, and placing the other 50% with customers who would make desirable stockholders. Could it pass a resolution at the special stockholders' meeting making it legal and binding to pay the non-resident or undesirable stockholder in cash in proportion to the sale of the stock to the new stockholders and in this way avoid the undesirables from taking on some more stock? *Opinion:* Where the capital stock of a bank is increased in the method provided by law, each stockholder has a right to subscribe to such proportion of the new stock as the number of shares owned by him bears to the whole number of shares before the increase and cannot be compelled to accept cash instead of new stock. Eidman v. Bowman, 58 Ill. 444. Gray v. Portland Bank, 3 Mass. 364. Stokes v. Continental Trust Co., 186 N. Y. 285. Electric Co. v. Edison Electric Co., 200 Pa. St. 516. Strickler v. McElroy, 45 Pa. Super. Ct., 165. Dousman v. Wisconsin, etc., Smelting Co., 40 Wis. 418. McNulta v. Corn Belt Bank, 164 Ill. 427. See Cook on Corporations, Vol. 1, Sec. 286. (*Inquiry from Wis., July, 1919, Jl.*)

National bank stockholder, though not voting for increase, has subscription rights

711. Where stock of national bank is increased by the vote of necessary number

of shareholders, and resolution authorizing increase fixes premium at which new stock shall be sold. *Opinion:* The stockholder not participating or voting for increase has right to purchase his proportion of new shares at par. 1 Cook on Corps. (4th Ed.), Sec. 286. Gray v. Portland Bk., 3 Mass. 364. Miller v. Ill. Cent. R. Co., 24 Barb. (N. Y.) 312. Wilson v. Bk., 29 Pa. 537. Mason v. Daval Mills, 132 Miss. 76. Cunningham's Appeal, 108 Pa. 546. De La Cuesta v. Ins. Co., 136 Pa. 62. Jones v. Crawford, etc., R. Co., 30 Atl. (N. H.) 614. Stokes v. Continental Tr. Co., 186 N. Y. 285, 295. 10 Cyc. 544. 26 Am. & Eng. Encycl. Law, 90 N. W. 1040. Bennett v. Baum 133 N. W. (Neb.) 439. Strickler v. McElroy 45 Pa. Super. 165. Bond v. Atlantic Terra Cotta Co., 122 N. Y. S. 425. (*Inquiry from Del., May, 1913, Jl.*)

Procedure for increase of national bank stock

712. Can a national bank increase its capital stock at any time, and what is the proper procedure? *Opinion:* A national bank with the approval of the comptroller by vote of its shareholders owning two-thirds of the stock may increase its capital to any sum approved by the comptroller notwithstanding a limit has been fixed in its original articles of association (Ch. 73 Act May 1, 1886). The procedure involves writing the comptroller and stating the amount of the proposed increase before formally submitting the question to the shareholders. If the comptroller approves, the bank will be so advised and blank forms supplied. Prior to the Act of 1886, the law required that the articles of association provide for increase of the capital (Sec. 5142 Rev. Stat.) but this provision is no longer necessary because the Act of 1886 authorizes shareholders owning two-thirds of the shares to increase the capital at any time and to any amount subject to approval of the comptroller. (*Inquiry from N. J., Nov., 1916.*)

Stock issued in name of partnership

713. John Smith and Son, a partnership, have bought bank stock and request that the certificate be issued under the firm name. The bank is uncertain as to whether one of the firm under such issue could qualify to act as a director of the bank. *Opinion:* A certificate of bank stock may be issued to a firm in the firm name and at common law a director's qualification shares may be held by the partnership of which he is a member. But where the statute provides that the

director must own a certain number of shares "in his own right" he could not qualify as a member of a partnership who owned the requisite number of shares. Where a certificate of stock is issued in the name of a partnership, a valid transfer thereof may be executed by any member of the firm who is authorized to sign the firm name. Union Hotel Co. v. Hersee, 79 N. Y. 454. Morse v. Pac. Ry. Co., 191 Ill. 356. Rehbein v. Rohr. 109 Wis. 136. In re Glory Mills Co. 3 Ch. 473, 63 L. J. Ch.. 885 (Eng.). Barton v. London, etc., R. Co., 242 B. D. 77 (Eng.). Kortwright v. Buffalo Commercial Bk., 20 N. Y. 91. Plymouth v. Norfolk Bk., 10 Pick. (Mass.) 454. Cook on Corps., Chap. 24, Sec. 429. (*Inquiry from N. J., April 1918, Jl.*)

Transfer of bank stock

Arkansas statute requiring registry of certificate of transfer with county clerk

714. A Virginia bank purchased at a private sale ten shares of stock of an Arkansas bank which it had held as security for a loan to a stockholder of the latter bank. The Arkansas bank refused to transfer the stock thus sold, claiming that under the Arkansas statute the pledged stock was not registered in the county clerk's office as required by law. *Opinion:* Notwithstanding provisions of Arkansas statutes that upon transfer of stock a certificate of transfer must be deposited with county clerk, it has been decided that a pledge of stock is valid without such deposit and the statute is only applicable to transfers by the stockholder by way of sale. Kirby's Dig. Ark. Stat. (1904), Chap. 31, Sec. 849. Masury v. Ark. Nat. Bk., 93 Fed. 603. Batesville Tel. Co. v. Meyer, etc., Co., 68 Ark. 115. Sand. & H. Dig. Ark. Stat., Sec. 1338. Claffin Co. v. Bretzfelder, 69 Ark. 271. Contrary decision in Fahrney v. Kelly, 102 Fed. 403. (*Inquiry from Va., Sept., 1913, Jl.*)

Note: The statute above referred to is still in force.

Question of full negotiability of national bank stock under stock transfer act

715. A certificate of stock indorsed in blank was stolen, and inquiry is made whether purchaser would have good title. *Opinion:* At common law a certificate of stock is not a negotiable instrument, and one who in good faith purchases from a third person a certificate of stock, with power of attorney indorsed in blank by the owner,

does not take any better title than the third person. *Knox v. Eden Musee American Co.*, 148 N. Y. 441. But in 1913 the legislature of New York passed the Uniform Transfer of Stock Act, Section 5 of which gives full negotiability to certificates of stock, and under this Act the purchaser from a thief of an indorsed certificate in a New York corporation would take good title. The only question is whether this Act would cover a certificate in a national bank. It has been held that a state law cannot limit the transferable quality of national bank stock. *Doty v. First Nat. Bk.*, 3 N. D. 9. But it has also been held that a state statute prescribing the mode of transfer of stock by executors will apply to the stock of a national bank in such state. *Hobbs v. Western Nat. Bk.*, 2 Nat. Bank Cases, 187. The question has not been as yet definitely determined (*Inquiry from N. Y.*, June, 1916.)

Book transfers

716. The owner of fifty shares of national bank stock seeks to divide the same equally among his five children. He assigns each certificate in blank, leaving them in a safe deposit box to be delivered upon his death. The purpose is to avoid payment of the national inheritance tax. Can the bank legally transfer said stock without making a transfer on the books? *Opinion:* A valid gift of bank stock may be effected by delivery of same to the bank to be delivered to the donee upon death of the donor, provided there is an absolute and unequivocal surrender by the donor of dominion over the stock and it is clearly indicated that the bank is constituted trustee of the donee and not mere agent of the donor. Regarding the bank as trustee, the necessity of transferring the stock on the books could possibly be dispensed with. In case of sale of bank stock it has been held that title to national bank shares is transferred by delivery of the certificate, with, power of attorney indorsed in blank, without the necessity of transfer on the books and presumably the same rule would apply to a gift of bank stock. *Calvin v. Free*, 66 Kan. 466. *Bickford v. Mattocks*, (Me.) 50 Atl. 894. *Grant Tr., etc., Co. v. Tucker*, (Ind.) 96 N. E. 487. *Johnston v. Laflin* 103 U. S. 800. (*Inquiry from Kan.*, July, 1918, *Jl.*)

Voting

Proxy under general power of attorney

717. Does an attorney in fact under a general power have the right to vote the

national bank stock of his principal at an annual meeting, without the usual proxy? *Opinion:* U. S. Rev. St. provides among other things that "shareholders may vote by proxies duly authorized in writing." It is doubtful whether the general power of attorney is sufficient without a special proxy to authorize the voting of the stock. Apparently the question has never been passed upon judicially. (*Inquiry from Ill.*, Dec., 1920.)

Trustee in bankruptcy of registered owner of pledged stock

718. The pledgor of certain stock in a national bank became bankrupt. The trustee in bankruptcy claimed the right to vote the stock at the stockholders meeting. *Opinion:* The trustee had the right to vote the stock in the hands of the pledgee of the bankrupt, where the stock had not been transferred to the pledgee on the books of the bank. 10 Cyc. 333. National Bankruptcy Law, Sec. 70 a. (3) (5). Iowa Code Supp. Sec. 1641 a. (*Inquiry from Iowa*, Dec., 1912, *Jl.*)

Sufficiency of vote by majority of those present

719. Is a majority vote of all of the stock issued by a bank either state or national necessary to be voted at a regular annual meeting of stockholders to elect a board of directors or to transact other business? *Opinion:* At a regular meeting of stockholders of a national or state bank, notice of which has been duly given, a majority of votes, in person or by proxy, present at the meeting is sufficient to elect a board of directors or transact other business, though such votes are a minority of all the stock, unless different provision is made in the statute or by-laws. See *Sylvania, etc.*, R. R. v. *Hoge*, 129 Ga. 734. *Green v. Felton* 42 Ind. App. 675. *Gilchrist v. Collopy* 119 Ky. 110. *Morrill v. Little Falls Mfg. Co.*, 53 Minn. 371. *Ashcroft v. Gammond* 132 N. Y. App. Div. 3. *Craig v. First, etc.*, Church, 88 Pa. St. 42. (*Inquiry from Kan.*, Jan., 1920.)

Voting trust agreement of national bank stockholders

720. A bank inquires as to the legality of voting trust agreements of national bank stockholders. *Opinion:* There is a decision by the Supreme Court of North Carolina in *Bridgers v. First National Bank of Tarboro*, April 6, 1910, reported 67 S. E. 770, which holds that a voting trust agreement of

stockholders of a national bank, placing their stock in the hands of trustees, is against public policy and void. One of the justices dissented. This appears to be the only decision upon voting trust agreements by national bank stockholders. (*Inquiry from Ky., Dec., 1916.*)

Executor's right to vote

721. It is a general rule of law that an executor has the right to vote with respect to the stock standing on the corporate books in the name of the testator on exhibiting an exemplified copy of his letters testamentary. There is nothing in the national bank act which restricts this right with respect to stock in a national bank. *Market St. R. Co. v. Hellman*, 109 Cal. 571. (*Inquiry from N. Y., June, 1915, Jl.*)

BILLS OF LADING

Cross references—Attachment of proceeds of B/L draft see attachment and garnishment. Opinion Nos. 387-389
Collection of b/l draft, see Collection

Form of b/l draft

723. Doe a local merchant sells Sully a cotton buyer, ten bales of cotton and draws on Sully for the price, making the draft payable to the X National, which is the buyer's local bank. Sully accepts the draft, to which no bill of lading is attached and it is indorsed in blank by Doe and is delivered to the X State Bank, which is his own local bank, for credit. The latter bank objects to the form of the draft and as not conveying proper title. *Opinion:* The draft is incorrectly drawn for the purpose intended in that it is made payable to the X National Bank, and the acceptance delivered to Doe when it is the purpose of Doe to deposit and collect the same through his own local bank. In other words, this acceptance is payable to the X National Bank and is transferable and payable through their indorsement. If Doe intended to deposit and collect it through that bank it would be all right for such purpose, but otherwise the draft should be drawn and the acceptance made payable either to Doe or to his own local bank. Where an acceptance is made payable to the X National Bank and delivered to the drawer, it would require the indorsement of the payee before the drawer could properly negotiate it to or collect it through the inquiring bank. The fact that the bill of lading is not attached does not affect it as

Retention of voting power on sale of stock

722. If A should sell shares of his controlling interest in a bank to B, is there any way A can still retain the voting power of B; and if B leaves the employ of A is there any legal way of providing for the return of the stock to A at book value? *Opinion:* A person may accept ownership of stock on condition involving consent that another may vote the stock for him. *Elger v. Boyle*, 126 N. Y. Supp. 946. It seems in the case stated A could sell the stock to B on condition that A retained the right to vote the stock and upon an agreement that in the event B left the employ of A, the latter should have the option to repurchase the stock at book value. (*Inquiry from Wis., April, 1920.*)

Sully would be entitled to the bill of lading upon acceptance. Furthermore, the fact that the acceptance is made across the left margin of the draft, is not valid ground for objection. True, an acceptance is usually evidenced by words written across the face of the instrument, but it is sufficient to write the acceptance on any part of the bill. See *Iowa City First Nat. Bk. v. Trognitz*, 12 Cal. App. 176. (*Inquiry from Tex., Aug., 1917.*)

Shipper's signature

Effect of absence of shipper's signature

724. The requirement of the signature of the shipper, where a blank is provided on the uniform bills, is not a requirement of law but a recommendation of the Interstate Commerce Commission. It is a matter of practice, not of law, and the absence of the shipper's signature does not render the document invalid. (*Inquiry from N. J., March, 1910, Jl.*)

Shipper's signature not necessary

725. Should a bank insist upon the shipper's signature on a bill of lading drawn to his order, before it accepts drafts drawn thereon? *Opinion:* It is the general practice for the shipper not to sign the bill of lading, although there is a blank for the signature in the uniform bill of lading. Under the great weight of authority, the shipper's signature is not necessary to the validity of the contract contained in the bill of lading, and to its binding effect on the shipper, accepting the bill of lading. The

Henry B. Hyde, 82 Fed. 681. Cin. U. & D. R. Co. v. Berdan, 22 Ohio Cir. Ct. Rep. 326. (*Inquiry from Mo., Jan., 1911.*)

Note: The Uniform Bills of Lading Act, in force in a number of states which provides the form and essential terms of bills of lading, enumerates "the signature of the carrier" as one of the essentials, but contains no corresponding requirement of signature of the shipper. The Federal Bills of Lading Act, passed in 1916, contains no such requirement.

Carrier's liability upon b/l issued without receipt of goods

Liability to drawee of b/l draft

726. A bank purchased and collected of the drawee a bill of lading draft, given for goods to be shipped on the Wabash railroad. The goods were never delivered to the railroad and the consignors failed. The drawee sued the purchasing bank for money paid under a mistake of fact. *Opinion:* The purchasing bank was not liable to the drawee as warrantor of the accompanying bill of lading; but the drawee's remedy, if any, was against the railroad for issuing an accommodation bill of lading without the receipt of the goods. *Landa v. Latten*, 19 Tex. Civ. App. 246. *Haas v. Bk.*, 144 Ala. 562. *Finch v. Gregg*, 126 N. C. 176. *Searles v. Smith*, 80 Miss. 688. The doctrine of the above cases was overruled by the following cases: *Blaisdell v. Bk.*, 96 Tex. 626. *Mason v. Nelson Cotton Co.*, 148 N. C. 492. *Tolerton v. Bk.*, 112 La. 706. *Leonhardt v. Small*, 117 Tenn. 153. *Hall v. Keller*, 64 Kan. 211. *German American Bk. v. Craig*, 70 Neb. 41. (*Inquiry from Ill., March, 1910.*)

Liability to bona fide holder of order bill

727. A railroad company through its agent issued an order bill of lading for a shipment to another state, although no goods were in fact received by it. An opinion is asked whether the bill of lading is conclusive in the hands of a bona fide holder for value against the company issuing it, where no property was received to warrant its issuance. *Opinion:* It seems the railroad would be held liable in such a case under the Federal Bill of Lading Act of August 29, 1916. Section 22 of this Act makes the carrier liable to the "holder of an order bill who has given value in good faith, relying upon the description therein of the goods, for damages caused by the non-receipt of the goods or their failure to correspond with the description thereof in the

bill at the time of its issue." The case stated falls directly within the statutory rule of liability of the carrier. (*Inquiry from Va., June, 1918.*)

Liability under state b/l act upon bill purporting interstate shipment

728. A case is presented, where the agent has issued an order bill of lading without goods and on faith thereof the bank has advanced value. *Opinion:* Under the Pomerene Act, the railroad would be clearly liable. But that Act only took effect January 1, 1917, and the transaction was August and September, 1916. Under the Uniform B/L Act of Michigan the railroad would also be liable for the issue of an order bill of lading without receiving the goods and the only question is whether that act would apply and create a liability of the railroad where the purported bill of lading represented, not a shipment within, but to another state. The decision of the United States Supreme Court in *Adams Ex. Co. v. Croninger*, (226 U. S. 491) creates serious doubt whether the rule of liability upon false bills provided by the Uniform Bills of Lading Act as passed in the different states, would apply where the false bill of lading purported to represent an interstate shipment. If the loss is a large one, the question would be worth fighting out in the courts. (*Inquiry from Mich., April, 1917.*)

Indorsement of bill of lading

Bank purchasing draft and b/l indorsed in blank need not indorse b/l

729. A draft is drawn by Z. Co. by John Doe, President, in favor of the F. Bank, on the S. bank, and has an order bill of lading attached consigned to John Doe. The question is asked whether the draft should be indorsed by the F. bank, and the bill of lading by John Doe; and should the F. bank also indorse the bill of lading. *Opinion:* The F. bank should indorse the draft and John Doe to whose order the goods are consigned should indorse the bill of lading. The indorsement in blank of the bill of lading by John Doe is sufficient for transfer and it is not necessary that the F. bank indorse the bill of lading. (*Inquiry from Ariz., June, 1920.*)

Indorser of draft does not warrant b/l

730. A bill of lading draft comes to a bank with several indorsements "pay to order of any bank or banker, previous indorsements guaranteed." Inquiry is as to

the liability of indorsers either on account of the bill of lading or of the draft. *Opinion:* The indorsement "Pay any bank or banker" is generally held restrictive and does not bind the bank to the liabilities and warranties of a regular indorser. The indorsement "pay to order of any bank or banker previous indorsements guaranteed", would have the effect of making the indorsing bank liable as guarantor of the genuineness of prior indorsements, but would not render the bank liable in the event the paper was not paid. Assuming the signature of the drawer to be forged, the bank so indorsing would not be liable to drawee, or assuming the bill of lading attached to the draft was a forgery, or that the goods represented by the bill of lading were deficient in quantity, quality or condition, the indorsing bank would not be liable to the drawee which paid the draft. This has been so held by the Supreme Court of the United States, and by a number of states even where the indorsing bank was owner of the draft. The only state in which the contrary doctrine prevails is Mississippi. See *Cherokee National Bank v. Union Trust Co.* 33 Okla. 342, 125, Pac. 464. (*Inquiry from Okla., Oct., 1916.*)

Liability of indorser of 60 day b/l draft cashed by drawee's bank before, but refused payment at maturity

731. A form of draft submitted is by John Smith, a cotton buyer in Alabama, drawn upon John Doe in Columbus, Miss., to whom he sells the cotton at 60 days' sight payable to the order of the Alabama bank who discounts the draft which is made payable through a national bank at Columbus. Presumably the draft is accepted by the drawee, but in any event it is stated that the national bank, through whom it is made payable, cashes it upon presentment and does not wait for the 60 days to elapse before the sum becomes payable. The question asked is whether the indorser is responsible where the draft is cashed or paid by the bank through which it is payable when first presented although at maturity payment should be refused. *Opinion:* Where a draft upon a specified payee is drawn payable "through" a bank, it has been held that presentment for payment at the bank is sufficient and presentment need not be made to the drawee. *Bartholomew v. First Nat. Bk.*, 18 Wash. 683. When, therefore, a 60-day sight draft is presented before maturity to the bank through which it is made payable, and it is paid by that bank, the question arises whether the trans-

action is in reality a payment or a purchase by the bank. If the draft is paid at the place where payable in advance of maturity, then the indorser would be discharged. If however, the draft is purchased, the indorser would remain liable. It seems in the case stated, that the transaction would be held to be a purchase of the draft and the indorser would be liable if dishonored at maturity and the necessary steps were taken to preserve his liability. He can, however, indorse "without recourse" which would transfer title without indorser's liability in case of non-payment. (*Inquiry from Ala., Oct., 1919.*)

Shipper's indorsement supplied by collecting bank

732. The shipper's indorsement on an "order notify" bill of lading was supplied by a collecting bank in order to facilitate the payment of the attached draft and the delivery of the goods to the consignee. *Opinion:* The collecting bank would incur no responsibility in supplying the indorsement where the transaction was bona fide and the bill of lading represented the actual goods, but might incur responsibility in the event of a forged or false bill of lading. (*Inquiry from Ala., Nov., 1912, Jl.*)

Indorsement of b/l in blank followed by special indorsement

733. (1) May a carrier deliver goods to any one presenting the bill of lading regardless of indorsements or lack of them? (2) If a bill of lading is indorsed in blank by the consignee, and a bank when it delivers it to the party to whom it has made advances, plainly stamps the back of the bill under but in such close proximity to the indorsement of the consignee, that it is practically impossible to see the indorsement without seeing the stamp, in the following form: "Deliver to any Buffalo elevator for account of Bank of ———, A. B., Cashier," would the carrier be liable for disregarding the stamps in making delivery? *Opinion:* (1) Generally speaking, some railroads use care in scrutinizing the indorsements before taking up order bills of lading, while others disregard them. A railroad would seem to act at its peril in delivering goods upon an unindorsed bill of lading. The contract on the bill of lading itself provides that "the surrender of this original order bill of lading properly indorsed shall be required before the delivery of the property." (2) Concerning the effect of the stamped indorsement

in this particular case, an indorsement of commercial paper in blank makes the paper transferable by delivery and payable to bearer notwithstanding a subsequent special indorsement. Were this applied by analogy to bills of lading, the carrier would not be bound to notice the special indorsement, but could deliver to the holder of the bill under blank indorsement, and the way for the bank to protect itself would be to place such indorsement over the blank indorsement so as to change the character of the latter from an indorsement in blank to an indorsement in full. (*Inquiry from N. Y., Jan., 1911.*)

Collection

Collecting bank's liability for violation of instructions

734. A bank held a bill of lading to be delivered to the consignee after he had signed an attached agreement to buy a soda fountain. In violation of instructions from its principal, the bank as agent delivered the bill of lading without procuring the signature to the agreement. *Opinion:* The bank was liable to its principal for the damages suffered by reason of the violation of instructions, but if the principal was not rightfully entitled to have the agreement signed as a condition of delivery of the bill of lading and the imposing of such condition was wrongful or fraudulent, the loss of opportunity on the part of the principal to drive an unconscionable bargain would not be legitimate actual damage recoverable from the agent bank. *Morse on Banks and Banking*, Sec. 246. *Kirkham v. Bk. of America*, 165 N. Y. 132. *Castle v. Corn Exch. Bk.*, 148 N. Y. 122. *Allen v. Merchants Bk.*, 22 Wend. (N. Y.) 215. *Borup v. Nininger*, 5 Minn. 523. *Trinidad First Nat. Bk. v. Denver First Nat. Bk.*, 4 Dill. (U. S.) 290. *Flood v. First Nat. Bk.*, 69 S. W. (Ky.) 750. (*Inquiry from La., Aug., 1912, Jl.*)

Failure to demand, wire non-payment and return before arrival of goods when subject to inspection

735. Bank A received for collection from Bank B in another state, a draft on a party in A's town, marked "No protest. If not paid on demand, wire and return." The order b/l read, "Allow inspection." As result of conversation with consignee A made no immediate demand for payment of draft because the goods were sold subject to inspection and to be paid for if satisfactory

to consignee and had not yet arrived. A acknowledged receipt of draft showing it had been entered for collection on condition that payment would be demanded on arrival of goods. In reply B wrote A that, having first ignored instructions, it would hold A for acceptance of goods because of failure to demand payment on receipt of draft and B/L instead of waiting for goods. Upon arrival of goods they were found not in condition called for by contract and were refused by consignee, and wire was sent to consignor of refusal, and draft and b/l were returned by A to B. The consignor then reshipped goods to another point and notified A that he would hold A and B jointly for loss. *Opinion:* As a matter of strict law, under the facts stated, Bank A would not be held responsible even though it violated the instruction to present the draft immediately. To make a case of liability there must not only be a failure to obey instructions but also damage as a result of that failure. Here was a case where, although the instructions were to demand the draft immediately and if not to wire and return, the attached bill of lading read "allow inspection" and from a conversation with the consignee the bank learned that he would not pay until the goods arrived and he had inspected them. The consignor having made a contract with the consignee for sale of the goods subject to inspection on arrival, it is difficult to see how the holding by Bank A of the documents until the goods arrived worked any damage to the consignor for which he would be entitled to recover either against Bank A or Bank B. (*Inquiry from Tenn., Oct., 1912.*)

Bill of lading draft with right to examine goods

736. A bank received from the shipper of a motor cycle for collection a draft with a bill of lading attached. The shipper by letter agreed with its customer that the machine would be shipped subject to examination, but the bill of lading was silent on this point. Knowing that this condition existed, the bank on receipt of the customer's deposit for the amount of the draft surrendered the bill of lading. The customer presented the bill of lading, received and tried the machine, but being dissatisfied therewith returned it to the freight office and received a new bill of lading. This he attached to the draft and returning same to the bank was repaid his deposit. The firm lost the sale. *Opinion:* The collecting bank is not liable for any neglect of duty. It had, in the absence of contrary instructions, a right to rely on the letter of the firm per-

mitting inspection, and to construe this permission as extending to an actual test, and for that purpose to surrender the bill of lading, safeguarding its principal by requiring a conditional deposit to be refunded if the machine proved unsatisfactory. Such deposit was not a payment of the purchase price, the surrender of which would have made the bank responsible. *Morse on Banks and Banking*, Sec. 246. *Kirkham v. Bk. of America*, 165 N. Y. 132. *Castle v. Corn Exch. Bk.*, 148 N. Y. 122. *Allen v. Merchants Bk.*, 22 Wend (N. Y.) 215. *Borup v. Nininger*, 5 Minn. 523. *Trinidad First Nat. Bk. v. Denver First Nat. Bk.*, 4 Dill (U. S.) 290. *Flood v. First Nat. Bk.*, 69 S. W. (Ky.) 750. (*Inquiry from N. Y. Aug., 1912, Jl.*)

737. A bank receives for collection a draft to which is attached a bill of lading which allows inspection. The car has not yet arrived. The bank questions whether it shall hold for arrival of car or protest immediately. *Opinion*: The better practice is to hold the draft for a reasonable time before presentment to permit of arrival and inspection. (*Inquiry from Tex., March, 1912, Jl.*)

Liability of bank for misdirecting to consignee

738. A bank through error mailed a draft and an indorsed order bill of lading to the consignee. The consignee obtained the goods upon the bill of lading without paying for the draft. *Opinion*: The bank is liable to its customer for the amount of the draft on the ground of negligence. (*Inquiry from La., March, 1912.*)

Deduction of freight charges from draft

739. A bank receives a draft with bill of lading attached with instructions to return at once if not paid and with further instructions to deduct amount of freight charges from draft. As the draft arrives before the goods do, there is no way of knowing what the freight charges are, and it is desired to know if the customer is under obligation to pay face of draft on presentation where the charges are not prepaid. *Opinion*: Where the freight charges are not prepaid according to agreement between shipper and customer, the customer would have a perfect right to refuse to pay the face of the draft. Such drafts ought to be accompanied with some instruction to bank authorizing it to hold the draft for arrival of goods and then receive the face of the draft less the freight charges. (*Inquiry from Mont., May, 1920.*)

Violation of instructions to protest if not paid

740. Bank A forwarded a sight draft with bill of lading attached to bank B with instructions to protest if not paid. Two weeks afterwards B, in response to inquiry, sent word that, because of controversy over freight charges, it was returning draft without protesting. A claims that because of the improper handling of the draft, it has been put to loss and requests that B remit at once. *Opinion*: The law requires a collecting agent to exercise reasonable care and diligence, which includes due presentment and notice of dishonor and protest, if instrument requires it. It is the duty of a collecting bank to follow instructions, and failure to do so will make it liable for resulting loss. In case of loss through negligence of B, bank A would have a right of action for damages for actual loss sustained because of B's omission of duty. See *Omaha Nat. Bank v. Kiper*, 60 Neb. 33, 82 N. W. 102. (*Inquiry from Neb., July, 1916.*)

Liability of collecting bank which allows deduction from draft because of claim of damaged goods

741. Bank A in Michigan, received a draft from customer with bill of lading attached drawn on an Indiana firm, with instructions from customer to send draft to bank B. A instructed B to deliver bill of lading only on payment. B was not instructed to allow deductions, but on its remittance to A sent a lesser amount than face of draft, claiming damaged goods, which amount A received under protest. Inquiry is made as to proper procedure. *Opinion*: The law is that a collecting bank in the absence of contrary instructions, is entitled to surrender a time draft upon acceptance of the bill of lading without awaiting payment, but is not so entitled in case of a sight or demand draft, and must surrender the bill of lading only on payment. In this case there were express instructions not to surrender the bill of lading until payment was received and for violation of these instructions B would be answerable for resulting damages. It was B's duty to collect the face of the draft, and it had no right to make a deduction, because of claimed defects in the goods, without receiving instructions from its principal. Undoubtedly A's customer has a cause of action against B for damages. (*Inquiry from Mich., Jan., 1918.*)

Delay in presentment of draft pending arrival of goods

742. Can a collecting bank hold a sight

draft with a bill of lading attached until the arrival of the goods before making formal presentment or giving notice of dishonor, in the absence of instructions so to do by the principal? *Opinion:* A sight draft with order-notify bill of lading attached drawn by the seller upon the buyer of goods is governed by the provisions of the Negotiable Instruments Act. The draft is a negotiable instrument although the bill of lading is attached. Generally when the shipper does not expect the draft to be paid before the goods arrive, he issues instructions that the draft shall be held for presentment pending arrival, and this will excuse the collecting bank for any reasonable delay; but where no instructions accompany the draft, the question is raised whether it is the duty of the collecting bank to promptly present and protest if payment is refused, immediately notifying the drawer of dishonor, or whether the collecting bank is justified in holding it a reasonable time pending the arrival of the goods, because of a custom to that effect. The Negotiable Instruments Act provides that presentment must be made within a reasonable time, but in determining what is a reasonable time, "regard is to be had as to the nature of the instrument, the usage of trade or business (if any) with respect to such instrument and the facts of the particular case." If there is a usage of trade to hold the draft a reasonable time for the arrival of goods, upon proof of such usage or custom, the bank would be probably held free from negligence because it did not present the draft immediately knowing that such presentment would be futile. See *Hubble v. Fogartie*, 3 Rich L. (S. C.) 413, 45 Am. Dec. 775. *Dickens v. Beal*, 35 U. S. (10 Pet.) 572, 9 Led 538. *Joseph v. Salomon*, 19 Fla. 623. *Orear v. McDonald*, 9 Gill (Md.) 350, 52 Am. Dec. 703. *Grosvenor v. Stone*, 25 Mass. (8 Pick.) 79. *Robinson v. Ames*, 20 Johns. (N. Y.) 146, 11 Am. Dec. 259. *Robbins v. Gibson*, 1 M. & S. 288. But in the absence of well-established custom to hold the draft for a reasonable time, pending arrival of goods, the safer course is to make prompt presentment. (*Inquiry from S. C., Feb., 1919.*)

743. Inquiry is made as to responsibility of collecting bank in holding for arrival of goods a no protest sight draft with bill of lading attached in the absence of instructions. *Opinion:* If the owner wants the draft held pending arrival of goods, he should give instructions to that effect.

In the absence of such, and where there is no provision for inspection, a collecting bank would not be safe in holding a sight draft for any length of time to await the arrival of goods. The goods covered by a bill of lading generally travel slower than the bill of lading draft in the mail, and it cannot be expected in all such cases, in the absence of instructions, that the collecting bank should take the risk of holding for arrival of the goods. The drawee is presumed to pay the draft upon presentment with the bill of lading attached and not wait arrival of the goods which may not come in for some time, and if he does not intend to pay the draft the principal should be promptly advised so that he may be guided accordingly. He might be prejudiced by delay. There is little positive judicial authority for guidance on this question, and it is the safest rule to present a no protest sight draft with bill of lading attached promptly, in the absence of specific instructions. If the draft is subject to protest, there is all the more reason for prompt presentment. 4 A.B.A. J. 557. *Citizens Nat. Bank v. Greensburgh Nat. Bank*, 19 Ind. App. 69, 49 N. E. 171. (*Inquiry from Va., March, 1920.*)

Collecting bank should require unconditional payment in absence of instructions

744. A draft with bill of lading attached was sent to a bank for collection and return, without special instructions. The inquiry made is whether the drawee has a right to deposit the money with the collecting bank to pay and take up same with bill of lading and require withholding of payment until examination of the goods can be made, and if not satisfactory return to the collecting bank the documents after refusing the goods, and demand a return of his money. *Opinion:* It does not seem that the bank has any right to receive the money in payment and surrender of the draft and bill of lading on the conditions above specified. It would require special instructions or authorization from the holder of the draft before the bank could make any such arrangement. In the case stated, the bank should not receive payment, but should receive an unconditional payment and remit same to drawer, or else protest the draft for refusal to unconditionally pay. (*Inquiry from Ohio, Dec., 1916.*)

Surrender of b/l without payment of sight draft

745. A bank clerk, without knowledge of the officers, and in the name of the bank,

sent for collection a sight draft with b/l attached to an Omaha bank. Payment was refused by the drawee bank, and b/l was subsequently delivered to the consignee without collection of draft upon official instructions given by the sending bank. The drawer claims that the sending bank acted without authority in releasing the b/l, and claims damages. *Opinion:* While the clerk forwarded the draft and bill of lading without authority, the bank subsequently virtually ratified the clerk's act by assuming control of the matter and officially instructing the Omaha Bank to surrender the bill of lading without collection of the draft. This surrender without payment is the act for which the drawer claims damages and this was an official act of the bank, for which it would be liable for any damages sustained. (*Inquiry from Mont., April, 1919.*)

Surrender of b/l upon acceptance of draft

746. Information is sought regarding effect of surrendering the documents attached to a bill of exchange in the absence of instructions to the contrary. *Opinion:* The question asked, it seems, is covered by Section 41 of the Uniform Bills of Lading Act, which has been passed in New York and in a number of other states in the country. According to this, in the absence of specific instructions to the contrary, the documents are surrendered upon acceptance where the draft is payable on time (that is, payable more than three days after demand, presentation or sight), but where the draft is by its terms or legal effect payable on demand or not more than three days thereafter, the documents must be held for payment of the draft. (*Inquiry from N. Y., Nov., 1917.*)

Collecting bank's duty as to demand and protest of demand b/l draft

747. A collecting bank received from C bank a collection letter enclosing a demand draft with bill of lading attached, which was drawn by A upon B and payable to C bank. There were no instructions regarding protest. The questions asked by the collecting bank are set forth below. *Opinion:* The first question is whether the draft should be protested, if unpaid, on first presentation. It appears it should. When the draft is presented and payment is refused, it is dishonored by non-payment, and the necessary steps upon dishonor should be taken to preserve the liability of the drawer. Although notice of dishonor might be sufficient, unless it was a draft coming from an-

other state, it is best to protest in any event and protest, if made, must be made on the day of dishonor. The second question is whether the collecting bank would be liable if after receiving the draft it refrained two days from making demand and protest. It seems the ordinary course, unless specifically instructed otherwise, is to present a demand draft with bill of lading as soon as received. A delay of two days before presenting might in certain cases be in the interest of the holder, if the collecting bank had reason to believe that it would receive payment if delayed a short time and that the draft would not be paid if immediately presented. At the same time there might be a case where a delay of two days in presentment would be held to work an injury to the drawer for which the collecting bank might be liable. The third question is whether the case would be altered if the draft bore a "no protest" slip. The Negotiable Instruments Act provides that a waiver of protest whether in the case of a foreign bill of exchange or other negotiable instrument is deemed to be a waiver not only of a formal protest, but also of presentment and notice of dishonor. (*Inquiry from Tenn., Dec., 1913.*)

B/L draft "with exchange."

748. A bank received for collection a draft with bill of lading attached, the draft being drawn "with exchange." The bank accepted the face of the draft and made a reasonable charge for collection. *Opinion:* The courts have held in a number of cases that, where an instrument is drawn payable "with exchange," such words are surplusage, meaningless, and have no effect, because the instrument is payable in the place on which it is drawn, and in such case there can be no exchange. In the case stated, the bank was justified in receiving the face of the draft from the drawee. (*Inquiry from Miss., June, 1919.*)

Collecting bank not liable for act of freight agent who allows inspection

749. A bank received a sight draft marked N. P. with order bill of lading attached and held it a few days after notifying drawee by mail. In the meanwhile a freight agent allowed the drawee to open the car which contained the goods covered by the bill and afterward drawee refused to pay the draft. Would the bank be in any way responsible. *Opinion:* It is difficult to see how the collecting bank could be held responsible for the act of the freight agent in

allowing inspection, where without the knowledge or authority of the bank, provided the bank otherwise acted with due diligence. If the freight agent, without authority, had allowed the drawee to open the car and remove the goods without paying the draft, the railroad would be responsible, but it is doubtful if his mere allowing inspection, though unauthorized, would be a sufficient basis for an action for damages against the railroad. (*Inquiry from N. J., Oct., 1912.*)

Delivery of goods without surrender of bill

Delivery by carrier on order of consignee without surrender of the bill

750. A shipper in Michigan sold a commission merchant in Chicago a carload of beans to be shipped to a point in Indiana. The shipper received an order bill of lading containing the usual clause that surrender will be required before delivery of the property, which indicated R in Indiana as the notify party. The bill was not taken out to shipper's order but the order of the Chicago consignee. The shipper attached the bill of lading to a draft and deposited it with a bank for collection but the draft was returned unpaid. It appeared that the Chicago commission merchant, learning the number of the car, made out a written order addressed to the connecting carrier at the terminal point to deliver the beans to R on the payment of charges "without surrender of the original bill of lading" which was done. The beans not being paid for, the bank desires to know the liability of the railroad to the shipper for the delivery of the goods without requiring surrender of the bill. *Opinion:* Where bill of lading is made out to shipper's order, numerous authorities hold that the railroad is liable for damages sustained if it makes delivery without taking up the bill. In this case the bill of lading was delivered to the shipper but was made to the order of the commission merchant. While no direct precedent can be found, upon principle and analogy of the authorities, the carrier is liable to the shipper for the damage sustained because he has expressly contracted with the shipper not to deliver except upon production of the bill and it is no excuse for making delivery without surrender of the bill that such delivery is made upon the order of the person who is named in the bill as the consignee. (*Inquiry from Mich., March, 1914.*)

Note: In the above case the shipper sued the carrier and in April, 1915, the Supreme Court of Michigan decided in his favor. *Thomas v. Blair*, 151 N. W. (Mich.) 1041. The court held in substance: Where plaintiffs shipped goods under an "order notify" bill of lading requiring its surrender before delivery and the goods were delivered to the consignee upon his written order and without surrender of the bill, such delivery was a breach of the contract for transportation giving the shippers a right of action. Further held the initial carrier was liable for such delivery by the terminal carrier under the provision of the Interstate Commerce Act which makes the initial carrier of interstate shipments liable for the defaults of connecting carriers in the transportation of through shipments.

Delivery to notify party in straight bill without authority from shipper

751. A straight bill of lading was issued by a railroad company in which A was named both as consignor and consignee and B named as the person to be notified of the arrival of the goods. Would the railroad company be justified in delivering the goods to B without further authority from A even though it was customary to deliver to notify parties on straight bills? *Opinion:* Delivery, of course, may be made without surrender of the bill, but such delivery can only safely be made to the consignee or to someone authorized by him to receive the goods. It seems at first view a little anomalous to have to notify a party in connection with such a bill, but where a straight bill is used, as here, the consignor naming himself as consignee and adding a notify party, it leads to the opinion that the railroad cannot safely deliver the goods to the notify party without the latter possessing some authority from the consignee to receive them other than what is indicated by the mere insertion of his name as notify party in the bill of lading. The Uniform Bills of Lading Act in force in New Jersey contains a provision that "Where by the bill the goods are deliverable to the seller or to his agent or to the order of the seller or his agent the seller thereby reserves the property in the goods. But if except for the form of the bill, the property would have passed to the buyer on shipment of the goods, the seller's property in the goods shall be deemed to be only for the purpose of securing performance by the buyer of his obligations under the contract." In the present case the goods are deliverable

to the seller or consignor who is also named as consignee in the bill, which indicates that the seller reserves the property in the goods. This being so, it would seem that delivery to the notify party without his producing authority from the seller would not be any safer for the railroad than similar delivery on an order bill without his producing the bill. (*Inquiry from N. J., Feb., 1915.*)

Rights of attaching creditor of shipper

Superior right of purchasing bank to proceeds of draft

752. Local dealers shipped peaches to the west, and western banks wired guaranties that drafts of local dealers for the peaches would be paid. These drafts were discontinued by a local bank and forwarded for collection. The drafts were paid, and the peaches delivered to the buyers, who then claimed that the peaches were not up to contract, and attached the proceeds in the hands of the collecting bank. Who is entitled to proceeds as between bank purchasing drafts and attaching creditors of shippers? *Opinion:* It has been repeatedly held by courts in different states that the bank which has purchased a draft has a superior right to the proceeds thereof to an attaching creditor of the shipper. Some years ago courts in four states, Texas, Alabama, North Carolina and Mississippi, held that a bank purchasing a draft with bill of lading for goods attached, warranted the quality of the goods, so that after the draft was paid, if the goods were not up to contract, the purchasing bank was liable. But these decisions have been subsequently overruled in all of these states, except in Mississippi. In Mississippi such rule still prevails, and it also has a statute requiring a collecting bank to hold the proceeds 96 hours before remitting, so as to give the buyer of the goods an opportunity to attach the proceeds, if the goods are not up to contract. But outside of Mississippi the rule is as stated above. (*Inquiry from Md., Feb., 1918.*)

Creditor takes no greater right to proceeds than shipper

753. A drew a draft on B payable to C to which was attached a bill of lading. It was indorsed by C and delivered to bank D which gave him credit for the full amount and sent it to bank E for collection indorsing it payable to said bank's order. B paid the draft, received the documents attached, and

immediately filed suit against A, alleging breach of contract, and making bank E garnishee defendant. Must bank D which in good faith advanced full amount of draft lose? *Opinion:* There are a number of decisions to the effect that, when a bank takes title to a draft, as distinguished from merely holding it as agent for collection it has a right to the proceeds superior to that of an attaching creditor of the shipper. These cases sometimes go against the bank in the lower court, but the Supreme Court generally reverses the judgment, applying the well-known rule that the creditor in the garnishment proceedings can take no greater rights than his debtor possessed and as the debtor, namely, the shipper, would have no right to the proceeds as against the discounting bank, neither does the attaching creditor. (*Inquiry from Wash., March, 1917.*)

Drawee's claim to proceeds where goods not according to contract

754. A bank purchased a number of drafts covering cars of hay with order bills of lading attached and forwarded the same to another bank for collection. The drawee paid the drafts but later attached the funds in the hands of the collecting bank, because the goods were not according to the contract. *Opinion:* The purchasing bank had a right to the proceeds in the hands of the collecting bank as against the drawee. *Blaisdell v. Bk.*, 96 Tex. 626. *Mason v. Nelson Cotton Co.*, 148 N. C. 492. *Tolerton v. Bk.*, 112 Iowa 706. *Central Mercantile Co. v. Okla. St. Bk.*, 83 Kan. 504. *German American Bk. v. Craig*, 70 Neb. 41. *First Nat. Bk. v. Mt. P. Milling Co.*, 103 Iowa 518. (*Inquiry from Minn., Feb., 1913, Jl.*)

Conflicting claim to proceeds of draft for potatoes

755. A customer of the bank sold potatoes to representative of a Pittsburg commission firm, delivering the bills of lading therefor, and receiving in payment thereof two sight drafts drawn by said representative on the commission company. The drafts were deposited with the inquiring bank as cash items and forwarded in regular course, and upon presentation were paid and the funds immediately attached in the hands of the Pittsburg bank. The commission company claimed that the potatoes were not as represented, and attached the funds against the bank's customer who in turn claims the sale and delivery took place f.o.b. the shipping point when he delivered

the bills of lading to the purchaser and accepted the drafts in payment. The bank claims that the moneys attached are funds of the bank. *Opinion*: If the bank took title to the drafts it would have a right to their proceeds superior to an attaching creditor of the shipper. If the bank held the drafts simply for collection it would not. A case almost identical with the bank's case has been decided by the Supreme Court of North Carolina, *Elm City Lumber Co. v. Childerhose*, 83 S. E. 22, holding as stated in the preceding sentence hereof. (*Inquiry from N. C., Sept., 1918.*)

Owner's right to proceeds of draft for prunes

756. A bank discounted and became owner of a draft with an attached order bill of lading representing prunes. The draft was paid by the consignee of the goods, but while the funds were in the hands of the collecting bank they were attached by a creditor of the shipper. *Opinion*: The purchasing bank has a right to the proceeds in the hands of the collecting bank superior to that of the attaching creditor. See citations in opinion No. 757. (*Inquiry from Cal., April, 1912, Jl.*)

Superior rights of pledgee bank to goods

757. Where goods, shipped under an order bill of lading, are attached by a creditor of the shipper, the courts quite generally hold that a bank to whom the bill has been pledged for value as security for advances has a right to the property superior to that of an attaching creditor. *Seward Co. v. Miller*, 55 S. E. (Va.) 681. *Mather v. Gordon*, 77 Conn. 341. *American Nat. Bk. v. Henderson*, 123 Ala. 612. *Neil v. Rogers*, 41 W. Va. 37. *First Nat. Bk. v. Milling Co.*, 103 Iowa 518. *Nat. Bk. v. Everett*, 71 S. E. (Ga.) 660. (*Inquiry from Me., Dec., 1908, Jl.*)

Superior right of purchasing bank to proceeds of goods

758. Where a bank gave value for a draft for the purchase price of automobiles, b/l therefor attached to draft, and subsequently authorized the railroad company to release the cars to consignee, and authorized latter to sell them for bank's account, what are bank's rights as against claim of consignee against the original shipper? *Opinion*: It would seem that the bank is entitled to the proceeds of the sale of the cars free from any claim of the consignee against the original shipper. The rule is well established

that where the consignor draws on the consignee for the purchase money, and the draft, with b/l attached, is indorsed or transferred to a party who discounts the draft, a special property in the goods passes to the transferee, subject, however, to be divested by acceptance and payment of the draft. (*Halsey v. Warden*, 25 Kan. 128. See also *State Nat. Bank v. Wood*, 142 Pac. [Okla.] 1002. *Ladd, etc., Bank v. Com. State Bank*, [Oreg.] 130 Pac. 657). This rule applies although no money has actually been advanced to the consignor, and it is sufficient that the consignor has been given credit. (*Kansas City First Nat. Bank v. Mt. Pleasant Mill. Co.*, 103 Iowa 518. *Fredonia Nat. Bank v. Tommel*, 131 Mich. 674). (*Inquiry from Mich., Feb., 1918.*)

Bank acquires superior title by giving credit

759. A bank discounted a shipper's draft with an accompanying bill of lading representing hay, and credited the shipper with the amount. The drawee refused to pay the draft and attached the goods because of an alleged prior indebtedness of the shipper to him. *Opinion*: The bank was not simply collecting agent of the shipper but acquired special title to the hay superior to that of an attaching creditor of the shipper, even though the credit was not checked out. See citations in opinion No. 760. (*Inquiry from N. Y., July, 1910, Jl.*)

General rule stated

760. It is the undoubted rule of law that where a bank purchases or makes advances upon a draft, to which is attached a bill of lading as security, the purchasing bank takes a right to the property superior to that of an attaching creditor. See citations in opinion No. 757. *Sather Banking Co. v. Hartwig*, 23 Misc. (N. Y.) 89. *Third Nat. Bk. of St. Louis v. Hayes* (Supreme Ct. Tenn. 1907), *Citizens St. Bk. v. Cowles*, 180 N. Y. 346, 73 N. E. 33. *First Nat. Bk. v. Mt. Pleasant Milling Co.*, 103 Iowa 518. (*Inquiry from N. Y., July, 1910, Jl.*)

Rights of attaching creditor of shipper superior to claim of shipper's collecting bank

761. A New Jersey bank received for collection a draft signed by a depositor drawn on a concern in Indiana. The draft was payable to the bank's order with bill of lading attached. The draft was sent to an Indiana bank for collection and remittance with instructions to deliver bill of lading only upon payment of draft. The Indiana

bank, upon being requested to remit or return draft and bill of lading, stated they has been impounded by the sheriff and were in the hands of the Indiana court. *Opinion:* If this draft was the New Jersey bank's property with bill of lading attached as security, a creditor of its depositor in Indiana would have no right to attach the same; but if it was the property of the bank's depositor, it seems it would be subject to attachment by his creditor in that state, and the collecting bank would not be responsible if it was taken out of its hands by order of the court. The creditor's right of attachment would depend upon ownership or otherwise, by the New Jersey bank of the draft and bill of lading. (*Inquiry from N. J., April, 1919.*)

Liability of collecting bank to attaching creditor for wrongfully deducting attached proceeds from his account

762. A shipper forwarded goods and entrusted to a bank for collection bill of lading attached to sight draft. The consignee requested the collecting bank to have the goods and draft forwarded to another state, which request was complied with. The consignee paid the draft to a bank in such other state and immediately sued the shipper and garnished the money in the hands of such bank. This latter bank remitted to the first named bank the balance of the proceeds after deducting the amount of the judgment rendered against the shipper, which the court directed to be paid out of the proceeds. The original collecting bank, added to the net proceeds, sufficient to pay the draft and sent the amount to the shipper and deducted the amount added from the consignee's account in the bank. Subsequently the consignee drew checks against his account on which payment was refused for insufficient funds, although were it not for the amount deducted there would have been sufficient to pay the checks. The consignee has sued the bank to recover the amount claimed to be on deposit, and asks damages for refusing to pay checks. Is the bank liable to the consignee? If so, to what extent? *Opinion:* There is a line of cases which holds that where a bank takes title to a draft with bill of lading attached and collects the proceeds from the consignee, such proceeds cannot be attached or garnished by the consignee as the property of the shipper who drew the draft. The following cases are on this general subject, most of which so hold: Merchant Bk. v. Parker,

82 S. E. (Ga.) 658. Thomas v. Cit. Nat. Bk., 147 N. W. (Wis.) 1005. First Nat. Bk. v. Mt. Pleasant M. Co., 103 Iowa, 518. Seward v. Miller 55 S. E. (Va.) 681. Mather v. Gordon, 77 Conn. 341. Am. Nat. Bk. v. Henderson, 123 Ala. 612. Neill v. Rogers, 41 W. Va. 37. If, therefore, the bank had given value to the shipper and had not taken the draft for collection, it would upon the authority of the above cases be held entitled to the proceeds in the hands of the bank in the other state to whom the draft and bill of lading were forwarded and by proper intervention in the garnishment proceedings, would have been entitled to those proceeds free from garnishment. But apparently the draft was received for collection only as agent of the shipper and the proceeds were subject to garnishment as the property of the shipper; the bank forwarded more than the shipper was entitled to receive, and had no right to deduct the amount from the consignee's account. Hence the bank would be liable to the consignee for the amount so deducted; and there may also be a liability to the consignee for not paying his checks. (*Inquiry from Colo., Nov., 1914.*)

Warrantor liability of purchasing bank

No warranty of bill of lading to acceptor of draft

763. The question is asked whether a bank discounting a draft warrants to the acceptor bills of lading attached thereto as security. *Opinion:* The rule is quite well settled that the bank does not. In Goetz v. Bank of Kansas City, 119 U. S. 551, the Supreme Court of the United States held that the acceptor of a bill of exchange discounted by a bank with b/l attached which the acceptor and the bank regard as genuine at the time of acceptance, but which turns out to be a forgery, is bound to pay the bill to the bank at maturity. To the same effect, see Hoffman v. Bank of Milwaukee, 12 Wall. (U. S.) 181. Springs v. Hanover Nat. Bk., 130 N. Y. Suppl. 87 (affirming 127 N. Y. Suppl. 178). (*Inquiry from Iowa, May, 1917.*)

No warranty of goods to payor of draft

764. What is the liability of a bank in forwarding for collection a draft with a bill of lading attached? *Opinion:* A bank which purchases from the drawer and collects from the drawee a draft, with bill of lading attached, is not responsible for the quantity, quality or condition of the goods covered by the bill of lading. Cosmos

Cotton Co. v. First Nat. Bank, [Ala.] 54 So. 621. (*Inquiry from Ala., July, 1920.*)

The exceptional rule in Mississippi

765. A bank has been informed that the Supreme Court of the United States has handed down a decision that, if a bank accepts even for collection a draft having a b/l attached covering a shipment of cotton, the bank or collecting agent becomes liable for the count, weight and quality thereof, even if it stamps such draft on the back a disclaimer of liability therefor. *Opinion:* The supreme court of Mississippi in *Searles v. Smith Grain Co.* 32 So. 287, decided in 1902, held that a bank, sending a draft for grain, with b/l attached, payable in Mississippi was a co-warrantor with the shipper and seller of the grain, and if the grain was defective, the bank was liable for the loss to the payor of the draft—i. e., the consignee of the grain—and such debt would sustain an attachment. This decision did not apply to a collecting bank, not owner of the draft, after it has remitted the proceeds, but a statute in Mississippi required retention of the proceeds for 96 hours. The Supreme Court of the United States in 1887 held directly the contrary. *Goetz v. Bank of Kansas City*, 119 U. S. 551. It seems the State of Mississippi stands alone in holding that a bank which collects a draft with a bill of lading is responsible to the drawee where the goods are not up to contract, and that is the reason it is necessary for the bank to put on the bill of lading drafts the stamped disclaimer of liability. (*Inquiry from Miss., June, 1916.*)

Note: In *Citizens Bank v. Harpeth Nat. Bank*, 82 So. (Miss.) 329, decided July, 1919, the supreme court of Mississippi adheres to the decision in the earlier *Searles* case.

766. A bank inquires whether a bank purchasing a draft with bill of lading attached is responsible to the payor of the draft for the quality, quantity or condition of the goods. *Opinion:* The courts are almost unanimous that the bank is not responsible in such cases. A contrary rule was formerly held in the states of Texas, North Carolina, Alabama and Mississippi, that the bank purchasing the draft warranted the goods to the buyer, but this doctrine has been repudiated in the three states first named and the only state wherein the warrantor doctrine still prevails, as far as discoverable, is Mississippi. (*Inquiry from Minn., Oct., 1918.*)

Distinction between negotiation of bill of lading and collection of debt secured thereby

767. Under Sections 37 and 39 of the Pomerene bill (embodying the main features of the Uniform Bills of Lading Act), which has passed the United States Senate and is pending in the House,

1. Where a bank purchases a draft with an order bill of lading attached and assigns the draft with indorsement to another bank for value, the bank guarantees the genuineness of the bill to the purchaser although it does not indorse the bill, but

2. Where a bank forwards the draft with the attached bill of lading for collection from the drawee, the bank does not warrant the genuineness of the bill of lading to the payor. The act makes a distinction between the negotiation of a bill of lading by indorsement or delivery, and the collecting of a debt for which the bill of lading is security. (*Inquiry from N. Y., Nov., 1912, Jl.*)

Note: The above bill became a law August 29, 1916, and took effect January 1, 1917. In the law as passed the sections above referred to are numbered 34 and 36 respectively.

Bank negotiating b/l for value warrants genuineness unless liability disclaimed

768. A bank inquires respecting utility of stamps placed upon drafts and bills of lading disclaiming responsibility for lack of genuineness or for defect of title, quantity, quality or condition of the goods, etc. *Opinion:* In the ordinary case of purchase of a draft secured by a bill of lading which is forwarded for collection, there would be no particular utility in placing such stamp on bill of lading documents, for, although the bank collected the draft from the drawee and it later turned out that the bill of lading was forged or that the property was defective or there was lack of title, the bank would not be responsible therefor to the drawee who paid the draft except possibly in the state of Mississippi where a contrary doctrine still holds. But should a case arise, where a bank secured by a bill of lading, should indorse it over to another purchaser for value, as distinguished from collecting payment from the drawee, the Uniform Bills of Lading Act provides in such case a warranty by the assignor of genuineness, title, condition, etc., and if it is desired not to assume this warrantor liability, the stamp referred to would have utility in such case. (*Inquiry from Pa., July, 1915.*)

Effect of disclaimer

769. A purchasing bank placed a rubber stamp indorsement on a draft with a bill of lading attached, whereby it disclaimed liability as warrantor of the quantity, quality, and delivery of the goods affected. The bank questions the effect of such disclaimer. *Opinion:* No decision by a court of last resort has been rendered testing the effect of such disclaimer. It is almost the universal rule that the bank does not incur this warrantor liability and it would probably be held that the written disclaimer would be surplusage and would not give a bank any more protection than it already had. *Leonhardt v. Small*, 117 Tenn. 153. (*Inquiry from Ga., Oct., 1908, Jl.*)

Disclaimer of warrantor liability for b/l security unnecessary except in Mississippi

770. A bank received payment of a draft with bill of lading attached for consignment of goods, in payment of purchase price. It later develops that the goods were not according to contract and the question is raised as to whether the receiving bank is liable as an agent of the seller guaranteeing performance of the contract, unless it disclaims such warrantor liability by indorsement on the bill of lading. *Opinion:* The almost universal judicial rule in this country, now enacted in statutory form as to interstate bills by Section 36 of the Federal Bill of Lading Act is that a bank which purchases a draft with bill of lading attached is not responsible to the drawee who pays the draft for the genuineness of the bill or the quantity or quality of the goods therein described. There is no necessity of stamping on the draft an express disclaimer of such warrantor liability except possibly in the case of intrastate bills of lading in Mississippi. *Blaisdell Co. v. Citizens Nat. Bk.*, 96 Tex. 626. *Mason v. Nelson Cotton Co.*, 148 N. C. 492. *Cosmos Cotton Co. v. First Nat. Bk.*, 54 So. (Ala.) 621. *Tolerton-Stetson Co. v. Anglo-California Bk.*, 112 Ia. 706. *Hall v. Keller*, 64 Kans. 211. *German American Bk. v. Craig*, 70 Neb. 41. *Leonhardt v. Small*, 117 Tenn. 153. *Goetz v. Bk.*, 119 U. S. 551. Federal Bill of Lading Act, Sec. 36. (*Inquiry from Colo., Nov., 1918, Jl.*)

Disclaimer indorsed on draft does not weaken bank's special title

771. A bank indorses a draft with a bill of lading attached, using its rubber stamp as follows: "By indorsing this draft or

receiving a payment thereon we do not warrant the genuineness of the bill of lading attached, nor the quantity or quality of the goods therein.

..... Bank

..... Michigan."

The bank asks whether this disclaimer of warrantor liability invalidates its title to the goods covered by the bill of lading. *Opinion:* Bank which purchases and collects draft to which bill of lading is attached as security holds a special title to the goods as pledgee which is divested upon payment of the draft, but does not warrant the quantity or quality of the goods therein described. A disclaimer of such warrantor liability, stamped upon a bill of lading draft is unnecessary, except probably in case of drafts drawn on Mississippi, where the warrantor doctrine still prevails; but if such disclaimer stamp is indorsed upon the draft, opinion expressed that it would not weaken the bank's special title in the security. *Cosmos Cotton Co. v. First Nat. Bk.* 54 So. (Ala.) 621. (*Inquiry from Mich., April, 1918, Jl.*)

Disclaimer where necessary should be placed on draft rather than on b/l

772. It is almost universally held that a bank which purchases a draft with a bill of lading attached does not warrant to the drawee who pays the draft the quantity and quality of the goods. An express disclaimer by the bank of such liability, where it is thought necessary to guard against a possible liability, should be placed on the draft rather than on the bill of lading and such stipulation would probably be binding on the drawee. (*Inquiry from Ohio, Nov., 1910, Jl.*)

Rights of banks as purchasers*Rights of bank discounting order b/l*

773. Information is sought concerning the method of handling negotiable bills of lading; also as to liability of banks in connection with such transactions. *Opinion:* The shipper who delivers goods to the railroad and obtains a negotiable bill of lading therefor frequently attaches thereto a draft on the purchaser for the price and discounts the same with his local bank. Since the enactment of the Pomerene bill of lading act, the railroad is liable on such bill of lading even though the agent issued same without receipt of goods. The bank would, therefore, be protected in security although the bill was issued by an agent as

accommodation to the shipper without goods or fraudulently in collusion with the shipper. It was held at one time in a few states that a bank discounting a bill of lading draft and collecting the same from the drawee was responsible to the latter in case the goods were not up to contract, but at the present time this doctrine has been repudiated and there is no such responsibility except that the courts of Mississippi still uphold such doctrine. Furthermore, a bank discounting a draft with negotiable bill of lading draft attached has a superior right to the goods or to the proceeds of the draft in the hands of a collecting bank over an attaching creditor of the shipper. This has been held in numerous cases. If, however, the first bank does not discount the draft but simply takes it for collection as agent of the shipper or drawer, this result would not follow. (*Inquiry from Mont., Sept., 1917.*)

Where order b/l is consigned to broker and order on broker is attached to draft

774. In the shipment of lima beans from California to Eastern points cases arise where one carload contains shipments to several purchasers. In such cases b/l for the entire car is forwarded by the shipper to his broker in the Eastern city and the shipper deposits his draft on the purchaser attaching to the draft an order on the broker for the beans. A bank which has in the past discounted shipper's drafts with b/l attached is now asked to discount shipper's drafts with such order attached and asks (1) whether a national bank is permitted to discount such drafts with orders attached and if so (2) whether such orders give the bank sufficient control over the shipment. *Opinion:* (1) It is within the power of a national bank to discount such drafts with orders attached without reference to the statutory limit of loans to a single borrower. The ten per cent. limit does not apply to the discount of bills of exchange drawn in good faith against actually existing values and such drafts would be drawn against actually existing values although the bill of lading representing the goods was not actually attached to the draft and transferred to the bank at the time of discount. But (2) where the bill of lading does not accompany the draft but only an order for the goods addressed to a broker to whom they have been shipped the bank would not have sufficient security in financing such transactions unless the responsibility of the shipper was ample. The order on the broker does not

amount to anything as security. Where an order bill of lading is attached to a draft the pledgee bank, in case of non-payment, has recourse both against the drawer and against the shipment which it controls by means of the bill of lading, but where only an order on the broker is attached, the sole recourse of the bank is upon the drawer of the draft, in event of its non-payment, for the broker might wrongfully dispose of the goods and they would be beyond the control of the bank. Unless, therefore, the shipper is of undoubted financial responsibility, it would be inadvisable to discount such drafts upon mere attached orders upon the broker to whom the goods have been shipped. (*Inquiry from Cal., July, 1914.*)

Conflicting claim of title between bank holding bill of sale and copy of b/l and consignee claiming under prior bill of sale

775. A party shipped a car load of lumber to a firm in Louisville, Ky., and a bill of sale was given to the bank by the shipper, to which was attached a copy of a straight bill of lading in which said firm was named as consignee. Upon these documents the bank advanced value to the shipper. The lumber was accepted upon arrival, but no remittance was made, a claim being advanced that the title to the lumber had been already transferred by bill of sale to the consignee. (1) Did the bill of sale by the shipper to the bank and attached copy of bill of lading transfer title to the bank? (2) Can the shipper be held criminally liable for obtaining money under false pretenses?

Opinion: (1) The goods being deliverable to the consignee, the bill of lading would evidence a transfer of title to such consignee. Therefore, the bill of sale and attached copy of the bill of lading would not transfer any title to goods already sold and transferred to the consignee. The bank should have taken for its own protection a bill of lading to shipper's order with the firm in Louisville as notify party, indorsed in blank by the shipper, attached to his draft for the price and transferred to the bank, in which case the railroad could not deliver the goods without surrendering and the Louisville firm would have to pay the draft in order to get the b/l and obtain the goods. But even then, if there had been a prior valid transfer of title to the goods by bill of sale to the consignee, the latter's title might be held superior to that of the bank, because if at the time of delivering the goods to the railroad and receiving the bill of lading the

shipper had no title, the bank would acquire no greater rights even under an order b/l. (2.) If the shipper obtained the bank's money, upon false representation of title, he might be held liable criminally. (*Inquiry from Ind., Oct. 1915.*)

Consignor cannot change routing

776. The consignor of goods having transferred an order bill of lading as security to a bank, has no right without the bank's consent to have the shipment diverted *en route*, and if the railroad obeys his instructions it would be liable in damages to the bank. In the case of a shipment from California to New York, if the bank sued the railroad for damages in converting and injuring the property, the law of the state where the injury occurred would govern; but if the bank sued the railroad for breach of contract, the law of the state where the contract was made would govern. *Ryan v. Great Northern Ry. Co.*, 90 Minn. 12. *Baily v. Hudson River R. R. Co.*, 49 N. Y. 70. *Sheldon v. N. Y. Cent. & H. R. R. R. Co.*, 61 Mis. (N. Y.) 274. (*Inquiry from N. Y., Dec., 1910, Jl.*)

Estoppel of carrier to claim lien for freight against bona fide holder where b/l recites "freight prepaid."

777. A draft with a b/l attached was negotiated by the maker through the inquiring bank, the b/l containing a statement that freight charges were prepaid. While goods were in transit the maker failed. The railroad company over which goods were shipped extended credit to the maker on a weekly basis. In order to facilitate matters the bank paid the freight charges upon the company's refusal to deliver goods without payment thereof, the goods being of a perishable nature. The inquiry is whether the company is liable to the bank for the freight charges. *Opinion*: (1.) The carrier's right to a lien on the goods may be waived by giving credit. *Pinney v. Wells*, 10 Conn. 104. *Chandler v. Belden*, 18 Johns. (N. Y.) 525. *Sicard v. Buffalo, etc., R. Co.*, 15 Blatch (U. S.) 525. See also *Cent. of Ga. Ry. Co. v. Southern Ferro Concrete* (Ala. 1915) 68 So. 981. *Sears v. Wills*, 4 Allen (Mass.) 212. (2.) In this case the carrier did give credit and waived the lien. (3.) Although the waiver of the lien on the goods would not deprive the carrier of his right to collect the freight charges from the person lawfully liable therefor, still the bank having advanced

value on the bill of lading on faith of the statement therein contained that the charges were "prepaid", it might fairly be maintained that the carrier was estopped to deny the truth of such statement as against a bona fide purchaser who had paid value on faith thereof. There seems to be no precedent upon a precisely similar state of facts, but it seems that the bank having paid the freight charges under protest, might hold the railroad liable therefor. (*Inquiry from Ohio, Sept., 1916.*)

Conversion of lost order b/l by consignee

778. A bank messenger lost a bill of lading covering a car load of produce, which b/l found its way into the hands of a produce firm, the consignees. It was to shipper's order. The firm presented it to the railroad company and obtained the produce without making payment. A bank which acquired the b/l for value asks as to the liability of the firm. *Opinion*: The firm in question is undoubtedly civilly liable for the value of the bill of lading, having appropriated the same to its own use without paying the draft. Whether it can be held criminally liable under the Illinois statutes depends upon the facts. If it could be proved that it stole the bill of lading from the messenger or obtained it from him by false pretense, the bill of lading being property, it seems the offender would be amenable to the criminal statutes. If, however, the messenger lost the bill of lading in the street and somebody picked it up and handed it to the firm, thinking it belonged to such firm, there probably would be no criminal liability. (*Inquiry from Ill., Dec., 1911.*)

Acceptor's liability on b/l draft

779. The drawee of a draft which had been discounted by a bank with an attached bill of lading representing cotton accepted the draft before checking the invoice. Before the expiration of the three days of grace, the drawee discovered an error in the invoice and refused payment of the draft at maturity, whereupon the instrument was protested. *Opinion*: Under the Mississippi law (the Anti-Commercial statute) the acceptor of the draft is not liable to a bona fide holder where it has a good defense against the drawer. *Miller v. Bk.*, 76 Miss. 84. (*Inquiry from Miss., April, 1912, Jl.*)

Note: Under the Negotiable Instruments Act, which became a law in Mississippi in 1916, the acceptor would be liable.

Non-negotiable b/l drafts and rights thereunder

Recovery by drawee of money paid on non-negotiable b/l draft

780. A draft was drawn payable "on arrival" and provided that the "paid freight bill will be accepted as part payment." The drawer cashed the draft with the bill of lading attached at the bank, which forwarded the instrument for collection. The drawee paid the draft upon surrender of the bill of lading, but afterwards repudiated the transaction and recovered the money from the collecting bank, claiming that the goods were bought on sample from the drawer and were not as represented. *Opinion:* The draft not being an unconditional order to pay money was not negotiable and the bank which purchased the draft was liable to refund where it was shown that there was failure of consideration for the draft. *Detroit First Nat. Bk. v. Burkham*, 32 Mich. 328. *Tolerton v. Bk.* 112 Iowa 706. *Burton St. Bk. v. Pease-Moore M. Co.*, 163 Mo. App. 135. *Cosmos Cotton Co. v. First Nat. Bk.*, 54 So. (Ala.) 621. (*Inquiry from Mich., Feb., 1912, Jl.*)

B/L draft payable "on arrival of goods" not protestable

781. A bank holds a bill of lading draft sent as a protest item which reads, "On arrival of goods pay to the order of", etc. Is draft protestable at time presented or after arrival of goods? *Opinion:* A draft payable "on arrival of goods" is not strictly speaking a negotiable instrument as its payment depends upon a condition which may never be fulfilled. The law merchant authorizes a protest and notice only in cases of negotiable instruments, and the protest of a non-negotiable bill would be of no avail, nor be evidence of any fact therein stated, unless some statute expressly provided for the protest of non-negotiable bills of exchange. The sections of the Negotiable Instruments Act providing for protest only apply to negotiable instruments. A draft, therefore, payable on arrival of goods, would not in strict law be protestable upon refusal of payment when presented at or after arrival. (*Inquiry from Ark., Oct., 1915.*)

Purchaser holds subject to defense of party liable

782. A bank cashed two drafts drawn on an Illinois company, payable to H. H. Bailey, who was employed by the company

in purchasing logs. The cashed drafts being payable "when attached to bill of lading." The bill of lading was not attached. The Illinois company, purchaser of logs, had withheld the amount for charges of loading the logs on the cars. Bailey caused the bank to believe that he would load the logs and produce the bill of lading, and the bank was to mail same and collect amount of drafts. *Opinion:* The drafts were non-negotiable, being payable "when attached to bill of lading." If Bailey loaded the logs and the company owed him this amount, the selling of the drafts to the bank would operate as an equitable assignment to the bank of his claim against the company. But if the company had paid Bailey or anyone else for loading, it would seem that the bank has no claim against the company as the drafts the bank acquired from Bailey for the cost of loading were non-negotiable and only payable when attached to the bill of lading which was not attached. (*Inquiry from Mo. March, 1918.*)

Straight bills of lading

Straight b/l insufficient as collateral security

783. Question is asked whether a railroad company would be liable for reshipping and delivering a car of goods to parties other than consignees, without authority from bank holding original bill of lading. *Opinion:* It seems the draft upon which the bank made advances had attached a straight and not an order bill of lading. If the bill of lading had been an order bill, the railroad would be liable to the bank as the holder for wrongful delivery of the goods. But a straight bill of lading affords a bank no protection. *Prima facie*, the consignee is the owner of the goods in transit and the carrier is bound to treat the consignee as owner and take orders from him until it is advised that a different relation exists. (*Inquiry from N. C., July, 1915.*)

Foreign shipments under straight b/l containing requirement that bill be surrendered by consignee before delivery of goods

784. It seems shipping orders of the British Government authorize the seizure of neutral merchant vessels and the taking of conditional contraband if consigned "to order" in a neutral port. The use of an order bill not being practicable, a bank inquires how shipments to Norway, Denmark and Sweden can be made so as to insure payment by the consignee before

delivery of the goods. *Opinion:* Under such circumstances perhaps it could be arranged with the carrier that they imprint upon the straight bill of lading a clause or contract with the shipper that the goods represented thereby are deliverable to the consignee only upon his production and surrender of the bill of lading. The situation is a peculiar one, but it seems that, while,

under the law, the carrier is bound to deliver the goods to the consignee of a straight bill of lading upon his demand, such requirement of law might be supplemented by an additional contract under which the consignee would not be entitled to obtain the goods except upon production and surrender of the bill of lading. (*Inquiry from N. Y., 1917.*)

CERTIFICATE OF DEPOSIT

Form and interpretation

Demand and time certificates distinguished

785. The provision printed on the back of a certificate of deposit payable on return that "this certificate is payable twelve months after date" is part of the terms of the contract on the face so that the instrument is not a demand but a time certificate of deposit. *Warrington v. Early*, 2 El. & Bl. 763 (1850). *Benedict v. Cowden*, 49 N. Y. 396. *Springfield Bk. v. Merrick*, 14 Mass. 322. *Coolidge v. Ingler*, 13 Mass. 26. *Heywood v. Perrin*, 10 Pick. (Mass.) 228. *Franklin Sav. Inst. v. Reed*, 125 Mass. 365. *Effinger v. Richards*, 35 Miss. 540. *Daniel on Neg. Inst.* (6th Ed.) Vol. 1, p. 203. *Farmers Bk. v. Ewing*, 78 Ky. 264. *Van Zandt v. Hopkins*, 151 Ill. 248. (*Inquiry from Colo., May, 1915, Jl.*)

C/D payable 6 or 12 months after date "with 3% int. if left 6 and 4% if left 12 mos." is time and not demand certificate

786. A bank submits a sample certificate of deposit, the same being payable: "On return of this certificate properly indorsed 6 or 12 months after date, with interest at the rate of 3 per cent. per annum, if left six months, or 4 per cent. per annum if left twelve months. No interest after maturity". The contention of the National Bank Examiner is that the phrase "if left six months", makes it a demand certificate; that it implies that the holder may demand payment at any time after date, but if he chooses to leave the money on deposit for six months it will bear three per cent. interest. The bank states that it has been treating these certificates as time deposits up to within thirty days of their maturity, and asks whether such course was proper. *Opinion:* It does not seem that this form of certificate has been interpreted by any court, but it is reasonable to construe it as a time certificate and not payable on demand of the holder before the expiration of six months. The

promise is not to pay on demand, but to pay 6 months after date or 12 months after date and it seems reasonable to suppose that a court would construe it as a time certificate and that the three per cent. clause is simply intended to differentiate the rate of interest which it bears for six months from the rate of four per cent. which it would bear if not demanded until twelve months after date. At the same time there is some merit in the criticism of the Bank Examiner, and in order to obviate this it might be drawn payable on return "twelve months after date" with interest at 4%, and contain the clause "payable in six months if desired with interest at 3%." In *Citizens Bank of Los Angeles v. Jones*, 53 Pac. (Cal.) 354 a certificate so phrased was held a negotiable instrument which matured at the end of a year, with an option to the payee to present in six months at his election and the indorser is not discharged because not presented for payment by his indorsee at the end of six months. (*Inquiry from Wash., Jan., 1920.*)

Certificate of deposit with foreign correspondent payable by check on correspondent

787. The customers of a bank having branches and agencies in Central and South America frequently request it to open interest bearing accounts with its foreign correspondents. These accounts are regarded as time deposits and are, therefore, not subject to sight drafts as a rule. For this reason it is not convenient for banks in America to negotiate drafts drawn against time deposits or savings accounts in South America and as a consequence the rate of exchange cannot be fixed until notice is received that the funds have actually been collected. The depositor, on the other hand, desires to withdraw his funds to take advantage of a favorable rate of exchange, and does not wish to be subject to a fluctuating exchange until the transaction is finally consummated. Would the following form of foreign certificate of deposit, which would seem to render

possible the withdrawal of time deposits without inconvenience to the beneficiary, be proper? Would it relieve the makers from all responsibility after the foreign account has been once opened?

"Foreign Certificate of Deposit No.— San Francisco, Cal.—

This is to Certify, that—
has delivered to the X bank, the amount of — to be deposited by mail in a special account with the X bank's correspondent — at — payable on demand upon proper endorsement of this Certificate by the X bank's check against said deposit with interest at the rate accorded the X bank, by said correspondent on said deposit. This Certificate is issued on condition that the X bank assumes no responsibility for deposits made at the request of clients with its correspondents abroad, that such deposits are held solely at the risk and peril of the client, and the form of withdrawal of such deposits has been adopted purely for the convenience of said client or depositor. No interest will be allowed on deposits withdrawn within thirty days." *Opinion:* The proposed form of certificate would relieve the maker from responsibility to the depositor after the deposit has been mailed to the foreign correspondent. But when the issuing bank comes to pay the certificate by making its draft on the foreign correspondent against the deposit and the draft is not paid because of failure or insolvency of the correspondent or for other reason, it seems there might be a liability of the bank upon its unpaid draft, assuming it was in negotiable form and the payee had negotiated the same. If there is any weight in this suggestion it might be well to issue such checks "without recourse on the drawer" or containing some other form of words that would stipulate against liability. The Negotiable Instruments Act provides that the drawer is liable in the event of dishonor but further provides:—"But the drawer may insert in the instrument an express stipulation negating or limiting his own liability to the holder." (*Inquiry from Cal., Feb., 1921.*)

Negotiability

Effect of words "not transferable"

788. A certificate of deposit drawn payable to specified payee with the words "non-transferable" written on or across the face of the instrument is not negotiable. *Tanners Nat. Bk. v. Lacs.* 136 App. Div. (N. Y.) 92. *Durr v. State*, 59 Ala. 24. (*Inquiry from Cal., Dec., 1912, Jl.*)

Effect of words "non-negotiable"

789. Do words "non-negotiable" printed on a negotiable certificate of deposit make the same non-negotiable? *Opinion:* The words "non-negotiable" printed on the certificate of deposit would render the instrument non-negotiable but it would still be assignable. See *Dollar v. International Banking Corporation*, 101 Pac. (Cal.) 34 where the words "not transferable" appearing at the top of a c/d were held to destroy the negotiability of the instrument under the law merchant but not to restrict the right of transfer. (*Inquiry from Ark., Aug., 1916.*)

Advantages and disadvantages of non-negotiable form

790. What are the advantages and disadvantages of the use respectively of negotiable and non-negotiable certificates of deposit? *Opinion:* Where a bank's certificate is negotiable, it enables the depositor to negotiate it before maturity when he needs money, either by pledging the certificate for a loan or selling it outright. On the other hand, if a negotiable certificate is lost, the depositor is put to the disadvantage of furnishing indemnity, for, although the depositor may assert that the certificate was un-indorsed when lost the bank cannot take the risk of the honesty of the depositor or safely pay without indemnity. Some banks make all their certificates non-negotiable for then, upon claim of loss, they can safely pay to the original depositor without indemnity. Being non-negotiable, no transferee of the original depositor can acquire greater rights, and defense of payment to the original depositor would be a good defense against an assignee who had not notified the bank of the assignment before payment of the certificate. Some courts hold that a bond of indemnity need not be given where a depositor alleges that a negotiable certificate has been lost; others hold to the contrary, and, in order to avoid all disputes as to the giving of indemnity some banks think it better to issue all their certificates of deposit in non-negotiable form, for then they can be safely paid without indemnity. See *Zander v. N. Y. Security & Trust Co.*, 178 N. Y. 208, 70 N. E. 449, 102 Am. St. Rep. 492. (*Inquiry from La., Jan., 1917.*)

C/D payable on condition not negotiable

791. A bank upon receiving from an attorney \$500, delivered its certificate of

deposit to John Doe a justice of the peace. The certificate was made payable to John Doe in case of default of a certain bond in the case of *People vs. Jones*. The court records showed that Jones was acquitted, and as there was no default on the bond, the attorney requested return of the certificate, which was refused. Later, however, the bank, returned the money to the attorney without the surrender of the certificate on the claim that the court would not surrender it to him. Still later, the certificate indorsed by John Doe in blank was presented to the bank in the regular course of business and payment refused because of no evidence to show that Jones had defaulted on his bond. The bank is threatened with suit. *Opinion*: A certificate of deposit payable on condition is not negotiable, and where the condition does not eventuate, the issuing bank may safely return the money to the depositor without surrender of the certificate. The condition not being performed, neither the payee nor an assignee acquires any enforceable rights therein. *Lemar, etc., Co. v. Bk.*, 127 Ga. 448. *Baker v. Tillman*, 84 Ga. 401. *McGorray v. Stockton Sav., etc., Soc.* 131 Cal. 321. (*Inquiry from Mich., Oct., 1917, Jl.*)

Negotiability of c/d payable six or twelve months after date

792. Is a certificate of deposit, drawn payable six or twelve months after date and bearing the notice on its face, "This is a time deposit under the provisions of Section 19 of the Federal Reserve Act. Therefore, the right is reserved to require notice of thirty days before payment", negotiable? *Opinion*: It has never been specifically decided that a certificate "payable six months or twelve months after date" is negotiable. The Negotiable Instruments Act requires that to be negotiable the instrument must be payable on demand, or "at a fixed or determinable future time" and provides that the instrument is payable at a determinable future time when payable "at a fixed period after date or sight or on or before a fixed or determinable future time specified therein". The courts might construe the words "six or twelve months after date" as making the instrument payable "on or before a fixed or determinable future time specified therein". The only trouble with this interpretation would be that there are in reality two fixed future times specified in the instrument, namely, six months and twelve months. In *Leader v.*

Plaute, 95 Me. 339, 50 Atl. 54, 85 Am. St. Rep. 415, the promise to pay was "within one year after date," and the court held that it was a negotiable promissory note, payable one year after its date, with an option in the maker to pay before maturity. Also in *Citizens Bank of Los Angeles v. Jones*, 53 Pac. (Cal.) 354 a c/d payable twelve months after date containing the clause "payable in six months if desired" was held negotiable, maturing in a year with an option to the payee to present at the end of six months. Likewise a promise to pay "six or twelve months after date", might be construed as a promise to pay twelve months after date with an option in the maker (not the payee or holder) to pay at six months. Until this point is specifically settled by decisions, the question of negotiability is somewhat doubtful. In addition there is the provision in the certificate reserving the right to require notice of thirty days before payment. This provision of itself would seem to make the instrument uncertain as to time of payment. (*Inquiry from Wis., April, 1917.*)

Time of payment

Withholding payment of time certificate

793. The Iowa statute allows savings banks to require sixty days' notice of withdrawal of a savings deposit and question is raised whether a bank would have the right, by giving public notice, to withhold payment of time certificates of deposit sixty days after due date. *Opinion*: A bank must pay its time certificate of deposit at maturity according to its terms, in the absence of a contract with the debtor expressed in certificate or otherwise binding, which would give it the right to require notice of withdrawal given at a specified time before payment, unless there is some statutory provision which gives it such right. Iowa statute giving savings banks right to require sixty days' notice of withdrawal of savings deposits interpreted not to apply to time certificates of deposit having fixed and definite time of maturity. Code of Iowa, Sec. 1848, 1860. (*Inquiry from Iowa, Aug., 1917, Jl.*)

Statute of limitations

794. A national bank in Nebraska issued a certificate of deposit on January 1, 1903, "payable on return properly indorsed one year from date." Eleven years have elapsed and said certificate has not been presented for payment. *Opinion*: The weight of

authority (a few cases contrary) is to the effect that a certificate "payable on return properly indorsed" is not due until demanded and the statute of limitation begins to run only from the time of demand. Where the certificate is "payable on return properly indorsed one year from date" some courts apply the same rule that the statute does not begin to run until demand of payment is made, while other courts hold that the statute begins to run at the time when the certificate specifies it is due and payable. *Mitchell v. Wilkins*, 33 N. W. (Minn.) 910. *Tripp v. Curtenius*, 36 Mich. 494. *Curran v. Witter*, 68 Wis. 616. *Lusk v. Stoughton St. Bk.*, 135 Wis. 311. *Elliott v. Capital City St. Bk.*, 128 Iowa 275, 103 N. W. 777. *Citizens Bk. v. Fromholz*, 64 Neb. 284. *Bk. of Commerce v. Harrison*, 66 Pac. (N. Mex.) 460. *In re Gardner's Estate*, 228 Pa. 282. *Thompson v. Farmers St. Bk.*, 140 N. W. (Iowa) 877. (*Inquiry from Iowa March, 1914, Jl.*)

795. A Minnesota bank carries on its books two time certificates of deposit issued in 1907, payable in six months. One was issued to a party since deceased and the other to a stranger, who cannot be located. The bank seeks to dispose of the certificates. *Opinion*: In Minnesota, a time certificate of deposit is outlawed six years after maturity, and the bank may credit undivided profits with the amount of an unpaid certificate. In some states statutes exist requiring unclaimed deposits to be paid over to the public authorities. *Mitchell v. Wilkins*, 33 N. W. (Minn.) 910. *Mitchell v. Easton*, 37 Minn. 335. *Thompson v. Farmers St. Bk.*, 140 N. W. (Iowa) 877. *Elliott v. Capital City St. Bk.*, 103 N. W. (Iowa) 777, 128 Iowa 311. (*Inquiry from Minn., May, 1917, Jl.*)

796. A Missouri bank issued a certificate of deposit which has been outstanding twelve years. Would the bank have the right, either under the Statute of Limitations or otherwise to appropriate the amount and credit to profit and loss? *Opinion*: There is a conflict of authority whether a time certificate of deposit is due at the maturity date of the certificate, so that a cause of action immediately accrues against the bank and the statute begins to run from such maturity date or whether the certificate notwithstanding the maturity date is not due until demanded so that the cause of action would not accrue and the statute begin to run until demand made. This

question does not appear to have been decided one way or the other in Missouri. In Iowa it was held in the case of *Thompson v. Farmers State Bank*, 159 Iowa 662, 140 N. W. 877, where a certificate payable on return six months after date was not presented until thirteen years after issue, that it was outlawed and action thereon barred.

If this rule was adopted by the Missouri courts then the bank which issued the certificate in question could appropriate the amount and credit it to profit and loss. (*Inquiry from Mo., Dec., 1920.*)

Interpretation of maturity clauses

797. A bank issued a certificate of deposit payable "on the return of this certificate properly indorsed 12 months after date with interest at the rate of 4 per cent., if left 12 months". A short time after issue the certificate was presented and payment refused by the bank which claimed that it was not due until 12 months after date of issue. *Opinion*: The clause in the certificate is ambiguous. It provides that it is payable upon "return of this certificate properly indorsed 12 months after date" which, standing alone, would make it a time certificate not payable before 12 months; but it couples the above with the further phrase "with interest at the rate of 4 per cent., if left 12 months." This phrase is more appropriate in a demand certificate. It might be held to indicate that the holder has the right to demand payment at any time, but that if he leaves the money on deposit for 12 months he is then entitled to interest at 4 per cent. for the year, or it might be construed as contemplating payment before twelve months only by common consent. This latter interpretation would be consistent with the clause making it payable in twelve months and, if so construed, the bank's refusal to pay before that time was justified. (*Inquiry from Kan., Oct., 1920.*)

798. The provision in a certificate of deposit payable on return properly indorsed for "interest at the rate of 4 per cent. per annum if left twelve months" does not prevent earlier presentment if the holder chooses to waive interest. (*Inquiry from Mo., April, 1911, Jl.*)

799. Where a certificate of deposit provides that the money has been deposited payable in one year from date at 4 per cent. interest, the certificate is not due until the expiration of twelve months from date, and

the holder cannot compel payment before maturity, although payment of interest is waived. (*Inquiry from Okla., June, 1911, Jl.*)

800. A bank issued a certificate of deposit payable "on the return of this certificate properly indorsed six months after date with interest at the rate of six per cent. per annum for the time specified only". The certificate contained also the clause: "The right to demand sixty days' notice of payment is reserved". Could the certificate be held to be payable on demand, or is the time of payment absolutely fixed at six months with the added right to the bank to defer payment sixty days thereafter if it chooses? *Opinion:* The certificate matures at the end of six months after date and it is then payable upon return properly indorsed. It cannot be held payable on demand. The clause reserving the right to demand sixty days' notice of payment would more properly have relation to a demand certificate and, if contained in a demand certificate, would enable the bank, if it so chose, to refuse payment on demand and require sixty days' notice, but inserted in a certificate such as this which is payable six months after date, it can only be construed as having operation at or after maturity and as giving the right to the bank to postpone payment for sixty days after maturity by giving notice. (*Inquiry from Wis., Jan., 1921.*)

Payable "in current funds"

801. A certificate of deposit payable "in current funds" is not negotiable in Indiana. The decisions of other states conflict upon this proposition. *Bk. v. Ringel*, 51 Ind. 393. (*Inquiry from Ind., Feb., 1911, Jl.*)

802. A bank's drafts and certificates of deposit contain the words "Payable in current funds." Inquiry is made as to their meaning. *Opinion:* The decisions in the various states are not harmonious respecting the negotiability of instruments containing those words, but the courts of Iowa have uniformly held that they render the instrument non-negotiable. The Supreme Court of that state has so held in a case decided after passage of the Negotiable Instruments Act. *Dill v. White*, 132 Iowa, 327, in which the court said: "The checks here in controversy were not made payable in money but in current funds, and it is the settled law in this state that such instruments do not have the qualities of negotiable paper."

As to the meaning of the words "current funds", they seem intended to designate as a medium of payment anything which is current as money and not only legal tender money. (*Inquiry from Iowa, April, 1917.*)

803. The original owner of a certificate of deposit payable "in current funds" was held up by a thief and forced to indorse and part with the certificate. The thief negotiated it to an innocent purchaser for value. In the meantime the issuing bank was notified to stop payment. *Opinion:* According to a Minnesota decision the certificate is negotiable, and for that reason the innocent holder is protected as against the original owner. *Butler v. Paine*, 8 Minn. 324. *Hatch v. First Nat. Bk.*, 94 Me. 348. (*Inquiry from Minn., July, 1909, Jl.*)

Payment

Insanity of payee

804. A certificate of deposit was issued to a depositor, who later became insane. The certificate was indorsed in blank and the bank is doubtful whether the depositor was insane at the time of the indorsement. A relative was the holder of the certificate. *Opinion:* The bank should refuse payment to the holder of the certificate in the absence of positive proof that the indorsement in blank and the delivery took place while the depositor was sane. A guardian or committee of the lunatic should be appointed to receive payment. If the holder sues the bank a bill of interpleader should be filed. *Riley v. Albany Sav. Bk.*, 36 Hun (N. Y.) 513. *American Tr. & Banking Co. v. Boone*, 29 S. E. (Ga.) 182. *Fidelity Fire Ins. Co. v. Ill. Tr. etc.*, Bk. 110 Ill. App. 92. *Livingston v. Montreal Bk.*, 50 Ill. App. 562. *Platte, etc., Bk. v. Nat. Bk.* 155 Ill. 250. *Newhall v. Kastens*, 70 Ill. 156. (*Inquiry from Ill., July, 1915, Jl.*)

Payment of non-negotiable c/d to third person

805. Is it advisable for a bank to pay a non-negotiable certificate to a third person? *Opinion:* If the certificate has been duly assigned and notice of assignment and satisfactory proof thereof given to the bank, the certificate could be paid the assignee; but generally speaking, in the absence of assignment, the certificate should only be paid to the depositor. (*Inquiry from La., Jan., 1917.*)

Payment of time c/d before maturity

806. Is a bank compelled to cash a certificate of deposit on demand whether it

is a demand or time one and notwithstanding the wording of it? *Opinion*: Sometime the terms of the certificate make it a little uncertain whether it is to be construed as a demand or time certificate, but where the certificate is unquestionably payable at a future date and the time has not arrived, there is nothing in the law which would compel the bank to pay on demand if it does not choose to do so. (*Inquiry from Neb., March, 1916.*)

C/D payable in Mexican money

807. Bank A issued a certificate of deposit to B payable six months after date in current funds on the return of certificate properly indorsed. It bore on its face stamped in two different places the words "Mexican money." B made no demand until nearly five years after date of maturity, when he demanded the value of silver Mexican money which had appreciated in value since such date. If the certificate is not outlawed, is the bank compelled to pay in Mexican silver or its equivalent, and as of what time should it fix value? *Opinion*: When a certificate of deposit is payable six months after date on return, the courts differ as to when the Statute of Limitations begins to run, some holding that it does not begin to run until demand—others, that it begins to run at the end of the six months. The Texas courts have not passed upon the point and if it should be held that this certificate is not outlawed then the question arises as to what the bank is obliged to pay. It has used an ordinary form of certificate of deposit payable in current funds of the United States and stamped upon same "Mexican money." The contract, it would appear, is a promise to pay the certificate in Mexican money six months after date, and it would be reasonable to maintain that the value of Mexican money at the end of six months would be the amount payable and not the value of the Mexican money five years later or whenever the holder chooses to demand payment at a time when it has appreciated. There seem to be no decisions in point upon this state of facts. (*Inquiry from Tex., Jan., 1919.*)

Payment on conditional indorsement

808. A certificate of deposit issued by bank A to B was presented for payment bearing the following indorsement: "For value received I assign the within certificate to H. M. to be held on a release of a mortgage on property that I am conveying to W. J. until the same is released", signed by

B and followed by the indorsement of H. M. Payment to the indorsee was refused by the bank which demanded an unconditional indorsement. Its action is questioned. *Opinion*: This was not a straight indorsement but an indorsement on condition, of which the bank was bound to take notice. There are cases which hold that if a bank pays a certificate of deposit which has been indorsed on condition without satisfying itself that the condition has been complied with, it does so at its peril. See *McGorray v. Stockton Sav. Soc.*, 131 Cal. 321, 63 Pac. 479; *Johnson v. Barrow*, 12 La. Ann. 83. In the present case, if the condition was performed, it would seem that B would be entitled to return of the certificate, and he rather than the indorsee would be entitled to collect it. Under the circumstances of the case bank A's refusal of payment of the certificate was proper. (*Inquiry from W. Va., March, 1916.*)

Certificate obtained through fraud

809. A bank issued its certificate of deposit payable to the order of A six months after date with interest. The certificate was fraudulently obtained and the bank asks if it is liable to a third party. *Opinion*: If the third party is an innocent purchaser for value before maturity, and the certificate is in negotiable form, he can enforce same free from defense of fraud of payee. (*Inquiry from Ark., May, 1918.*)

Validity of payment to indorsee

810. A received a certificate of deposit from bank B, and regularly received interest on the money. This certificate bearing A's indorsement and underneath the words "To C. D. and E. F.", was paid by the bank to some person not remembered but other than A who a short time afterwards became irrational and left the vicinity. Returning several years later, A threatened suit against the bank because it had paid the certificate without the indorsement of C. D. and E. F. *Opinion*: Under the circumstances it would not appear that A could hold bank B liable. If this certificate is to be regarded as indorsed in blank by A and if the words underneath do not amount to a special indorsement by him to C. D. and E. F., then it would be payable to bearer by virtue of A's indorsement in blank and could be negotiated by delivery and its payment by bank B, although not now able to say to whom, would be a discharge from liability. If, on the other hand, the certificate is to be re-

garded as specially indorsed by A to C. D. and E. F., and the courts would probably hold so, although the form of indorsement is unusual, then, A having transferred the certificate would have no ground to make claim thereon, but C. D. and E. F. would be the only ones to complain if they had not received the money. Its possession by bank B, though unindorsed by them, would be prima facie evidence of payment to them which would have to be disproved by them. (*Inquiry from Mich., May, 1913.*)

Interest

Indorsement of interest payments on certificates

811. A number of six months time certificates of deposit upon which interest was to be paid until due only, were issued to a depositor by bank A. Under an arrangement between bank and depositor, as soon as the certificates would mature the depositor would, instead of renewing same, receive the interest due, indorsement to this effect being made on the certificate, and leave same in the bank's keeping. Shortly after one of these payments of interest, the depositor died and, something over a year afterwards, the administrator of his estate demanded payment of the certificates with interest to date. The bank claims it is only obligated to pay interest on the certificates for the period for which same were originally written. *Opinion:* The contract in this case was to pay interest until due only, and no interest after maturity, when the interest was due. Instead of the depositor taking out new certificates, bank A indorsed payment of interest on the certificates and this was virtually understood as renewing the interest-bearing period of the certificate for six months more. It would seem that the bank's liability to pay interest ceased six months after the last indorsement and that, legally, it could not be held for interest thereafter. The original contract to pay interest only to the due date of the certificate was modified by an understanding and practice to pay interest for succeeding six months periods, but this modification only applied where the depositor called at the end of six months and collected the interest and a new indorsement was made. The modification could not be construed to change the original contract so as to make the interest run indefinitely. (*Inquiry from Ida., March, 1920.*)

Interest clause where "per annum" omitted

812. As certificates of deposit are usually

issued with interest at a certain rate "per annum" if left a certain time, could a holder of a certificate with the clause "with interest at the rate of 4 per cent. if left six months", collect interest at the rate of 8 per cent. a year? *Opinion:* The clause "with interest at the rate of 4 per cent. if left six months", would be interpreted by any court to mean 4 per cent. per annum. It would not be construed so as to allow the holder of such a certificate to collect interest at the rate of 8 per cent. a year. Such a construction would imply that the parties contracted for a usurious rate of interest apart from other considerations. (*Inquiry from N. Y., April, 1919.*)

Payment of interest after maturity

813. Bank A issued a certificate of deposit to B in which it was stated that the bank will allow interest at the annual rate of 3 per cent. from the date of deposit and on a certain date pay the amount with the interest to B or assignee on the return of the certificate. B did not present the certificate at the time set for payment, but held it for over a year after that time, and then upon presentment demanded the amount with interest at the rate of 3 per cent. up to date set for payment together with interest at the rate of six per cent. per annum from that time to time of demand. Is B entitled to receive any interest after the maturity of the certificate? *Opinion:* There appears to be but few cases on the precise point and none in New York, but those cases in which the question has been raised seem to agree that the failure to present does not stop the running of interest which continues at the same rate. See *Payne v. Clark*, 23 Mo. 259; *Lordell v. Bank*, 64 Mo. 600; *Bank of Commerce v. Harrison*, 11 N. M. 50, 66 Pac. 460. It is usual for certificates to contain such clause as "No interest after maturity" or "Interest for six months only" or "Interest to date of maturity only," and it would be wise for banks to protect their certificates by some such clause. (*Inquiry from N. Y., Dec., 1917.*)

Rights of holder

Purchase of certificate with money fraudulently obtained

814. An agent of an insurance company sold a policy of insurance to A who gave his note in payment of premium. The agent discounted the notes at bank B and received a certificate of deposit for the amount. A refused to accept the policy sent him,

claiming it was not such as had been represented, and notified bank B that he repudiated the note. On presentation of the certificate by the insurance company, payment was refused by the bank on the ground that the certificate was not valid and binding on the bank, as the note given therefor had been secured by fraud. Can the bank interpose as a defense, the fraud perpetrated on the maker of the note by the holder of the certificate through its agent? *Opinion:* It would seem that the ends of justice would be best served by denying recovery to the fraudulent payee, but the authorities seem to point to a contrary conclusion. See *Times Square Automobile Co. v. Rutherford Nat. Bank*, 77 N. J. L. 649, 73 Atl. 479; *Warren v. Haight*, 65 N. Y. 171; *Carrier v. Sears*, 86 Mass. 336, 81 Am. Dec. 707. It is doubtful if bank B could successfully defend payment of this certificate of deposit and in the event it should be held liable, it would seem to have a good cause of action against A, the maker of the note, as a bona fide holder thereof. (*Inquiry from Cal., Nov., 1914.*)

Defense against payee

815. A bank issued certificates of deposit to a corporation in exchange for its notes the stock of the corporation later turned out to be worthless. Can the bank stop payment if the certificates are presented with the signature of the corporation only? What would be the effect of a sale to an innocent purchaser? *Opinion:* If the certificates are negotiable and have been negotiated to innocent purchasers, the bank is liable to such purchasers. If the certificates are presented by the original payee and if the bank has a good defense of failure of consideration, it may refuse payment, and interpose the defense in a suit on the certificates. The nature of the notes is not disclosed. If the certificates were issued in exchange for notes of the corporation, secured by certificates of stock, then it would owe the bank upon the notes and its indebtedness upon the notes could be set off against the indebtedness to it on the certificates, and the bank would not be liable. However, as above stated, the bank would be liable to a holder in due course of negotiable certificates. (*Inquiry from Mo., Feb., 1921.*)

Rights of innocent purchaser

816. A bank issued a negotiable certificate of deposit for \$500 to one of its depositors in exchange for her check on the same bank for \$500, which, as it turned out,

was an overdraft of \$100. The bank seeks to know if it can refuse payment in case the certificate should come to it through an innocent purchaser. *Opinion:* So long as the certificate remains in the depositor's hands or is presented by her in person, the bank has the right to withhold payment of the excess over \$400. But if the certificate had been negotiated to a holder in due course the bank would be liable for the full amount and would have to look to the depositor for the overdraft. (*Inquiry from Pa., March, 1917, Jl.*)

Laches of holder where bank closed and affairs settled

817. A certificate of deposit was issued to A by bank B which matured the following year. It was not presented at maturity and two years later B failed and its assets were purchased by bank C which assumed such debts as could be ascertained and verified. A could not be located nor could anything be learned of the certificate issued to him, and the court finally foreclosed it and ordered the account closed. Ten years afterwards A presented the certificate for payment to bank C, and the latter, without acknowledging liability, offered in settlement two thirds of its face value. Has A any legal claim against bank C? *Opinion:* According to decisions in some states, the statute of limitations begins to run from the maturity of the certificate, while in others it does not run until payment is demanded. The point does not appear to have been passed upon either way by the South Dakota Courts, but, even if the latter rule would prevail in that state, it seems reasonable that its courts would not hold C liable ten years after foreclosure of the certificate where A has slept on his rights for this long period. A's rights have doubtless been forfeited by laches and the best thing for him to do would be to accept the offer. See *Re Gardner*, 228 Pa. 282, 77 Atl. 509. (*Inquiry from S. D., Dec., 1914.*)

Non-liability to payee where certificate outstanding

818. Bank A issued a certificate of deposit payable in either six or twelve months to B who indorsed it and gave it to C as a deposit in a business transaction which was never completed. C failed to return certificate to B on demand and the latter notified bank A not to pay the same, claiming that he had been defrauded. The certificate was presented before the first due date of payment and payment refused on the ground that it was not due and that pay-

ment had been stopped because of alleged fraud. It was not afterwards presented, and is overdue. Can B compel the bank to pay the amount of certificate to him? *Opinion:* It is very possible that before its maturity, C may have negotiated the certificate to an innocent purchaser and in that event the bank would be liable to that purchaser although C himself was a fraudulent holder. To justify the bank in paying the certificate to B, he should either surrender it or establish by proof that it was still in the hands of C at and after maturity, and that C was a fraudulent holder. But it not being satisfactorily shown that the certificate is in the possession of C (being overdue), and that he did not negotiate the same before maturity, a court would not be likely to compel bank A to pay amount to B without surrender of the certificate or without requiring that the bank be fully indemnified against a possible liability of being compelled to pay it again to an innocent purchaser who acquired it before maturity. (*Inquiry from Wash., Feb., 1918.*)

Innocent purchaser of c/d issued against uncollected funds

819. A bank issued a negotiable demand certificate to a depositor against deposit of his check upon another bank. Four days later the bank over the long distance telephone, upon depositor's request, advised that the certificate could be cashed O.K., as the deposited check had not been returned. After the certificate was cashed, the depositor's account in the other bank was attached. *Opinion:* Where a bank issues a negotiable demand certificate against deposit of a check upon another bank, the fact that the deposited check is dishonored is no defense to the liability of the bank to an innocent purchaser of the certificate. This transaction illustrates the unwisdom of issuing a negotiable certificate against uncollected funds. (*Inquiry from Wash., Dec., 1917, Jl.*)

Transfer

Transfer without indorsement

820. A certificate of deposit issued to A was pledged by A to B for value, without indorsement. After its maturity A, upon a false written statement that he had lost and had not negotiated the certificate, obtained payment from the bank. B not having been paid by A now seeks to hold the bank liable on the unindorsed certificate pledged by A. *Opinion:* The bank is not liable to B who, taking without indorse-

ment, holds the certificate subject to any defense good against A. A is criminally liable for obtaining money under false pretenses. *Neg. Inst. A. of Ill., Sec. 7688. Mfg. Co. v. Blitz. 115 N. Y. S. 402. Croy v. Farmers Bk., 109 Ky. 694. Nat. Bk. v. Bingham, 118 N. Y. 349. (Inquiry from Ill., April, 1913, Jl.)*

Negotiation of c/d restrictively indorsed to issuing bank

821. A certificate of deposit was issued by bank A to B who, wishing to renew it, indorsed it payable to the bank and gave it to C to mail. C indorsed the certificate and depositing it with bank D received credit for same. Bank A paid D the certificate notwithstanding B's restrictive indorsement to it. Should bank D refund to bank A? *Opinion:* Bank D having received the certificate without indorsement to it, took no greater rights than transferor and having collected the certificate without having good title, is under liability to refund. While bank A should not have paid the certificate indorsed as it was, and is liable to B for so doing, this does not prevent it from recovering the money paid to bank D which had no title to it. (*Inquiry from Ore., March, 1916.*)

Time limit for negotiation of demand certificate before overdue

822. A note signed by A and indorsed by B was discounted for the latter by bank C. Attached to the note as collateral was a certificate of deposit for same amount issued five months previously by bank D to A "payable in current funds on return of this certificate properly indorsed" with interest at 3 per cent., a line showing it was not expected to run over twelve months being stricken out. Being unable to collect the note, bank C two years after issue of the certificate presented it to bank D which refused payment and returned it protested giving as a reason that it had some agreement with A that the certificate would not be presented for payment until a certain note for the proceeds of which the certificate was issued had been paid and that the note was past due when negotiated. Can C hold D liable? *Opinion:* The certificate in question is virtually a demand instrument "payable in current funds on return of this certificate properly indorsed." Such a certificate carrying interest until presented for payment does not contemplate immediate presentment and banks are in the habit of loaning on the security of such,

within a reasonable time after their date. There would seem to be a right of recovery by the bank upon this certificate unless it could be held (1) that the certificate was non-negotiable, in which event the transferee would take no greater rights than the payee, or (2) if negotiable, that it was not transferred to the bank until it was overdue. It is generally held that a certificate "payable on return properly indorsed" is negotiable, and the weight of authority is to the effect that making an instrument payable "in current funds" does not destroy negotiability. The vital question in this case is whether negotiation of the certificate five months after date, subjected it to equities. Upon this question there is very little specific authority, and what there is, in the case of demand promissory notes, is conflicting so it would require a court decision to settle the precise period of time during which this certificate could be negotiated before it became overdue. Probably five months would be held within the negotiable period. (*Inquiry from W. Va., March, 1917.*)

Bank's obligation to know payee's signature

Effect of "prior indorsements guaranteed"

823. Bank A issues a certificate of deposit to a stranger. It comes back through regular course, the indorsements of all banks handling the same reading, "All prior indorsements guaranteed". The payee's signature seems to be different from that on file and bank A refuses to pay. *Opinion:* Where the bank has the signature of the payee of a certificate of deposit on file, it is bound to know the signature the same as on a check, and if it pays on a forgery it cannot recover the money from a bona fide holder. The guaranty of all prior indorsements, in the case of a check has been held not to cover the signature of the drawer. In the case of a certificate of deposit, while technically it would seem to cover same, there is a chance it might be held or construed not to apply to the payee's signature in view of the fact that the bank is responsible for that. Where the signature differs in several particulars from the specimen on file, the safest course is to refuse payment until the genuineness of the signature is satisfactorily established, or a guaranty is given specifically covering the indorsement of the payee. (*Inquiry from Iowa, Nov., 1915.*)

Rule limited to signatures kept on file

824. A bank issued a certificate of de-

posit without keeping a record of the payee's signature. The certificate was presented at the clearing house and paid by the bank of deposit, although the presenting bank refused to guarantee the payee's indorsement. In the event the payee's indorsement was a forgery, the paying bank questions its right of recovery. *Opinion:* Where bank keeps file of signatures of payees to whom certificates of deposit issued it is bound to know payee's indorsement upon such certificates and cannot recover money paid on forgery thereof. But this rule is limited to cases where signature is kept on file. (*Inquiry from Ohio, Jan., 1917, J.L.*)

Liability of indorser

825. The depositor of a bank brought in a time certificate of deposit of another bank which had run nine months, it having been made out for twelve months, which he indorsed to the bank. The bank issued to said depositor one of its own time certificates and allowed him the accrued interest for nine months on the certificate brought in. Before the nine month's certificate came due, the issuing bank failed. Can the bank hold its depositor as indorser? *Opinion:* The bank can hold the indorser of the certificate of deposit provided at maturity there was due demand and notice of dishonor to preserve his liability; this upon the assumption that the certificate was negotiable in form. Being indorsed to the bank for value before maturity, the contract of the indorser of the certificate, the same as of any other negotiable instrument, is that he will pay provided the maker does not pay at maturity upon due demand, and provided he receives due notice of dishonor. (*Inquiry from Minn., Aug., 1916.*)

Use of certificate of deposit as collateral by officer of bank

826. A bank issued to its president who had a running account with it subject to check, a certificate of deposit for amount less than account, which he pledged to another bank as security for a personal loan. His right to do this is questioned. *Opinion:* If the holder of a demand certificate who is the president of the issuing bank should seek to obtain a loan on it from another bank instead of cashing it in at his own bank, the bank department might naturally question the regularity of the transaction. Or there might be a case where a certificate was signed in the name of the bank by its president, payable to his own order, in which the form of the certificate might affect its

validity as collateral for a loan by another bank. But if there are no such irregularities and the certificate is a regular time certificate issued by the bank to the order of its president, representing an actual deposit of money, it would not be unlawful for another bank in the same state to make a loan to the

holder on the security thereof. The banking law of Nebraska prohibits loans by a bank to its own officers, but this is a case of a loan to a bank officer by another bank, the officer having deposited money in his own bank and taken as evidence thereof a time certificate of deposit. (*Inquiry from Neb., Sept., 1914.*)

CHECKS

Form, interpretation and execution

Duty of care in preparing check

827. A bank which draws checks on its correspondent has been approached by an insurance company and requested to take out a forgery bond covering the raising and forging of checks. The insurance company cite instances where the payor bank under some circumstances would not be liable but the loss would fall upon the bank which draws the check for not using proper precautions. The bank requests reference to any recent pertinent decisions. *Opinion:* The general rule has been thus stated by the New York Court of Appeals: "While the drawer of a check may be liable where he draws the instrument in such an incomplete state as to facilitate or invite fraudulent alterations, it is not the law that he is bound so to prepare the check that nobody else can successfully tamper with it." *Critten v. Chemical Nat. Bank*, 171 N. Y. 219. Also, in *Timbel v. Garfield Nat. Bank*, 106 N. Y. Supp. 497, the court said: "The text books are quite unanimous in asserting that, where a drawer of a check has prepared his check so negligently that it can be easily altered, without giving the instrument a suspicious appearance, and alterations are afterwards made, he can blame no one but himself, and that in such case he cannot hold the bank liable for the consequences of his own negligence in that respect."

If the drawer delivers the check with the amount line left blank and it is wrongfully filled out, he is liable. *Trust Co. v. Conklin*, 119 N. Y. Supp. 367. Likewise, if he delivers the check with the amount blank partly filled so as to permit insertion of an increased amount without detection. *Young v. Grote*, 4 Bing. 253. In *Timbel v. Garfield National Bank*, a woman signed a check filled out by her husband for nine hundred dollars leaving a space which enabled him to raise the amount to four thousand, nine hundred dollars, and it was held a question for the jury to determine whether her negligence precluded recovery

from the bank. Other specific recent cases of negligence of the depositor which makes him liable, are *Citizens Nat. Bank v. Reynolds*, 126 N. E. (Ind.) 234 and *S. S. Allen Grocery Co. v. Bank of Buchanan Co.*, 182 S. W. (Mo.) 777, where depositors signed checks in blank that were lost or stolen, the blanks filled in and the checks cashed. Most of the cases in which depositors have been held liable for negligence in the execution of the check have been those where blanks have been unfilled or partly unfilled, so as to invite successful alteration. We have been unable to find a case in which it has been held that failure to use protective devices, safety paper or the like, is negligence; nor a case in which it has been held that the drawing of a check in lead pencil is negligence. At the same time, the general rule announced by the courts and text writers that where the drawer prepares his check "so negligently that it can be easily altered without giving the instrument a suspicious appearance" he is responsible, is broad enough to cover much more than the leaving of unfilled blanks and cases may arise in the future where it will be held that the drawing of a check in lead pencil is negligent because it can be so easily altered, whether or not the courts will ever hold that the omission to use certain protective devices is negligent. A recent decision in Texas (*First Nat. Bank of Newsom v. Walling*, 218 S. W. 1080) may have broad application. A check raised from \$12.40 to \$112.40 was paid by the bank. The court held the bank "is entitled to show as a defense as between it and the depositor, that it has done all that due care and foresight would suggest and that the real and proximate cause of loss in making payment of a fraudulently altered check was solely caused by the negligence of the drawer in so preparing the check that it can be easily altered without exciting the suspicion of a prudent and cautious man. A person free from negligence should not suffer the loss. The drawer can blame as against the bank no one but himself, as a consequence of his own

negligence." There are cases, also, where the drawer has been held liable because he cannot prove that his check paid by the bank has been altered. Thus, in *Mitchell v. Security Bank*, 147 N. Y. Supp. 470, a check for \$196.76 payable to "H and A" was stolen from the mail box of the payee, who informed the drawer of the theft and the latter stopped payment. The check in question, however, was returned to the drawer among his paid vouchers at the end of the month, the payee having been changed to bearer. The drawer sued the bank and alleged that before presentment the check had been "washed" and altered and was therefore a forgery. The court reversed a judgment for the plaintiff and ordered a new trial, saying: "As to the alteration of the check, I am of the opinion that the weight of evidence is against the plaintiff. It was drawn on safety paper, which turns white if washed with acid, yet it shows not the slightest trace of alteration." Whatever may be the truth in this particular case, it indicates the possibility that the drawer of a check which has been altered might be held liable, not because of negligence in execution, but because the alteration has been so skilfully done that he is unable to prove in a particular case that it has been altered. (*Inquiry from N. Y., March, 1921.*)

828. What is the drawer's duty of care in preparing checks? *Opinion:* It is the duty of the drawer to exercise ordinary care in preparing his check. The question of negligence does not arise unless the depositor leaves blanks unfilled or by some affirmative act of negligence facilitates fraud. While he may be liable where he draws the instrument in such incomplete shape as to facilitate or invite fraudulent alterations, he is not bound to so prepare the check that nobody else can successfully tamper with it. A drawer does not use ordinary care when he fills in the amount of a check in the middle of the line so that a person can prefix an increased amount, or when he signs a check in blank and carelessly leaves it lying around. However, a drawer is not responsible where he carelessly leaves his check book around unsigned. No judicial decision or statute exists at the present time which would require the drawer of a check to use a protectograph, check punch, safety paper or other protective device in order to absolve himself from the charge of negligence in case the instrument were altered or forged. Nor have the courts ever held the drawing

of a check in lead pencil negligent. *Meyers v. Southwestern Nat. Bk.*, 193 Pa. 1. *Nat. Bk. v. Nolting*, 94 Va. 263. (*Inquiries from Iowa, May, 1916, Sept., 1910, Jl.*)

Duty of care of check-book

829. A customer carelessly leaves his check-book lying around the office, accessible to clerks, and a blank check is stolen, forged and paid by the bank. *Opinion:* The bank is responsible to its customer for money paid on his forged signature and the carelessness of the customer is not such negligence as will charge him with responsibility. *Mackintosh v. Elliot Nat. Bk.*, 123 Mass. 393. *Hatton v. Holmes*, 97 Cal. 208. *Chicago Nat. Bk. v. Pease*, 168 Ill. 40. *Williams v. Drexel*, 14 Md. 566. *Armstrong v. Pomeroy Nat. Bk.*, 46 Ohio St. 512. *Seventh Nat. Bk. v. Cook*, 73 Pa. 483. *Otis El. Co. v. First Nat. Bk.*, 163 Cal. 31. *Morgan v. U. S. Mtge. & Tr. Co.*, 208 N. Y. 218. (*Inquiry from Mo., June, 1914, Jl.*)

Check written and signed in lead pencil

830. An opinion is asked by a bank as to the legality of check written and signed in lead pencil. *Opinion:* There do not appear to be any cases wherein the validity of a check drawn and signed in lead pencil has been judicially passed upon, or wherein the right of a bank to refuse payment of such checks has been decided. There are cases, however, in which a contract drawn in lead pencil has been held valid. *Geary v. Physic 5 B. & Co.* 234. *Brown v. Butchers' & D. Bank*, 6 Hk. (N. Y.) 332. *Classon v. Stearns*, 4 Vt. 11. In this latter case the court said: "Although it may be imprudent and unsafe in many cases to rely on a writing made with a pencil, yet the authorities show clearly that such writing has been recognized as legal." From the above authorities the conclusion to be drawn is that a check drawn in lead pencil is valid. But, although valid, there is considerable doubt whether the drawee bank would be under any obligation to pay same. In view of the fact that the instrument is so susceptible of alteration, it would seem fair to conclude that a bank would be upheld in refusing to honor a check so written and signed because the bank could not safely rely on its genuineness. No case has yet been so decided, but it seems the better course is for bankers to take such a stand and refuse to pay lead pencil checks on the ground that they are unsafe and that

they do not come within the implied contract of the bank with its depositor to honor his written orders. (*Inquiry from Wash, Feb., 1920.*)

Where words and figures differ

831. A check is presented at a bank drawn for \$12 so stated in writing in the body of the instrument, but the marginal figures are stated \$16.50. The bank teller in cashing the check paid out \$16.50. *Opinion:* The sum payable on the check was \$12. The Negotiable Instruments Act provides in part: "Where the sum payable is expressed in words and also in figures, and there is a discrepancy between the two, the sum denoted by the words is the sum payable; but if the words are ambiguous or uncertain, reference may be had to the figures to fix the amount." Neg. Inst. A., Sec. 17 (Comsr's. dft.), Sec. 9089 Q, Ind. Act. Rochville v. Second Nat. Bk. of Lafayette, 69 Ind. 479. (*Inquiry from Ind., Jan., 1919, Jl.*)

832. The amount written in the body of a check is \$100.89 and in the margin \$189. The presenting bank protested it for non-payment, as the drawee refused to pay without a guaranty of the amount, which the presenting bank would not furnish. *Opinion:* Where the amount written in the body of a check is \$100.89 and in the margin \$189, the sum denoted in the body is the amount payable and the check is protestable upon refusal to pay that amount, though not if the refusal is to pay the larger amount expressed in the margin. Neg. Inst. A., Sec. 17, Subdiv. 1 (Comsr's, dft.) (*Inquiry from Cal., Oct., 1918, Jl.*)

833. A check was drawn for the written amount of eighty dollars, but the marginal figures are \$8.00 and the words "not over ten dollars" were stamped thereon. The instrument was negotiated for eighty dollars, and that amount paid by the drawee. The drawer refused to be charged with the eighty dollars. *Opinion:* While no positive conclusion can be arrived at as to whether the drawee can charge the full amount to the drawer's account, it seems probable that the words "not over ten dollars" would be notice to the drawee and protect the depositor. If the drawee were held responsible, it is probable that it would have a right to recover the excess from the bank receiving payment. Neg. Inst. A., Sec. 17 (Comsr's dft.). Daniel Neg. Inst., Sec. 86. Saunders v. Piper, 5 Bing. N. C. 425, (*Inquiry from Okla., April 1914, Jl.*)

834. A bank refused to pay its customer's check, which was written for "two dollars" but which contained the marginal figures of "\$200," the credit balance of the customer being \$190. The drawer threatened to sue the bank, although the latter had tendered the \$2 to the holder on the same day the check was presented, which tender was refused by request of the drawer. *Opinion:* Where there is a discrepancy between the words and figures, the words control, but the court may justify the bank's refusal to honor the check because the figures are an index of the sum payable in the body and contributed to mislead the bank. Nominal damages at most might be awarded the customer. (*Inquiry from S. C., May, 1914, Jl.*)

835. A check was presented for payment in which the figures read \$181.50 and the body of the check read One Eighty One and 50-100, the hundred being omitted. *Opinion:* It would be safe for a bank to pay \$181.50, because where the words are ambiguous, reference may be had to the figures. Neg. Inst. A., Sec. 17 (Comsr's. dft.). Smith v. Smith, 1 R. I. 398, (*Inquiry from Wyo., Jan., 1912, Jl.*)

Figures in body control figures in margin

836. Do figures stated in the body of a check control where a different amount is stated in the margin? *Opinion:* The figures in the body prevail and denote the sum payable, under the law merchant. (*Inquiry from Ohio, April, 1917.*)

Check in figures only

837. A bank drew a cashier's check and instead of filling out amount in pen and ink stamped in the body of it with a machine, "Pay \$56 and 25 cents." It is asked if this is legal. *Opinion:* While it is customary in drawing a check that the amount be stated both in words and figures, and the rule is well recognized that in determining the amount for which a check is drawn the words will control the figures where there is a discrepancy between them, yet if the amount is stated solely in figures in the body of the check, the instrument would not be held incomplete and invalid for that reason. The Negotiable Instruments Act provides that, to be negotiable the instrument, among other things, "must be in writing and signed by the maker or drawer", and also provides that "writing" includes print. But while "writing" is generally understood to be the expression of ideas by visible letters, the statement of an amount by figures would undoubtedly

come within the definition of writing. See A.B.A. Journal May 1915, p. 892. Succession of Vanhille, 49 La. Ann. 107, 21 So. 191, 62 Am. St. Rep. 642; Northrop v. Sanborn, 22 Vt. 433, 54 Am. Dec. 83. (*Inquiry from Ariz., Oct., 1919.*)

838. A bank states that it is using a check protectograph that cuts only figures in checks. The bank asks whether this is legal, or should the amount be inserted in writing? *Opinion:* A check in which the amount is given in figures only, is legal and valid. The Negotiable Instruments Act requires an instrument to be in writing, but it has been held that figures are writing, equally as words. (*Inquiry from Iowa, Aug., 1918.*)

839 The amount of a check was not expressed in words written in the ordinary way but in figures stamped by a machine in the body of the instrument. *Opinion:* The instrument is valid and negotiable, and the maker is not negligent in so drawing the check. Succession of Vanhille, 21 So. (La.) 191. Northrup v. Sanborn, 22 Vt. 433. Norwich Bk. v. Hyde, 13 Conn. 279. Hollen v. Davis, 59 Ia. 444. Witty v. Ins. Co., 123 Ind. 411. Ives v. Farmers Bk., 2 Allen 236. Timbel v. Garfield Nat. Bk., 106 N. Y. S. 497. Crawford v. West Side Bk., 100 N. Y. 50. Critten v. Chemical Nat. Bk., 171 N. Y. 219. (*Inquiry from Mass., May, 1915, Jl.*)

840. Is a check negotiable where the amount is indicated by a Check Writer and Protector, which "cuts the filling on checks," and does not write out in words such amount but uses figures. *Opinion:* The check is legal and negotiable. The Negotiable Instruments Act requires that an instrument to be negotiable must be in writing, but writing can be expressed by figures as well as by words. (*Inquiry from N. J., Feb., 1921.*)

841. Inquiry is made as to the legality of paying checks the body of which is perforated with the word "Pay" and then the numerals perforated immediately afterwards. *Opinion:* An instrument, the amount blank of which is filled in with the word "Pay" and then the numerals perforated immediately after, is valid and negotiable. The Negotiable Instruments Act requires the instrument to be in writing, and, while it is customary in drawing checks to state the amount both in words and figures, the statement of the amount by

figures only would come within the definition of writing. (*Inquiry from N. Y., Oct., 1916.*)

Stamping amount in figures or in words

842. A bank submits two forms of checks, (a) containing amount stamped in figures, and (b) amount stamped in words, and the bank asks whether, in case the amount were raised, the drawer would be in as good a position with reference to care in execution if he used form (a) as if he used form (b). The amount in form A is given in stamped figures, "\$1,000 and 00 cts.", and in form B the amount is stamped "One thousand dollars". *Opinion:* The general rule with regard to the duty of care of the drawer of a check has been well expressed by the Court of Appeals in Critten v. Chemical National Bank, 171 N. Y. 219, to the effect that, while the maker of a check may be liable to its banker where he draws the instrument in such an incomplete state as to facilitate or invite fraudulent alteration, he is not bound as to so prepare the check that nobody else can successfully tamper with it. It does not seem that the drawer would be held careless or negligent if either of those forms were used. There appear to be no decided cases involving the contention of negligent execution with reference to either manner of filling in the amount. (*Inquiry from Mo., Feb., 1919.*)

Validity of typewriting body

843. Is it proper to fill in the names and amounts in checks and drafts with a typewriter? *Opinion:* Typewriting in the body of checks and drafts instead of being written therein with a pen is perfectly legal and valid. The Negotiable Instruments Act requires that, to be negotiable, an instrument must be in writing, but it also provides that writing includes print. (*Inquiry from Ohio, Jan., 1915.*)

Note: See Pingree Nat. Bank v. McFarland, 195 P. (Utah) 313. Feb., 1921.

Pen line drawn through payee blank or blank left unfilled

844. What is the effect on a check of a line drawn through the payee blank or of its being left unfilled? *Opinion:* Where a check has a pen line drawn through the payee blank or the payee blank is unfilled, it is an unsafe instrument for a purchaser to acquire or a drawee bank to pay. In the present condition of the law, it might be held to be payable to the bearer or it might

be held an incomplete and invalid instrument. Where the drawer indorsed the instrument, it would be extremely doubtful whether such indorsement would cure the defect. Under the Negotiable Instruments Law, where the drawer of a check with payee blank unfilled entrusts the instrument to a holder with authority to use it for a specified purpose and the holder in breach of trust fills in his own name as payee and negotiates it to an innocent purchaser for value, the purchaser would be protected as would be the drawee bank which paid such a check; but if the holder who committed the breach of trust should negotiate it without authority, leaving the payee blank unfilled, the purchaser would take the check subject to the defense of the drawer that it had been used without his authority and if the drawee bank paid such a check with the payee blank unfilled, the drawer could object to being charged with its amount for like reason.

Mechanics Bk. v. Stratton, 3 Abb. Ct. of App. Dec. 269. *McIntosh v. Lytle*, 26 Minn. 336. *Gordon v. Lansing St. Sav. Bk.*, 94 N. W. (Mich.) 741. *Neg. Inst. A.*, Sec. 14 (Comr's. dft.). *Guerrant v. Guerrant*, 7 Va. L. Reg. 639. *Hardington Nat. Bk. v. Breslin*, 128 N. W. (Neb.) 659. (*Inquiry from Pa.*, Jan., 1915, *Jl.*)

845. May a drawee bank refuse payment of a check because of the failure to fill in the name of the payee? *Opinion:* The bank was right in refusing payment of a check where the name of the payee had not been inserted. True, under the Negotiable Instruments Act the holder has prima facie authority to complete the check by filling in the blank space but "it must be filled up strictly in accordance with the authority given." The check presented with the payee blank unfilled, was incomplete, and the bank did right in refusing to pay it. (*Inquiry from Utah*, Oct., 1915.)

*Check payable to drawee and presented
by third person*

846. A customer drew a check in which the drawer ordered the bank to pay itself, and delivered the check to a third person, who presented it to the bank. The bank refused to pay without making inquiry from the drawer, while the third party contended that the check was in effect payable to bearer and should be paid without such inquiry. *Opinion:* Under the present condition of the law, the best course is for the bank to refuse to pay without inquiry as to the authority of the holder to collect the money. Such check

is certainly not payable to bearer. *Boston Steel & Iron Co. v. Steurer*, 66 N. E. (Mass.) 646. *Brown v. Rowan*, 154 N. Y. S. 1098. *Sims v. U. S. Tr. Co.*, 103 N. Y. 472. *Hathaway v. County of Delaware*, 185 N. Y. 368. *Kuder v. Greene*, 72 Ark. 504. *Neg. Inst. A.*, Sec. 52 (Comr's. dft.). (*Inquiry from Wis.*, Dec., 1915, *Jl.*)

847. G made his check upon and payable to the B—— Bank which he entrusted to H who received credit for the amount and drew out the proceeds of the draft which he misappropriated. Is the bank a bona fide holder? *Opinion:* The question whether the payee of a draft who gives value to a holder other than the drawer can be a bona fide holder who takes the instrument free from defenses of the drawer, seems to have been held affirmatively at common law, although the cases are not uniform. Under the Negotiable Instruments Act the majority of cases (a few contra) are to the effect that the payee may be a holder in due course. The point has not been decided in Texas. (*Inquiry from Tex.*, May, 1918.)

Check payable to A for account of B

848. A drawee bank paid a check drawn payable to A, upon which was written "for the account of B" or "to be placed to the credit of B." *Opinion:* The drawee bank in paying the check was not charged with the duty of seeing that A applied the money to B's account. The bank was under no duty to procure B's indorsement or to see that B's interest was protected. *Ridgely Nat. Bk. v. Patton*, 109 Ill. 479. *U. S. Fidelity & Guaranty Co. v. First Nat. Bk. of Monrovia*, 123 Pac. 352. (*Inquiry from Cal.*, March, 1915, *Jl.*)

Unauthorized amount inserted by agent

849. A certain horse buyer in Indiana had been sending dated and signed checks to his agent in Illinois, who had authority to fill in the amounts. On one occasion the agent made out a check for \$668.25 which should have been for \$550 and negotiated it to a bank which had been in the habit of cashing such checks. The drawer stopped payment. The purchasing bank seeks to hold the drawer. *Opinion:* Under the common law rule the drawer would be liable to a bona fide holder for the increased amount, but not so liable under the Negotiable Instruments Law unless the amount was filled in before negotiation and the purchasing bank had no notice that the check was filled in for an unauthorized amount.

Bk. of Pittsburg v. Neal, 22 How (U. S.) 107. Frank v. Lillienfield, 33 Grat. (Va.) 377. Neg. Inst. A., Sec. 14 (Comsr's. dft.). Boston Steel Co. v. Steurer, 183 Mass. 140, 66 N. E. 646. Guerrant v. Hughes, Corp. Court of Danville, Va., 1902. Bk. of Huston v. Day, 122 S. W. (Mo.) 756. Madden v. Gaston, 122 N. Y. S. 951. Hermann v. Gregory, 115 S. W. (Ky.) 809. (*Inquiry from Ill., June, 1911, Jl.*)

Unauthorized amount inserted by payee

850. A check was signed in blank as to amount and delivered in that form by the maker to the payee, who was requested to fill in the amount due him which was \$8. The payee disregarded this request and filled in the sum of \$80 and received payment from the bank. At the time the bank cashed the check the maker had on deposit only \$60. What is the bank's liability under the facts stated? *Opinion:* It seems in this case the bank can hold the drawer liable for the full \$80. The drawer having intrusted the payee with a check signed in blank, he would be liable although the payee exceeded his authority and filled the check up for an increased amount. The only question would be whether, in view of the fact that the account was not good for such an amount, the bank should have been put on notice; but the bank has a right to pay an overdraft of its depositor and it is reasonable to believe that the courts would hold the drawer liable to the bank for the full amount paid. (*Inquiry from Conn., April, 1916.*)

Form of pay roll check to protect against loss

851. A concern carrying a large pay roll finds that three-fourth of its pay roll checks are cashed in saloons and desires a check drawn in such a form that the employee must cash it at the bank. *Opinion:* A suggestion is made that the check be drawn payable to the payee only, and on the back print a receipt for wages to be signed by the payee and the signature witnessed by the paymaster, and under such signature add another line for the payee's indorsement, which he must make in the presence of the bank officer before payment. Such a system will (1) safeguard payor bank from risk of identification; (2) relieve payee from risk of loss, and (3) remove saloon-cashing evil. (*Inquiry from Minn., Feb., 1915, Jl.*)

Check to A or order and to order of A

852. A bank refers to checks made payable to the order of John Jones, and checks

made payable to John Jones or order, and asks whether, in the first case, John Jones can present the check to the bank and compel it to cash same without his indorsement. *Opinion:* The courts have held that there is no difference between a check payable to John Jones or order and payable to the order of John Jones; in legal effect they are the same. As to the right of bank to require John Jones' indorsement, when he presents the check at the bank, the courts differ, some holding that the bank cannot compel indorsement by the payee; others that the bank has a right to such indorsement. It seems the bank's right to require indorsement of the payee, should be maintained as a reasonable banking custom. (*Inquiry from Mo., April, 1916.*)

Effect of memorandum on check

853. A check was dated Feb. 6th and in the left hand corner was a pencil memorandum "to be used Feb. 8th." *Opinion:* The bank could not safely pay before February 8th. (*Inquiry from N. Y., March, 1911, Jl.*)

Checks for less than one dollar

854. Is there any prohibition against the use of checks for less than one dollar? *Opinion:* Checks in sums less than one dollar, issued in the regular course of business payments, are not prohibited by law. Section 178 of the United States Criminal Code of 1909 (substance of such section having been enacted in 1862), which forbids the making of a check for a less sum than one dollar intended to circulate as money, does not apply to checks issued for purposes of payment not of circulation. The purpose of the law is to prohibit the issue or circulation of instruments in sums less than one dollar designed to be used as fractional currency. U. S. Crim. Code, Sec. 178. Knox on U. S. Notes, p. 100. Bolles' Financial Hist. of U. S., Vol. 2, pp. 83, 84. (*Inquiry from Hawaii, April, 1911, Jl.*)

Check indorsed in another state not a foreign bill of exchange

855. A, living in Idaho, draws a check on his local bank payable to B, who also resides in that state. B deposits his check with his bank, which clears same through its correspondent in a foreign state, and through banking channels the check eventually reaches A's bank and is paid. Is the instrument a foreign bill of exchange? *Opinion:* A check drawn by A in Idaho upon an Idaho bank, payable to B in Idaho, is not a foreign

bill of exchange because it has been indorsed by a bank in another state. Sec. 129 of the Negotiable Instruments Act defines an inland bill as "a bill which is, or on its face purports to be both drawn and payable within this state. Any other bill is a foreign bill." A check dated in one state upon a bank in another state is a foreign bill. *Mankey v. Hoyt*, 132 N. W. (S. D.) 230. (*Inquiry from Idaho, May, 1920.*)

856. Is a check drawn by a person on his bank in the same place, sent to the payee in another state, who indorses it and cashes it at a bank in such other state an inland or foreign bill of exchange? *Opinion:* Such a check is an inland bill of exchange; it does not become a foreign bill of exchange because it is made payable to a person residing in another state. (*Inquiry from Iowa, Sept., 1917.*)

Signatures

Where signature does not correspond with one filed with bank

857. Is a bank liable for refusing to pay a check because the signature does not agree with the one left with the bank. *Opinion:* There is no liability. For example, where the signature on file is "J. Brown Smith" a bank would be justified in refusing to pay a check signed "J. B. Smith" or "John B. Smith," even though genuine. *Morse on Banks and Banking*, Sec. 432. (*Inquiry from, D. C., May, 1912, Jl.*)

Signature made with hectograph

858. What is the legal effect of making a signature with a hectograph copy? *Opinion:* The signature of a depositor to a check made with a hectograph copy, if imprinted by the depositor or by his authority, is valid and binding; but the payor bank would take the risk in paying the check where the imprint was unauthorized, unless the depositor was negligent or agreed not to hold the bank responsible in such case. *Moyers v. McRimmon*, 53 S. E. (N. C.) 447. *Robb v. Penn. Co.*, 40 Atl. (Pa.) 969. (*Inquiry from Ill., Dec., 1915, Jl.*)

Signature of drawer by hand of another

859. A bank in Kansas purchased a sight draft on a Nebraska bank, drawn by a depositor of the Nebraska bank but signed in his name at his request by his cousin, who was a customer of the Kansas bank. The draft was dishonored. What are the rights of the Kansas bank? *Opinion:* The Kansas bank has recourse upon the drawer only, and not

upon its customer who introduced the drawer and signed the drawer's name to the draft on the latter's request. (*Inquiry from Kan., Aug., 1912, Jl.*)

Indorsement but not signature in handwriting of drawer

860. A check payable to self is signed in the depositor's name by the hand of another, but the depositor indorses the check by his own hand. Is the check good? *Opinion:* Such a point seems never to have been before the courts for decision but, if the bank should pay such a check, it is impossible to see how the depositor could deny responsibility. The Negotiable Instruments Act provides that "the signature of any party may be made by a duly authorized agent" and by indorsing, the depositor virtually ratifies the signature of his name by hand of another. It is a general rule that every indorser warrants to subsequent holders in due course the genuineness of the instrument and while ordinarily this warranty does not extend to the drawee as to genuineness of the drawer's signature, because the drawee is bound to know such signature, still where the indorser is the person named as drawer, it cannot be seen how the customer could repudiate his check, if paid by the bank. (*Inquiry from Me., July, 1916.*)

Signature by mark attested by witness

861. What is the proper manner in which to have an illiterate person sign his name in connection with checks, withdrawal slips, promissory notes, etc? *Opinion:* When a man cannot write, the usual method is to have him make his mark in the form of a cross and to have this mark attested by a subscribing witness. The Wisconsin statute (Wis. Stat. 1917, Sec. 4971 Subd. 19) expressly provides that, if a person is unable to write, his signature may be written in his presence by some other person by his direction, or he may sign by his mark. It does not require that the mark shall be witnessed, and the court cannot add that as requisite. (*Finlay v. Prescott*, 104 Wis. 614, 80 N. W. 930), where the court said on this point: "The statute does not enlarge the methods of executing written instruments, but modifies the common-law rule so that a person can sign his mark only when he is unable to write. It does not add a requirement that the mark shall be witnessed." Notwithstanding the above, for all practical purposes, a subscribing witness is necessary as there is no way to identify a mark by mere

inspection. The signature by mark would be the manner of execution, not only of checks, notes, etc., but also of deeds and mortgages. (*Inquiry from Wis., April, 1919.*)

Signature by mark with notary's certificate in foreign language

862. A check was signed with a mark without a witness, and for that reason was dishonored and protested. Notary's certificate in a foreign language that the signature was genuine was attached but the bank was not advised of the nature of the certificate. Were the dishonor and protest justified? *Opinion:* Refusal of payment and protest were justified because of the lack of a witness to the mark and because the drawee bank had no translation or interpretation of the certificate in the foreign language. Diligent search has revealed but two cases bearing on the question. *Meyer v. Witter*, 25 Mo. 83, holds that to make the contents of a document in a foreign language evidence, it must be translated and be brought home to the party against whom it is sought to be used. *Sartor v. Bolinger*, 59 Tex. 411, holds that a deed authenticated in a foreign language, without a translation, is properly excluded as evidence. It would seem to follow from these cases that the refusal of payment and the protest were justified. (*Inquiry from Cal., June, 1919.*)

Signature by attorney

863. A bank inquires as to the usual method to pursue when a customer of the bank desires to authorize another person to draw checks on his account. *Opinion:* The form of signature may be agreed upon. "John Jones by Mary Jones, attorney" is the usual form. If the bank agrees to honor checks on the account of John Jones when signed by Mary Jones, this would be sufficient to protect the bank, although the first form is preferable as that indicates the account drawn upon. Mary Jones might have a separate account in the bank. The preferable method is for the bank to have on file a power of attorney from the depositor appointing the other person as attorney and providing that under such power the checks should be signed in the name of the customer by the attorney. (*Inquiry from Okla., March, 1919.*)

864. A, who had power of attorney from B to sign checks for B, signed B's name and refused to sign his own name as attorney under B's name. *Opinion:* The

signature of B's name without adding "per A, attorney" is sufficient. *Forsyth v. Day*, 41 Me. 382. *First Nat. Bk. v. Layhed*, 28 Minn. 396. 1 *Daniel Neg. Inst.*, Sec. 299. 1 *Parsons Bills & Notes*, 91, 92. (*Inquiry from S. C., May, 1913, Jl.*)

865. An agent, acting under a power of attorney, signed a check in his individual name, without more. The agent had no personal account in the bank to which the check could be charged. Should the bank honor the check? *Opinion:* Unless the power of attorney is restrictive as to the form of signature, a check signed in the name of the agent is good, although it is customary for the agent to sign in the name of the principal by himself as attorney. Some powers of attorney constitute the agent "my true and lawful attorney for me and in my name" to draw checks, etc. Such a form literally construed would confine the authority to checks drawn in the name of the principal. Where the power of attorney gives the agent authority to sign checks "in my own name or in his own name," or gives general authority to sign checks on the principal's account, there is no question as to the validity of a signature in the agent's name. (*Inquiry from Pa., Feb., 1921.*)

Check signed "John Doe per Jennie Doe"

866. A check signed "John Doe per Jennie Doe" was presented to a bank, which carried an account for John Doe. Jennie Doe was John Doe's wife but no authorization to pay was filed with the bank. *Opinion:* In the absence of authority from John Doe, the bank should not pay such check. If checks so signed are honored, the husband can recover unless he has authorized or ratified the act. (*Inquiry from N. Y., Oct., 1912, Jl.*)

Check signed "B by A"

867. A check signed "B by A" was presented through the clearing house and the drawee, ignorant of A's authority (which he actually had) refused payment and protested the item because of the signature. *Opinion:* The drawee rightfully refused payment and the check being genuine and not a forgery, its protest was justifiable. The presenting bank rather than the drawee, was the proper one to hand the check over to the notary for protest. (*Inquiry from Miss., Feb., 1910, Jl.*)

Signature by agent of insurance company

868. A bank's customer is a representative of a Philadelphia insurance company

and has asked the bank to procure him a check book for his personal account. In the corner thereof he desires to have printed the name of the insurance company, with his name as local manager. The bank asked him to procure from the company a letter authorizing him to use its name on the check. The bank asks if it is assuming any responsibility in connection therewith. *Opinion:* In the case stated, it is a proper safeguard to request and procure the authorization of the company to the printing of its name on the margin of the check to be signed by the local manager in his personal capacity. If he should deposit in this account checks made payable to him as agent of the insurance company, it would be safe to honor his personal check against the deposit, but if the checks were made payable to the insurance company and deposited by the local manager, there would be serious question as to his authority to indorse and check out the proceeds and it might be well, if such deposits are contemplated, to include in the letter of authority, an authorization from the insurance company to the agent to indorse checks payable to the company and authorizing the bank to honor the personal checks of the agent against such deposits. (*Inquiry from Pa., July, 1917.*)

Corporation signature

869. The board of directors of a corporation authorized its treasurer to open an account and sign merely the corporation name, as, "The L. R. Waist Co., Incorporated" in his own handwriting, submitting a specimen signature to the bank together with the foregoing authorization. *Opinion:* The signature "The L. R. Waist Co.", in the form quoted would be legal and the bank would be just as well protected in paying a check so signed, as paying any check on the written signature of an individual depositor. (*Inquiry from N. Y., Sept., 1915.*)

870. A bank asks whether it is authorized to pay out money on the signature left with it when an account is opened "Gem Manufacturing Company, by J. B. Jones, Vice President" even if it were a corporation whose articles provided for the signature of two officers. *Opinion:* Where the bank has knowledge that the articles provide for the signature of two officers, it would certainly be unsafe to pay on the signature of J. B. Jones, Vice President. When an officer deposits money in the name of a corporation the property becomes the property of the corporation and then the

question is whether the officer who makes the deposit has the authority to withdraw the money. There are, doubtless, many cases where such is the fact, but it would seem the safer banking practice in all cases, not to rely on the statement of the officer, but to request that the board of directors of the corporation pass a resolution naming the officer or officers who have the check-drawing power, and that same be filed with the bank for its protection. (*Inquiry from Iowa, Feb., 1916.*)

Exchange Clauses

Effect of provision "with exchange"

871. A check drawn and payable at the same place contained the words "with exchange." The last indorser attempted to collect 10 cents exchange in addition to the face amount of the check. *Opinion:* The words "with exchange" have no effect as in this case there could be no exchange. *Chandler v. Calvert*, 87 Mo. App. 368. *Buck v. Harris*, 125 Mo. App. 365. *Clausen v. Stone*, 29 Ill. 116. *Hill v. Todd*, 29 Ill. 103. (*Inquiry from Iowa, Jan., 1912, Jl.*)

872. Where a check is drawn and payable at one and the same place, the words "with exchange" therein are without effect and meaningless. Where A in New York draws his check on his bank in New York "with exchange" and mails it to a payee in Omaha, Nebraska, it is presumably the drawer's intention that the New York bank should pay the exchange on Omaha so that the payee might receive the face amount; but to carry out that intention the check should specifically provide "with exchange on Omaha." *Garrettson v. Bk.*, 47 Fed. Rep. 467. See citations in Opinion No. 871. (*Inquiry from Neb., Jan., 1913, Jl.*)

"With exchange" and "In exchange"

873. Where check is drawn merely "with exchange" without specifying exchange on another place, what amount is payable? *Opinion:* The face of the check is proper sum payable. (*Inquiry from S. D., Feb., 1912, Jl.*)

874. A bank received for collection a check drawn "with exchange," on a local bank. It is instructed to remit par. On presentation the drawee bank refused to pay the check with the exchange added, but offered to pay the face. Is the item protestable? *Opinion:* The check does not provide for exchange on any particular place and, as the check is payable at the place where the payor bank is located, the words

"with exchange" should be construed as ambiguous and indefinite, not clearly indicating whether the exchange is on the place of the drawer or on the place where the holder or payee is located. Tender of amount of the face of the check should satisfy the order, and the check would not properly be protestable for refusal by bank to pay in addition the amount of exchange on the place of payee. It has been held in several cases where an instrument is issued and payable at the same place "with exchange," that the words "with exchange" are surplusage and have no effect. *Mill v. Todd*, 29 Ill. 101. (*Inquiry from La., March, 1920.*)

Effect on negotiability of provision "in exchange"

875. A Chicago bank sends an Iowa bank for collection and remittance a check drawn on X bank in Iowa payable "in exchange." The collecting bank remits the Chicago bank the face of the check, adds the exchange, and presents to the X bank which refuses to pay the amount plus exchange. The X bank contends the collecting bank has no right to charge it with exchange for the service of remitting. The latter contends that on a check so drawn the drawer agrees to pay the exchange charges which would otherwise fall on the payee. It asks as to its right to protest the check. *Opinion:* According to some courts the check is not negotiable because not payable in money and it is therefore questionable whether it is properly protestable. (*Inquiry from Iowa, Feb., 1910, Jl.*)

876. Checks are sometimes made payable "in New York exchange" or "in New York exchange at current rates" and the question frequently arises as to the negotiability of an instrument so payable. *Opinion:* In Minnesota, Missouri and Illinois it has been held that the instrument is not payable in money, but in a bill of exchange which is commodity or property and therefore is not negotiable. Another view taken by a Federal Court holds that the instrument is payable in money with exchange added and is therefore negotiable. A more recent case in the Federal Court holds that the instrument is payable in money (*i.e.* "in" or by giving) a bill of exchange therefor on New York and is negotiable under the Negotiable Instruments Act. It is obvious in view of the above conflict that no opinion can be asserted with positiveness either in affirmation or denial of the negotiability of

a check payable "in New York exchange." *Chandler v. Calvert*, 87 Mo. App. 632. *Hogue v. Edwards*, 9 Ill. App. 153. *First Nat. Bk. of Brooklyn v. Slette*, 67 Minn. 425. *Bradley v. Till*, 4 Biss. 473. *Fed. Cas. No. 1783*. *Security Tr. Co. v. Des Moines County*, 198 Fed. 331. *Bull v. Bk.*, 123 U. S. 105. *Haddock v. Woods*, 46 Iowa 433. *Dille v. White*, 109 N. W. (Iowa) 909. *Neg. Inst. A., Sec. 6*, (Comsr's. dft.), *Sec. 7645*, Ill. dft. (*Inquiry from N. Y., March, 1917, Jl.*)

"Payable only in New York exchange at current rates"

877. A bank had imprinted on its customers' checks "Payable only in New York exchange at current rates" and received a circular issued by the Federal Reserve Board that a check with such wording was not a check acceptable for clearing at par through Federal Reserve Banks. Can the bank have such wording imprinted on all customers' checks without violating any rule or law promulgated by the Federal Reserve Board? *Opinion:* Some of the old cases have held that an instrument "payable in New York exchange" is not negotiable because not payable in money, but in a commodity, but in a recent Federal Court decision it has been held that such an instrument means the same as if it provided "with New York exchange," and is payable in money and negotiable. If a customer of a bank desires to make his checks payable only in New York exchange at current rates there is nothing in the law which would prevent him from so doing, and there is nothing which would prevent a bank making the checks of its customers so payable, for, while it prints the checks, it is for the convenience of its customers. (*Inquiry from Tenn., Aug., 1916.*)

Bearer checks

Possession prima facie evidence of title

878 Does the possession of a check drawn to bearer constitute in every case prima facie evidence of ownership, conferring authority on the bank to pay to any holder? May the drawer repudiate the payment on the ground that the holder was not the bearer to whom he delivered the check and intended that it should be paid? *Opinion:* Possession of a bearer check constitutes sufficient evidence of ownership to authorize payment to the holder, whoever he may be. In the case of *Newcombe v. Fox*, 1 N. Y. App. Div. 389, it was held that

where the instrument is payable to bearer, or, if payable to order, is indorsed in blank, possession is sufficient evidence of title under which to maintain an action and the court will not inquire into the right of possession unless there is some allegation of mala fides. Equally where the holder of a bearer check presents it for payment and the bank has no knowledge or information that he is a thief or finder or person other than the one the drawer intended to receive payment, the bank will be protected in making the payment. (*Inquiry from N. Y., Oct., 1917.*)

Stranger entitled to payment

879. (1) Is a bank justified in refusing to cash a check payable to cash, presented by an unknown man, who cannot be properly identified? (2) If the check payable to cash is indorsed by a person other than the one presenting the same, and the bank does not recognize the first indorsement, and does not feel that the person trying to cash the same is responsible, may it refuse to pay him, without having the first indorsement checked up? *Opinion:* (1) It is quite customary for banks to request the holder of a check payable to bearer (a check payable to cash is payable to bearer) to indorse his name on same for the purpose of identifying the person receiving the money and this request is generally complied with. But legally such checks do not require indorsement, and if the holder should stand on his strict rights, the bank would be obliged to pay him without indorsement or else suffer the check to be protested. (2) The same observations would apply to a check payable to cash and indorsed in blank by a person other than the presenting holder. It would still be payable to bearer. (*Inquiry from N. Y., Feb., 1921.*)

Check payable to "cash" is payable to bearer

880. Is a bank protected in paying a check to "Cash" to an indorser? Or is the contention valid that because the check is not payable to a specified person or bearer, it is not negotiable? *Opinion:* A check payable to "Cash" is payable to bearer and the bank upon which such check is drawn must make payment to the bearer and is absolutely protected in so doing against its depositor in the absence of a stop order or suspicious circumstances surrounding the holder who presents the same for payment. (*Inquiry from Wyo., Aug., 1917.*)

881. A check payable to the order of "cash" contains several indorsements in blank and one special indorsement. *Opin-*

ion: The instrument is payable to bearer and is transferable by delivery. It does not require any indorsement at all, either of maker or any one else, to make it transferable or payable. Neg. Inst. A., Sec. 40 (Comsr's. dft.) (*Inquiry from Wis., Jan., 1910, Jl.*)

Check to "J. S. (bearer)" not payable to bearer

882. A check was drawn payable to the order of "John Smith (bearer)." A party indorsed it John Smith and presented the item to the drawee which paid it without identification. *Opinion:* The check was not payable to any bearer but to John Smith, who was the bearer, and identification was therefore necessary for the bank's safety. Warren v. Scott, 32 Ia. 22. (*Inquiry from Mass., Jan., 1912, Jl.*)

Effect where "Or bearer" struck out

883. Where the drawer uses a form of check "pay to or bearer," scratches out "or bearer" and makes the check read "pay to John Jones," What is the nature of the check? *Opinion:* This is neither a bearer check nor an order check but is one payable to John Jones only and is not negotiable. Miss. Code 1906, Sec. 4001. Craig v. Vicksburg, 31 Miss. 216. (*Inquiry from Miss., April, 1912, Jl.*)

Gambling consideration

Check given for gambling debt

884. Richard Roe issues his check to his own order and after indorsing it delivers it to John Doe in payment of a gambling debt. The check was presented by Doe and returned to him by the bank without notation, in obedience to Roe's stop order. Later Roe cashed the check at another bank, which had no knowledge of the whole transaction. This bank regarding the instrument as a bearer check seeks to hold the drawer responsible. *Opinion:* In Illinois and many other states a check or other instrument given in payment of a gambling debt is void and has been held unenforceable even in the hands of a bona fide holder. In some states it has been held the Negotiable Instruments Act protects the holder in due course of such an instrument, while in other states the contrary has been held. Pope v. Hanke, 155 Ill. 617. 40 N. E. 839. Wirt v. Stubblefield, 17 App. D. C. 283. Alexander v. Hazelrigg, 97 S. W. (Ky.) 353. (*Inquiry from Ill., Nov., 1918, Jl.*)

885. A bank cashed a check in good faith. Payment was stopped by the drawer who declared that the check was given for a gambling debt. *Opinion:* Before the Negotiable Instruments Act it was held that the bank which innocently purchased a check or note given for a gambling debt and declared void by state statute had no right of recovery. The decisions conflict whether the Negotiable Instruments Act protects a holder in due course in such cases. That Act provides that "a holder in due course holds the instrument free from any defect of title of prior parties and free from defenses available to prior parties among themselves," and it has not been decided in West Virginia whether this provision repeals the state statute declaring gaming contracts void. West Va. Code, 1913, Chap. 97, Sec. 4168 *Hulbert & Sons v. Straub*, 54 W. Va. 303. Neg. Inst. A., Sec. 57 (Comsr's. dft.). *Wirt v. Stubblefield*, 17 App. D. C. 283. *Alexander v. Hazelrigg*, 97 S. W. (Ky.) 353. (*Inquiry from W. Va., Oct., 1916, JI.*)

Enforceability of bank draft lost at gambling

886. The customer of a bank receives the bank's draft in exchange for his check, which draft is lost in a game of poker. The customer asks for and is granted a stop payment of the draft which has been negotiated by the winner for value to a bank outside the state. The customer agrees to stand any loss resulting from the stop payment order. May the purchasing bank, as a holder in due course, recover on the draft from the issuing bank? *Opinion:* The New Mexico statute provides: "All securities, bonds, bills, notes or conveyances, when the consideration is money or property won at gambling; or at any game or gambling device, shall be void." Stat. 1915 Sec. 2510, Subd. 4. Sec. 2511 provides that "the assignment of any bond, bill, note, judgment, conveyance or other security, shall not affect the defense of the person executing the same."

Prior to the Negotiable Instruments Act, the courts quite generally held, where a statute made an instrument based on a gambling consideration, absolutely void, that it gathered no vitality by negotiation to a bona fide holder and remained void and unenforceable in his hands. See, for example, *Birmingham Trust & Savings Co. v. Curry*, 49 So. (Ala.) 319; *Swinney v. Edwards*, 55 Pac. (Wyo.) 306. But a new question has arisen under that act, which gives enforceable rights to a holder in due

course free from defects of title of prior parties and free from defense available to prior parties among themselves and the act includes "an illegal consideration" among the defects of title from which a holder in due course is freed. Whether under the act a holder in due course may enforce a note given for a gambling debt and whether to that extent the act has repealed the statutes making such an instrument void has not been passed upon in New Mexico. *Wirt v. Stubblefield*, 17 App. Cas. D. C. 283, holds the defense unavailable against a holder in due course. *Alexander v. Hazelrigg*, 123 Ky. 67 and *Raleigh Co. Bank v. Poteet*, 74 W. Va. 511 hold the defense available and the note void. In the case submitted, however, the consideration was not money won at gaming. The draft has a valid inception as it was issued in consideration for the customer's check, and was later transferred for money won at gaming. This raises the further question whether an instrument, valid in its inception, but transferred by the payee for a gambling debt is avoided or whether negotiation by the transferee to an innocent purchaser will give the latter enforceable rights against the maker. There is something to be said for each view, but the better view would seem to be that the New Mexico statute does not preclude enforcement by a holder in due course; otherwise it could be contended that even a national bank note lost by the holder in a poker game was thereby avoided and could not afterwards be enforced by a subsequent holder. There is a certain analogy in an early Virginia case, *Whitworth v. Adams*, 5 Rand. 333, holding that an intermediate indorsement of a valid note for an usurious consideration, did not vitiate the note in the hands of a subsequent bona fide purchaser without notice of the usury. The equities of the case are certainly with the holder in due course.

While it would seem probable that the bank drawing the draft is liable, yet in view of the uncertainty of the question and the fact that the customer will indemnify it against any loss, its proper course is to stand suit upon the draft and leave it to the court to decide. (*Inquiry from N. M., Feb., 1921.*)

Negotiability

Provisions affecting negotiability

To "order of payee shown on back"

887. The following bank checks are submitted for criticism: Check No. 1 is the

ordinary form of bank check, except that the payee blank contains the words "pay to the order of payee shown on back." The payee blank of check No. 2 contains the words "pay to the order of payee and all indorsers shown on back." *Opinion:* A check made payable "to the order of payee shown on back" designates the payee with sufficient certainty and is negotiable. The use of this form in check No. 1 is not preferable to the old style of forms. The other form submitted which is made payable to the "order of payee and all indorsers shown on back" would not serve a useful purpose because it provides for a multiplicity of payees. Neg. Inst. A., Sec. 8 (Comsr's. dft.). *Blackman v. Lehman*, 63 Ala. 547. *U. S. v. White*, 2 Hill 59. (*Inquiry from Kan.*, Dec., 1918, *Jl.*)

"Or order" erased

888. A check is drawn payable to John Smith wherein the words "or order" are erased. A bank requests advice as whether, in view of such erasure, it is obligatory upon the bank to pay John Smith to whom it is made payable, or has John Smith the right to transfer the paper by indorsement the same as if those words had not been erased. *Opinion:* A check payable to John Smith, the words order or bearer having been erased is non-negotiable and is payable to John Smith only. John Smith can assign his rights in the check but the assignee takes no greater title than possessed by the payee. The bank should not take the risk of paying the assignee and should proceed on the assumption that its authority is to pay John Smith only. (*Inquiry from Ala.*, May, 1917.)

"Pay to order of self"

889. Is a check "Pay to the order of self" and indorsed by the maker and negotiated negotiable? *Opinion:* (1) A check "Pay to the order of self," indorsed by the maker and negotiated, is a negotiable instrument. The Negotiable Instruments Act expressly provides that the instrument may be drawn payable to the order of "the drawer or maker" and such an instrument is payable to order within the meaning of the Act. To state the proposition in another way, if a check is in form negotiable, the fact that it is drawn "Pay to the order of self" does not make it non-negotiable. (*Inquiry from Iowa*, Sept., 1917.)

"Payable if desired at" another bank

890. A check is drawn upon a bank in Vermont "payable if desired at the Blank

National Bank, Boston." In view of the two places of payment, negotiability is questioned. *Opinion:* The negotiability of a check drawn on one bank "payable if desired at" another bank is uncertain. It depends on whether the instrument is construed to be drawn on two drawees in the alternative, in which case it would be non-negotiable, or whether on one drawee with two places of payment, in which case it would probably be negotiable. Checks drawn "payable if desired at" are prohibited in the New York Clearing House. Mass. Neg. Inst. Act., Sec. 145. *Bartholomew v. First Nat. Bk.*, 18 Wash. 683. (*Inquiry from Mass.*, Dec., 1912, *Jl.*)

Where payable out of particular fund

891. Explanation is asked of meaning of and distinction between provisions of Negotiable Instruments Law that (a) order or promise to pay is unconditional though coupled with indication of particular fund out of which reimbursement is to be made and (b) order or promise to pay out of particular fund is not unconditional. *Opinion:* The first stated provision relates to an instrument not payable out of a particular fund but payable generally and merely indicating such fund as a source of reimbursement. The last stated provision covers a case where the instrument is payable only out of a particular fund, and payment depends upon the sufficiency of the fund. Hence, in the latter case, the instrument is non-negotiable because not payable absolutely, while in the first stated case negotiability is not affected because payment is absolutely and unconditionally promised. Neg. Inst. A., Secs. 1, 3 (Commsr's. dft.). *Averett v. Booker*, 15 Grat. 165. *Worden v. Dodge*, 4 Denio, 159. *West v. Forman*, 21 Ala. 400. *Daniel on Neg. Inst.*, Sec. 51. *Redman v. Adams*, 51 Me. 433. *First Nat. Bk. v. Lightner*, 74 Kan. 736. (*Inquiry from Ala.*, Nov., 1912, *Jl.*)

Payable "on April 1st, if then living"

892. A check drawn by a life insurance company reading: "On April 1, if then living, pay to order of John Smith, \$800," was cashed by a bank April 2nd. The drawee bank refused payment, same having been stopped by the drawer for a partial failure of consideration. What are the rights of the cashing bank? *Opinion:* The check is payable on a condition, and is not a negotiable instrument. A bank acquiring such a check for full face value from the

payee takes simply the enforceable rights of the payee, and holds the check subject to proper defenses of the drawer. (*Inquiry from Colo., Aug., 1920, Jl.*)

Restriction of channel of collection

893. Inquiry is made whether or not the phrases (1) "Payable only through banks or bankers," (2) "Not payable through express companies or post offices," (3) "Payable only in New York exchange at current rates," appearing in a check would affect its negotiability. *Opinion:* According to decided cases the first two phrases would not destroy negotiability, but there are conflicting decisions as to whether or not a check payable in exchange is payable in money and negotiable. A late Federal decision upholds negotiability. (See A. B. A. Journal September, 1916). (*Inquiry from N. C., Aug., 1916.*)

Not payable through express company

894. What is the effect of the phrase "not payable through an express company" on the face of a check. *Opinion:* (1) Such provision is valid and does not affect the negotiability, and the check may be presented through other channels, (2) the duty of the drawee is to refuse payment when the check is presented through the prohibited agency, (3) the drawee so refusing would not incur liability either to the drawer or the holder, (4) the check could not be lawfully protested and the holder causing protest would be liable to the drawer in damages. *Commercial Nat. Bk. v. First Nat. Bk., 118 N. C. 783. Farmers Bk. of Nashville v. Johnson, King & Co., 134 Ga. 486. Neg. Inst. A., Sec. 325 Comsr's. dft. (Inquiry from N. Y., May, 1917, Jl.)*

895. Certain banks protest against the request made by the Federal Reserve Banks to remit for collections at par, and in order to avoid the method adopted in sending these checks to some agent of the Federal Reserve Bank in the particular city who presents them at the counter demanding cash therefor are considering the advisability of stamping on their checks phrases such as these. (1) "Not payable through the Federal Reserve Bank." (2) "This check will not be paid through express companies, post offices or any Federal Reserve Bank or its agents." (3) "Payable in cash to the payee, otherwise in exchange at current rates." (4) "Payable in cash to the original payee, otherwise in exchange at a maximum service charge of $\frac{1}{16}$ of 1%." Do

any of these indorsements restrict negotiability? Can payment be refused if check is presented in prohibited manner? *Opinion:* Provisions (1) and (2) are valid and do not render check non-negotiable. Payment can be refused if check is presented in prohibited manner, and there is no right to protest check. It is uncertain whether or not provisions (3) and (4) would render checks non-negotiable. There is a conflict of authority whether a check payable "in exchange" is a negotiable instrument. Some courts hold that it is payable in money, while others hold that it is not payable in money but in a commodity, namely, a bill of exchange. Furthermore, there is an alternative provision, the alternative depending on the condition whether the check is presented by the payee himself or by some other holder, and this might be construed by the courts as not calling for the payment of a sum certain in money absolutely. At all events, the negotiability of checks containing provisions (3) or (4) is doubtful. (*Inquiry from Ill., Nov., 1919.*)

Checks "not payable through Federal Reserve Bank"

896. A state bank in Louisiana writes that "The Federal Reserve Bank of Dallas, Texas has undertaken to coerce all the State banks of this State, non-members of the Federal Reserve System, to remit all items at par. . . . We protested against this line of action and declined to par the items. . . ; and then the Federal Reserve Bank began to collect all items drawn on us through the American Railway Express Company in cash across our counter—a plan which. . . was very detrimental to our cash reserve; and made it difficult for us to maintain the reserve as required by the laws of this State. Then, in order to protect our rights in the matter, we requested our depositors to stamp the following across the face of all checks drawn on us: 'This check is not payable through any post office, express company or Federal Reserve Bank.'" Does such a stamp destroy the negotiability of the checks? *Opinion:* Such stamp does not destroy the negotiability of the check. The following cases are the basis of the opinion. *Commercial Nat. Bank v. First Nat. Bank, 118 N. C. 783* held that a provision stamped across the face of a check, "This check positively will not be paid to the Gastonia Cotton Mfg. Co., the Gastonia Banking Co., or any of its agents," was valid and did not destroy negotiability so far as other persons were concerned. The court

said: "In England the system of crossed checks has long been recognized as valid. By that system there is stamped across the face of the check the name of a certain banker through whom it must be presented for payment, and if presented by any one else, it will not be honored. This does not destroy negotiability in any wise. The present case does not go that far, but merely stipulates that the check will not be honored if presented through one agency named. This cannot be deemed an unreasonable restriction of trade. Nor is it a boycott. There is no evidence of a conspiracy to injure the agency named, but it is agreed as a fact that it was an effort on the part of the drawer firm to prevent its transactions and the nature and extent of its business becoming known to a rival house by its checks passing through that channel."

In *Farmers' Bank of Nashville v. Johnson*, 134 Ga. 486, a check was drawn on the Bank of Nashville, Ga., "payable through the Citizens Bank of Valdosta, Ga., at current rate." The check was presented for payment by another bank and the drawee bank wrote on the back of the check "will pay when presented through the Citizens Bank of Valdosta, Ga." Thereupon the other bank caused the check to be protested. The court held that the bank was not required to pay the check when presented by a third bank, and that the qualified refusal to pay the check did not authorize the making of the protest. (*Inquiry from La., Oct., 1919.*)

897. General Counsel for the Federal Reserve board asked in connection with the opinion in the Louisiana case (Opinion No. 896 whether the two cases cited would have been decided differently under the Negotiable Instruments Act. He referred to Sec. 1, providing that a check to be negotiable "must contain an unconditional promise or order to pay a sum certain in money," and "must be payable to order, or to bearer," and to Sec. 8, providing that "the instrument is payable to order where it is drawn payable to the order of a specified person or to him or his order." He stated that there was nothing in the Act to indicate that a negotiable instrument may be drawn payable to order subject to restriction, and that the cases cited were decided independently of the Act. *Opinion:* Under the law merchant, an instrument to be negotiable must be payable unconditionally or absolutely and at all events to the order of a specified person or to him or his order or to bearer.

It would seem that the essential rules of the Negotiable Instruments Act are virtually the same as those of the law merchant and if so the North Carolina and Georgia decisions rendered under the law merchant would be equally in point, as if rendered under the rules of the Negotiable Instruments Act. The question is whether the stamped provision detracts from the absolute payability of the check so as to render the order to pay conditional. Of course, there is a condition expressed in the check but is it such a condition as will detract from absolute payability when properly presented? If not, it would not seem that the order is conditional within the meaning of the Act.

The condition, expressed on a certificate of deposit that it is payable on return properly indorsed does not destroy negotiability, except in Pennsylvania, and then not if suit is brought in the federal courts. *Bank of Saginaw v. Title & Trust Co.*, 105 Fed. 491. For Pennsylvania cases, see *Patterson v. Poindexter*, 6 W. & S. and *Lebanon Bank v. Mangan*, 28 Pa., St. 452.

Since the Negotiable Instruments Act was passed in New York millions of dollars of checks have, on certain occasions, daily gone through the New York Clearing House containing the provision "payable only through the New York Clearing House" and no question has ever been raised as to their negotiability. These checks were payable absolutely and at all events—in other words, unconditionally—but had to be presented through a designated channel.

It would seem, therefore, that a check drawn to John Smith or order but providing that it is not payable if presented by or through a specified person or agent, contains an unconditional order to pay a specified person or order within the meaning of the Negotiable Instruments Act, and that the provision restricting the channel of its collection does not make the order conditional so as to affect negotiability. Such a check is payable absolutely when properly presented. It is susceptible of negotiation by indorsement through a line of successive indorsees, but when the period of its negotiation has ended and the time comes when it is to be presented for payment, certain designated agencies are excluded. It is possible, however, that some court may construe the provision as destroying negotiability. (*Inquiry from D. C., Feb., 1920.*)

What constitutes payment

Payment of overdraft to bona fide holder of finality

898. A bank in the ordinary course of business pays to a bona fide holder a check drawn on it, under the mistaken belief that the drawer had funds when he had not. *Opinion:* Payment cannot be recovered, and the fact that the holder would be in no worse position if compelled to refund than if payment had not been made does not authorize a recovery. *Hull v. Bk., Dudley (S. C.) 259. First Nat. Bk. v. Burkham, 32 Mich. 328. Oddie v. Nat. City Bk., 45 N. Y. 735. Mfg. Nat. Bk. v. Swift, 70 Md. 515. Nat. Bk. v. Berrall, 70 N. J. L. 757. Spokane, etc., Tr. Co. v. Huff, (Wash.) 115 Pac. 80. (Inquiry from Mont., Nov., 1917, Jl.)*

Where holder has knowledge that check paid is a kite

899. A bank which sends a check directly to the drawee bank receives in payment a draft on a third bank, which acknowledges that it places the amount of the draft to the credit of the collecting bank. The collecting bank then allows the depositor to draw out the amount of the check. Can the drawee of the draft thereafter charge back the amount of the draft to the bank collecting the original check, because of the state of the account between it and the drawer of the draft, equally as where it has charged back an uncollected draft upon the latter? What effect would it have if the original depositor for collection is kiting checks through the depositary for collection and the drawee bank, which two banks clear through the drawee of the draft? *Opinion:* It is a general rule supported by numerous authorities, that, where a drawee bank pays a check to a bona fide holder, such payment is a finality and the drawee cannot recover the payment because it was made in error as to the state of the drawee's account. This rule applies where the payment is made by credit to account equally as if money is paid out. *Oddie v. National City Bank, 45 N. Y. 735; Spokane & Eastern Trust Co. v. Huff, 115 Pac. (Wash.) 80; First Nat. Bank v. Sidebottom, 145 S. W. (Ky.) 404.* Under the authorities cited, assuming that the collecting bank was a bona fide holder, the credit was final and irrevocable, notwithstanding any change in the state of the account between the drawee and the drawer of the draft. The rule would be the same

even if the account of the drawer had been insufficient when the credit was given. (Cases cited supra.) That the check was a part of a kiting transaction is immaterial if the depositary bank was ignorant thereof. However, if it had knowledge, then a question is raised as to its status as bona fide holder of the draft. If it were not such a holder the payment would not be final and irrevocable. The question has not been passed on judicially and the answer is somewhat uncertain. Knowledge by the holder of a check who received credit from the drawee bank that the drawer had no funds to meet it was held to deprive him of the status of a bona fide holder and disentitle him from enforcing the credit. *Peterson v. Union Nat. Bank, 52 Pa. 206. (Inquiry from Texas, June, 1916.)*

Crediting depositor's account with checks on same bank

900. A bank having a commercial and savings department was in the habit of receiving checks from its customer deposited to his credit in his savings account, said checks being drawn on the commercial department of the same bank. Occasionally the checks so deposited, when presented to the department on which drawn were found to be not good, or that payment of the same had been stopped. In such cases it was the bank's practice to charge the item back to its depositor. Was it justified in so doing? *Opinion:* In California, contrary to the majority of cases elsewhere, it has been held that the credit to a depositor of a check drawn on the same bank by another depositor, is not equivalent to payment, but the check is presumptively taken by the bank for collection from itself and may be charged back to the depositor at the close of the day if the funds drawn against are insufficient. Same rule applied to right of departmental bank to charge back overdraft upon one department deposited in another. *Oddie v. Nat. City Bk., 45 N. Y. 735. Consol. Nat. Bk., v. First Nat. Bk. 114 N. Y. S. 308. Bryan v. First Nat. Bk., 205 Pa. 7. Peterson v. Union Nat. Bk., 52 Pa. 206. Nat. Gold Bk. v. McDonald, 51 Cal. 64. Ocean Park Bk. v. Rogers, 6 Cal. App. 678, 92 Pac. 897. Newmark Grain Co. v. Merchants Nat. Bk., 135 Pac. 958. Gonyer v. Williams, 143 Pac. 736. Plumas Co. Bk. v. Rideout, 131 Pac. 360. (Inquiry from Cal., Sept., 1917, Jl.)*

Crediting depositor with check of drawer having no account

901. A bank credited its customer with

the proceeds of a check drawn upon it, and in sorting the checks discovered that the drawer had no account. The drawer happened in the bank a few minutes later and instructed the cashier to change the name of the drawee to another bank. The check was presented to the new drawee the same afternoon, but payment had been stopped. The depositor of the check objects to being charged therewith. *Opinion:* The amount is not chargeable back to the depositor, if he acted in good faith, because of the rule (adopted by a majority of courts), that credit of a check upon the depository operates as payment and is irrevocable. The fact that the drawer, after the check had been paid by the credit, changed the check and made it payable at another bank does not affect the rights of the payee. *Oddie v. Nat. City Bk.*, 45 N. Y., 735. *Consol. Nat. Bk. v. First Nat. Bk.*, 114 N. Y. S. 308. *City Nat. Bk. v. Burns*, 68 Ala. 267. *American Exch. Nat. Bk. v. Gregg*, 138 Ill. 596. *Titus v. Mechanics Nat. Bk.*, 35 N. J. L. 588. *Bryan v. First Nat. Bk.* 205 Pa. 7. *Nat. Gold Bk. v. McDonald*, 51 Cal. 64. *Ocean Park Bk. v. Rogers*, 6 Cal. App. 678. *Nat. Exch. Bk. v. Gwin*, 78 Atl. (Md.) 1026. *Peterson v. Union Nat. Bk.*, 51 Pa. 206. (*Inquiry from Okla., March, 1916, Jl.*)

Point of time when check received through mail is paid

902. At what time is a check received through the mail regarded as paid? *Opinion:* Where a check against sufficient funds is received by the drawee through the mail, it is paid at the time it is charged to the drawer's account and cancelled; so that thereafter the drawer cannot stop payment nor can a receiver or assignee of the drawer claim the fund, although remittance has not been made. Some courts hold the check paid even before charged to account, where it has been cancelled and filed as paid. But where a check against insufficient funds or a forged check received through the mail is by mistake marked "paid" and the mistake corrected before it is charged to the account, some authorities support the conclusion that the check is not finally paid but the mistake can be corrected and the check returned. *Albers v. Commercial Bk.*, 85 Mo. 173. *American Nat. Bk. v. Miller*, 229 U. S. 517. *Nineteenth Ward Bk., v. First Nat. Bk.*, 184 Mass. 49. *Consol. Bk. of N. Y. v. First Nat. Bk. of Middletown*, 114 N. Y. S. 308. *Carley v. Potter's Bk.*, 46 S.W. (Tenn.) 328. *Rankin v. Colonial Bk.*, 64 N. Y. S. 32. (*Inquiry from Iowa, May, 1919, Jl.*)

903. A check against sufficient funds is received through the mail by a drawee bank for payment and remittance. At what time in the physical handling of the check by the drawee is it paid, after which it will be too late for the drawer to stop payment, or to withdraw, or control the fund? *Opinion:* The check is paid at the time the amount is charged to the drawer's account, and the check is cancelled; thereafter the fund is held for the credit of the holder and control of the drawer ceases and he has no right to stop payment, even though actual remittance has not been made. *Mitchell v. Security Bk.*, 147 N. Y. S. 470. *Kellogg v. Citizens Bk.*, 162 S. W. (Mo.) 643. *First Nat. Bk. v. School Dist.*, 120 Pac. (Okla.) 614. See citations in *Opinion No. 902.* *State Nat. Bk. v. Boettcher*, 5 Colo. 185. *Liggett v. Weed* 7 Kan. 273. *Western Wheeled Scraper Co. v. Sadilek*, 50 Neb. 105. *Boyd v. Emerson*, 2 Adol. & El. 184. (*Inquiry from Mass., May, 1917, Jl.*)

Payment of unindorsed check by issue of exchange to payee

904. A draws a check on B bank, payable to C, and sends check to the bank with a verbal request that N. Y. exchange be issued to the order of C for the amount of such check. Does the obligation of bank B end with the issue of N. Y. exchange to the order of C, without C's indorsement on the check drawn on bank B, or is the indorsement of C necessary before the N. Y. exchange can be issued? *Opinion:* In the case stated the check is an incomplete instrument because it was never delivered to the payee, and the issue of the N. Y. exchange to C would not be in payment of the incomplete check, but an acceding to the request of the depositor for exchange, of which request such incomplete check is evidence; and, as presumably the check of this form is sufficient evidence of such request on which to charge the customer with the amount, it would seem that the indorsement of the payee would not be necessary for the bank's protection. *Inquiry from N. C., Sept., 1920, Jl.*)

Deduction of exchange

905. The town of B has a single bank which is located one mile from the town of W in which there are two banks. These towns are under separate governments, having no connection with each other. The banks in the town of W voluntarily accept checks drawn on the bank in the town of B for collection. Would the drawee bank be justified in declining to pay such checks in

full and tender the amount less exchange? And could the holder in such case legally protest the check for non-payment? *Opinion*: The bank cannot legally refuse to pay such a check where the holder refuses a deduction of the exchange. In law, when a check drawn on the bank by its customer is presented for payment at the drawee bank, it is obligatory for the bank to pay the amount called for if in funds, and if it refuses to pay the check in full, but tenders the amount less exchange, the holder can legally protest the check for non-payment. Exchange is the cost of transmitting funds from one place to another; but in this case the bank was not called upon to transmit the funds but only to pay the amount upon demand. (*Inquiry from Va., April, 1916.*)

Conditional payment by check

906. A check taken as absolute payment of a note will operate to extinguish the note, but, in the absence of an agreement, the giving and receipt of a check is usually considered a conditional payment only and not absolute until the check itself is paid. *Burkhalter v. Erie Sec. Nat. Bk.*, 42 N. Y. 538. *Morse on Banks and Banking*, Sec. 247. (*Inquiry from N. Y., June, 1913, Jl.*)

907. A check was received by a bank to take up a note held by it due on the 6th. The note was retained until payment of the check on the 7th. *Opinion*: The check was received as conditional payment, and the stamping of the note "paid on the 7th" is correct as indicating the date of actual payment. *Steinhart v. D. O. Mills Nat. Bk.*, 94 Cal. 364. *Watervleit Bk. v. White*, 1 Den. (N. Y.) 608. *Scott v. Betts*, Talor (N. Y.) 363. *Burkhalter v. Erie Sec. Nat. Bk.*, 42 N. Y. 538. *Smith v. Harper*, 5 Cal. 329. (*Inquiry from Wis., Aug., 1913, Jl.*)

Order of payment of checks for more than balance

Holder of overdraft has no priority over checks within balance

908. Where subsequent to the presentation of an overdraft, lesser checks are presented, which the funds are sufficient to pay, should the bank hold the amount on deposit for the payment of the overdraft or should it pay the lesser checks? Would it make any difference that the drawee bank accepted the larger check for collection? *Opinion*: The holder of the larger check has no claim to priority and it is the duty of the bank to pay the smaller checks subsequently

presented which are within the balance. *Gilliam v. Merchants Nat. Bank*, 70 Ill. A. 592.

Where a check larger than the balance is entrusted to the drawee for collection with a request to hold the same a reasonable time and pay out of subsequent deposits, it is the duty of the bank to pay smaller checks within the balance, as the same are presented and it has no right to refuse such checks in order to permit the balance to accumulate for the payment of the larger check. It cannot be held liable in such case for breach of duty as collecting agent of the owner of the larger check. It is only when the balance does become sufficient and the check is still held for collection, that it may be paid. See as bearing on the question, *First Nat. Bk. v. First Nat. Bk.* 154 S. W. (Penn.) 965; *Johnston v. Parker Savings Bank*, 101 Pa. 597; (holding that a specific appropriation by the depositor as to the checks to be paid governs) *Kraft v. Citizens Bank*, 124 N. Y. Supp. 214. However, where a check is held for collection at a time where the balance is sufficient to pay it, there might be a liability to the holder if the bank paid other checks to the exclusion of the one held for collection, and so reduced the balance that that one could not be paid. (*Inquiry from Kan., April, 1921, Jl.*)

909. A bank is holding for "first funds" a large check of one of its depositors. In the meantime several smaller checks are presented for payment. The bank asks whether it would be safe in paying them if there are insufficient funds to pay the larger check. *Opinion*: It is the duty of a bank to pay presented checks of its depositor which are within the balance although at the time it has received and is holding a larger check which exceeds the balance. The duty of a bank is to pay the checks of its depositor, as presented, so long as the funds are sufficient. The funds being sufficient to pay the smaller checks they should be paid. (*Inquiry from Conn., March, 1919.*)

Drawee as collection agent for check holder

910. The holder of a check requested the bank to hold it until the maker had sufficient funds to pay it. While it is holding the check for this purpose, there is presented a check for the precise amount on hand. Should the second check be paid or should the bank hold the money for the payment of the first check? *Opinion*: The relation of the bank to the check holder was virtually

that of agent for collection by virtue of which it would be its duty, as soon as the account became sufficient, to collect the check out of the account and charge the amount to its customer. The second check, however, should be paid, as the holding of the first check, would create no lien on the funds. (*Inquiry from N. C., Feb., 1921.*)

Bank holding check while account depleted by drawer

911. A bank receives a collection letter containing three checks drawn by a depositor upon it whose account is good to pay two of them but not sufficient to pay all three. In such cases it is the bank's custom to hold all the items for three days until deposit is made sufficient to cover all of the checks. Should the account be drawn down by the depositor during this time so that the fund would not be sufficient to pay the two checks originally good when the letter was received or either one of them, would the bank be liable? *Opinion:* It is not a safe custom to hold all the items for three days in such a case. A check is payable on demand and the bank should pay those of the checks which the account is sufficient to meet, and protest and return the other. Generally speaking, statutory provisions applicable to the acceptance of a bill do not apply to checks, but even though the bank might not be held liable as acceptor, because a check is presented for payment and not for acceptance, it might be held liable as collecting agent of the holder for negligence in holding a check three days, where the check was originally good where presented but where the bank afterwards allowed the account to be depleted by the drawer so as to allow insufficient funds for its payment. (*Inquiry from Me., Oct., 1917.*)

Selection where checks aggregate more than balance

912. Where a number of checks are presented to a bank simultaneously through the clearing house or by mail which aggregate more than the amount to the customer's credit, the bank is bound to pay the checks to the extent of the amount on deposit and has the option to select which it will pay and which reject in the absence of a clearing-house rule or custom to the contrary. *Reinsch v. Consol. Nat. Bk., 45 Pa. Super. Ct. 236. (Inquiry from Fla., March, 1919, Jl.)*

913. Two or more checks are simultaneously presented at a bank, each

taken separately for less, but any two aggregating more than the customer's balance. *Opinion:* The bank should not send all the checks back, but should pay any one of them and return the rest. *Morse on Banks and Banking, Sec. 450 b. Dykers v. Leather Mfrs. Bk., 11 Paige 612. Zane on Banks and Banking, Sec. 148. (Inquiry from La., Oct., 1910, Jl.)*

914. The customer of a bank with \$50 to his credit drew four checks of amounts of \$10, \$25, \$50 and \$60, respectively, in favor of four different parties. The checks bore the same date and were presented through the clearing house at the same time. *Opinion:* Where a number of checks aggregating more than the depositor's balance are presented at the same time through the clearing house and the balance is sufficient to pay some of them, the bank must pay such of the checks as the deposit is sufficient to meet and may choose which to pay and which to reject, but it will be liable in damages if it returns all such checks unpaid. *Sherburne v. Rickards, Superior Court, Chicago, 1898. Reinisch v. Consol. Nat. Bk., 45 Pa. St. Super. Ct. 236. Morse on Banks and Banking, Sec. 354. (Inquiry from S. C., July, 1914, Jl.)*

915. Two checks of \$30 and \$10, respectively were simultaneously presented, the smaller check being within and the larger check in excess of the customer's balance. *Opinion:* It is the duty of the bank to pay the smaller check rather than to dishonor both checks. *Sherburne v. Rickards, Superior Court, Chicago, 1898. (Inquiry from La., Sept., 1910, Jl.)*

916. Where a bank receives through the same mail several checks of one customer who has sufficient funds to his credit to pay all but one of them, does the law require the bank to return all of the checks if it returns any? *Opinion:* Where several checks are simultaneously presented aggregating more than the balance, the bank should not return all, but should pay what it can and return the rest, and it is optional with the bank which checks it will pay and which it shall leave unpaid. It should refuse to pay all the checks it would be dishonoring some which are good. (*Inquiry from Mo., Sept., 1918.*)

Priority of checks in morning mail over later checks from clearing house

917. Where a number of checks aggregating more than the customer's balance

are presented at the same time and the balance is sufficient to pay only some of them, what should the bank do? *Opinion:* The bank must pay such of the checks as the deposit is sufficient to meet and may choose which to pay and which to reject, but it will be liable in damages if it returns all such checks unpaid. Checks presented through the morning's mail have priority over checks later presented through the clearing house. *Meyers v. Union Nat. Bk.*, 128 Ill. 478. (*Inquiry from Ky.*, April, 1915, *Jl.*)

Return of overdraft through clearing house and cancellation of word "paid" stamped through error

918. During the course of a day a bank received checks through the clearings, by mail and over the counter. After paying the checks received by mail and over the counter, some of which were received after the checks through the clearings, the funds were insufficient to pay the checks through the clearings. Through mistake, however, a clerk without authority marked them "paid." These checks were then returned "Stamped 'paid' in error." Is the drawee bank liable on these checks on the theory that they were accepted or paid? *Opinion:* Assuming that the checks were returned within the time allowed by the rules or custom of the clearing house, the drawee bank is not liable. The stamp "paid" placed upon the check by mistake prior to actual payment is subject to revocation. *Fernandez v. Glynn*, 1 Camp. (Eng.) 426n.

Some Illinois cases hold that as between holders of checks, the one who first presents his check for payment is entitled to priority (*Jacobson v. Bank*, 66 Ill. A. 470), and that a bank cannot after presentment of one check pay other checks or demands, later presented, in preference. *Clark v. Chicago Title etc., Co.*, 85 Ill. A. 293, *affd.* 186 Ill. 440. These cases are not applicable under the Negotiable Instruments Law (in force now in both Illinois and Washington) providing that "A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank and the bank is not liable to the holder unless and until it accepts and certifies the check." The checks through the clearings were not accepted nor paid and the drawee bank is not liable on them. (*Inquiry from Wash.*, Jan., 1918.)

Use of "paid" stamp

Responsibility of collecting bank stamping check "paid" where indorsement forged

919. A collecting bank stamps checks "Paid" and receives payment from the drawee. What is the responsibility of the stamping bank in cases of forged or unauthorized indorsements. *Opinion:* In the event the checks have been indorsed "for collection" or otherwise restrictively indorsed so as to indicate that the collecting bank is an agent and not an owner, the "Paid" stamp would not be sufficient and the drawee should require an express guaranty of genuineness for its protection. *White v. Continental Nat. Bk.*, 64 N. Y. 316. (*Inquiry from Neb.*, Nov., 1911, *Jl.*)

Right of presenting bank to stamp check "paid"

920. A bank receiving payment of a check stamped the same "Paid;" the drawee bank which paid the check objected to such stamp and questioned the authority of the presenting bank to place it on the check. *Opinion:* The stamping of the word "Paid" would seem to come within the rights of the presenting bank and drawee's refusal to pay because of objectionable stamp would probably be held unjustifiable. (*Inquiry from S. D.*, May, 1914, *Jl.*)

Checks issued and paid to strangers

Drawee entitled to require identification of payee or holder before payment

921. A presents check of B payable to order of A and demands payment. A is a stranger to bank. Bank refuses to pay without identification which A does not or will not furnish. Is bank entitled to withhold payment until A procures satisfactory identification or can A have a notary protest the check and would the bank be liable in such case to its customer B whose account is good?

Opinion: The drawee bank is entitled to have satisfactory identification before it is under obligation to pay a check; refusal to pay because the payee is unknown to the bank is not a dishonor which would justify protest and the bank would not be liable to the customer in damages because of such refusal.

In *Citizens National Bank of Evansville v. Reynolds*, 126 N. E. (Ind.) 234, the court said:

"Where a check is presented for payment by a person who is unknown to the bank, it

becomes the imperative duty of the bank to require him properly to identify himself as the payee named in the check. For its own protection the bank may go further. It may refuse payment until the stranger brings in a person whom the bank knows to be financially responsible and who is willing to become an indorser."

Whether all courts would go to the extent of holding that the bank can refuse payment until the stranger can get another person to assume the obligation of indorser on the check might possibly be questioned, as it might be beyond the power of the payee to procure such indorsement, but at all events the bank is entitled to require the payee to satisfactorily identify himself before making payment. (*Inquiry from Ind., July, 1920, Ill.*)

Identification of holder of check indorsed in blank

922. Is a check indorsed by the payee in blank payable to bearer? Can the bank require identification of the person presenting it? *Opinion:* While a check indorsed by the payee in blank is payable to bearer, the bank before paying the check has the right to ascertain the genuineness of A's indorsement; for, if the instrument were a forgery, the check would not be payable to bearer. (*Inquiry from N. Y., Feb., 1917.*)

Identification of distant payee

923. The payee indorsed a check, mailed it directly to the bank on which it is drawn, and requested that a draft be sent him for the amount. Should it do so without identification? *Opinion:* It is not quite clear what the practice is, but it would seem to be the better procedure to require some further identification of the payee who sends a check by mail directly to the bank on which drawn with request for return draft. Should it turn out that the payee's name had been forged by the sender, or if the payee's indorsement was genuine that the check had been lost or stolen from him and forwarded by the sender in his name, and a draft had been mailed the sender for the amount, a troublesome question of responsibility of the bank might arise. There is a line of cases to the effect that, where a person makes his draft payable to A and mails it to B, thinking B is A, and B who impersonates A, indorses and negotiates the draft in A's name, the indorsement is not a forgery but by the precise person intended to receive the money. There are some cases to the contrary of this, but it seems

that, if a draft is mailed to the payee without further identification and it turned out that the person to whom mailed was not entitled to the money, that the bank might be involved in a troublesome law suit and that the best procedure would therefore be to have some further assurance or identification of the payee before mailing him the draft. (*Inquiry from Mo., May, 1916.*)

Check issued to stranger payee

924. A person claiming to be the payee of a cashier's check presents the same to the bank, properly indorsed, without proof of his identity and requests the issue of two checks to the same payee in lieu thereof. Can the bank safely comply? *Opinion:* The bank in the absence of suspicious circumstances may rely on the presumption that the holder is rightfully entitled thereto, and may issue the substitute checks to the same payee, without liability thereon in the event the stranger is not the true payee and negotiates such checks upon indorsement of the name of the payee. Should the holder prove an impostor and if the indorsement of the original check proved a forgery, the bank would, of course, be liable to the true payee of the original but would not be liable upon forged indorsements of the substitute checks. *Yatesville Banking Co. v. Fourth Nat. Bk., 72 S. E. (Ga.) 528. Gallo v. Brooklyn Sav. Bk., 129 App. Div. 698, reversed in 199 N. Y. 222. Crawford v. West Side Bk., 100 N. Y. 50, 2 N. E. 881, 53 Am. Rep. 152. Graves v. Am. Exch. Bk., 17 N. Y. 205. Holmes v. Trumper, 22 Mich. 427, 7 Am. Rep. 661. (Inquiry from Ill., Oct., 1917, Ill.)*

Note: The above opinion was chiefly based on the decision of the N. Y. Court of Appeals in *Gallo v. Brooklyn Sav. Bank*, 199 N. Y. 222, where an impostor presented an order on a savings bank and, not being able to satisfactorily identify himself as the depositor, received, instead of money, a check payable to the order of the depositor. The Appellate Division held the drawer liable to an innocent purchaser on the ground (1) the delivery of the check to the person claiming to be the payee was a representation that he was the payee and the drawer was estopped as against an innocent purchaser; (2) the drawer was culpably negligent in issuing a check payable to a stranger whom it could not itself identify, putting in his hands an instrument to defraud innocent persons. The Court of Appeals reversed the judgment, the Chief

Justice saying: "I am not prepared to admit the proposition that when a bank or individual, not being satisfied of the rights or identity of the party claiming payment from it or him, declines to pay the party in money, but gives a check to the order of the known creditor, it or he is thereby necessarily guilty of negligence or fraud." Werner, J., said: "The facts brought to the knowledge of the bank were such that it had quite as good a right to rest upon the presumption that the check would be properly used as to suspect that it would be criminally altered."

But in March, 1920, the Court of Errors and Appeals of New Jersey in *Montgomery Garage Co., v. Manufacturers Liability Insurance Co.*, 109 Atl. 296, where one Ennis, representing himself to be Turner, delivered a bogus check to the insurance company and received from the company its check, payable to Turner, the court held the company liable to an innocent purchaser who had received the check from Ennis, indorsed by him as Turner. The court laid down this rule: "Where the drawer of a check delivers it, for a consideration which turns out to be fraudulent, to an impostor under the belief that he is the person whose name he has assumed and to whose order the check is made payable, a bona fide holder for a valuable consideration, paid to the impostor upon his indorsement of the payee's name, is entitled to recover from the drawer; it appearing that the person to whom the check was delivered was the very person whom the drawer intended should indorse it and receive the money, and that the drawer made no inquiry before issuing the check concerning the identity or credit of the named payee, who was unknown to the drawer."

In view of this conflict in the decisions, the practice is dangerous to issue a check to a stranger, without identification, payable to the same payee as that of an original check presented by a stranger, and the above opinion is modified accordingly.

Check to impersonator

925. A bank received a telegram signed H. T. McCabe—a depositor, asking it to remit his balance to Houston, Texas, and a cashier's check was sent to a Houston bank for said sum, payable to the order of H. T. McCabe, and a man impersonating H. T. McCabe drew and appropriated the money. What is the legal result? *Opinion:* Assuming this check got into the hands of,

and was appropriated, by a man impersonating the real H. T. McCabe, the question would be whether under the circumstances such indorsement would be held a forgery or by the precise person intended to receive the money. If a forgery, then the drawer of the draft is not liable, and the bank paying the draft has right of recovery from prior indorsers and the loss would fall on the indorser who took the check from the forger. But there are a line of cases holding that, where one man impersonates another and writes a letter or sends a telegram in the name of that other, asking that money be forwarded him, and a check is drawn payable to the name of the party impersonated, and this is sent to the impersonator who indorses and cashes the same, the indorsement is not a forgery, but is by the precise person intended to receive the money. There are conflicting cases on this proposition. (*Inquiry from Tex., June, 1915.*)

Cashier's checks

Innocent purchaser may enforce

926. A bank which purchases a cashier's check from the holder, assuming it is properly indorsed and within a reasonable time after its issue, can recover the amount from the issuing bank free from any defense which that bank may have against the payee. The innocent purchaser of a stopped check may enforce payment from the drawer. (*Inquiry from Iowa, March, 1914, Jl.*)

927. A bank wishes to be advised what to do in this case: Its former cashier was caught embezzling bank funds, was arrested and thereafter permitted to go free after settling with the bank. It was afterwards noticed in the cashier's register that a considerable number of small cashier's checks had been drawn in amounts ranging from 50 to 75 cents, which he appears to have retained when he left for parts unknown. It is feared that he will, as he did while in the bank's employ, raise these small checks to large amounts, and negotiate them. *Opinion:* The outstanding cashier's checks, being negotiable instruments, would have to be paid by the bank if cashed by an innocent purchaser, unless originally issued for small amounts and subsequently raised. But if originally drawn for larger amounts than entered on the register, the bank would be liable to an innocent purchaser. The bank should endeavor to locate the former cashier and gain possession of the checks. (*Inquiry from Mont., Dec., 1917.*)

*Possession by bank presumes payment—
Statute of limitations*

928. Cashier's checks obtained by a member of a firm, since deceased, which are in the possession of the bank, bear the rubber stamp indorsement of the firm, and the rubber stamp of the bank indicating the number or name of the receiving teller handling the item which tends to show payment. Can the bank be held responsible to the firm after seven years for inability to show that either the firm's or the partner's personal account received credit for the amount of these items? Is such claim barred by the statute of limitations? *Opinion:* Where cashier's checks are made payable to a firm and delivered to a partner, who presents same to the bank bearing the rubber stamp indorsement of the firm, but no credit is given to either firm or partner therefor, possession of the checks by the bank raises a presumption of their payment, and throws the burden of proof on the firm to rebut such presumption. (Conway v. Case, 22 Ill. 127; Healy v. Gilman, 1 Bosw. [N. Y.] 235. Kincaid v. Kincaid, 8 Hump. [Tenn.] 17. Pickle v. Peoples Nat. Bank, 88 Tenn. 380. Lancaster Bank v. Woodward, 18 Pa. St. 361. Fletcher v. Manning, 12 M. & W. 577.) Where the transaction occurred seven years ago, it is now too late in any event to charge the bank with liability as suit on a cashier's check is barred after six years from date. (Curran v. Witter, 68 Wis. 16; Wis. Rev. St. Sec. 4222.) (*Inquiry from Wis., May, 1920, Jl.*)

Counter checks

*Refusal of payment to payee other than
drawer where contrary to terms of check*

929. A bank refused payment to a second person of a counter check marked "not negotiable" and "to be used only at the counter of the bank by the drawer personally." The bank inquires whether such action was justified. *Opinion:* The bank is perfectly justified in refusing to pay such a check to other than the drawer personally. While the bank printed and furnished the blank of the check, it is the drawer's order and subject to the conditions which he imposes. The drawer, then, orders the bank to pay the check only at the bank and to him personally and while he virtually contradicts this order by making the check payable to another person, still the original condition thereon remains and it seems the bank has a perfect right and in fact it is its

duty to pay only in accordance therewith. (*Inquiry from Ind., March, 1917.*)

Receipt as substitute for counter check

930. Should a bank paying a deposit require a receipt or a counter check? *Opinion:* A receipt signed by a depositor acknowledging payment of a deposit would not be of equal protection to the bank as a counter check, where payment was made to one other than the depositor personally, for should the receipt be presented by a wrongful holder it would not be binding on the depositor, as would a check which contains an order and authority to the bank to pay. In case of savings deposit payable only on presentation of book, payment to a wrongful holder upon presentation of book and receipt might be valid if reasonable care was used (*Inquiry from N. Y., June, 1918, Jl.*)

Checks "in full"

Decisions upon legal effect

931. A bank desires judicial decisions, etc., in reference to binding legality of notations on the face of checks similar to "In full settlement of," or "Payment in full for," etc. *Opinion:* Acceptance by creditor of check containing notation "In full settlement," or words of like import, in settlement of a *liquidated* claim does not bar recovery of the balance. (Tucker v. Martin, 2 Pa. Dist. Ct. 97. Hussey v. Crass, [Tenn.] 53 S. W. 986. Fire Ins. Co. v. Wickham, 141 U. S. 564. Chicago, etc., R. Co. v. Clark, 178 U. S. 353. See also Bingham v. Browning, 97 Ill. App. 442.) But where the claim is *unliquidated*, further recovery is barred, even though the payee negatives the condition and asserts that the check is received as part payment only. (Cunningham Co. v. Ross-Darragh Grain Co., 98 Ark. 269. Hand Lumber Co. v. Hall, 147 Ala. 561. Lapp-Gifford Co. v. Water Co., 166 Cal. 25. Bassick Gold Min. Co. v. Beardsley, 49 Colo. 275. Andrews v. Haller Wall Paper Co., 32 App. D. C. 392. Elrod v. Kiser, 13 Ga. App. 471, 79 S. E. 375. Smelting, etc., Co. v. Fence Co., 204 Ill. App. 312. Neubacher v. Perry, 57 Ind. App. 362. Ferguson v. I. L. H., 174 Iowa 61, 156 N. W. 176. Sentel v. Wilcox, 3 La. Ann. 503. Scheffenacker v. Hoopes, [Md.] 77 Atl. 130. Tread Co. v. Supply Co., 216 Mass. 104. Hoey v. Ross, 189 Mich. 193. Decker v. Smith, 83 N. J. L. 630, 96 Atl. 915. Nassoii v. Tomlinson, 148 N. Y. 326. Neely v. Thompson, 68 Kan. 193. Cunningham v. Standard Const. Co., 134

Ky. 196, 119 S. W. 765. *Richardson v. Taylor*, 100 Me. 175. *Bogert v. Mfg. Co.*, 172 N. C. 248. *Seeds, etc., Co. v. Conger*, 83 Ohio St. 169, 93 N. E. 892. *Schumacher v. Moffit*, 71 Ore. 79, 142 Pac. 353. *Washington Nat. Gas Co. v. Johnson*, 123 Pa. St. 576. *Hull v. Johnson*, 22 R. I. 66. *Produce Co. v. Brown*, [Tex. Civ. App. 1915], 174 S. W. 554. *Granite Co. v. Monument Co.* [Vt.], 99 Atl. 875. *Thomas v. Columbia Phonograph Co.*, 144 Wis. 470, 129 N. W. 522.) *Creditor accepting check for unliquidated claim is bound despite protest.* (*Rose v. Lilly*, [Ark. 1914] 170 S. W. 483 [holding that if creditor is not willing to accept check in full payment, it is his duty to return it without using it]. *Levenstein v. Dalton*, 202 Ill. App. 300. *Ryan v. Publishing Co.*, 16 Ga. App. 83, 84 S. E. 834. *Simmons v. Supreme Council*, 178 N. Y. 263. *U. S. Bobbin, etc., Co. v. Thissell*, 137 Fed. 1) *Dissenting creditor must return check within reasonable time.* (*Longstreth v. Halter*, 122 Ark. 212, 183 S. W. 177. *Jenkins v. Nat. Mut. Bld., etc., Assn.*, 111 Ga. 732. *Day-Luellwitz-Lumber Co. v. Serrell*, 177 Ill. App. 30. *Patten v. Lynett*, 118 N. Y. S. 185.) *Creditor's erasure of condition before collection is unavailing.* (*Ryan v. Pub. Co.*, 16 Ga. App. 83. *Worcester Color Co. v. Henry Wood's Sons Co.*, 1209 Mass. 105, 95 N. E. 392. *Smith v. Bronstein*, 107 N. Y. S. 875. *Kerr v. Sanders*, 122 N. C. 635.) (*Inquiry from Conn., Jan., 1920, Jl.*)

Check for less amount where account liquidated

932. The correct amount due to a bank on a note was \$150 and the debtor tendered in payment a check for \$140, containing the words "in full payment of the note." The bank accepted the check and applied it as a partial payment. *Opinion:* The check did not settle the entire debt and the bank can recover \$10 more. Had the bank's claim been uncertain as to amount, its acceptance would have barred recovery of the balance. (*Inquiry from Cal., Jan., 1912, Jl.*)

Release of balance due upon liquidated debt written by drawer on back of check ineffectual

933. A bank held a note having five makers, one of whom mailed the bank a check for one-fifth of the amount of the note with interest, with the following written on the back of the check: "It is agreed that the payment of this check does release (name) of any further obligation

on the note." What would be the legal effect of the cashing of the check. *Opinion:* The law is well settled that each maker of a note is liable for the whole amount, and one of them may not in the above described way relieve himself from liability for the balance because there would be no consideration for such release. There are numerous cases in which a man, owing an undisputed debt for a stated amount, as upon a note, has tendered his check for a less amount "in full of amount due" in which the courts have held that the acceptance by the creditor of the check did not operate as a bar to recovery of the balance due. If the amount was unliquidated or in dispute, the result would be different; but in a case like the present, the acceptance of the check for one-fifth could not relieve the maker from liability for the remaining four-fifths of the note, and the indorsement and collection of the check by the bank would not deprive it of the right to look to the maker for the balance, notwithstanding the stipulation written by him on the back of the check. (*Inquiry from Wash., May, 1917.*)

Check in full for less than price of car

934. A sells a car to B for \$500, but before B pays A he finds the car it not worth that amount. B draws a check to A for \$400 and writes upon its face the words "In full payment for one car." A indorses and cashes the check and afterwards tries to collect from B the remaining \$100. Can B collect the \$100? Should the words "In full for one car" have been put on the back of the check to make it binding? *Opinion:* The decisions quite generally hold where a check for a less amount is given "in full of account" or "in full of all claims" and the claim for which the check is given is unliquidated and in dispute, that the acceptance by the creditor of the check constitutes an accord and satisfaction and bars him from recovering anything further. But where a check for less amount and stated to be "in full" is given for a claim which is liquidated, the acceptance by the creditor of the check is not an accord and satisfaction and does not bar recovery of the balance due. Such being the general law, the question in the present case depends chiefly upon whether the \$500 was a liquidated or an unliquidated claim. If the parties agreed that the price of the car was \$500, then the mere fact that the purchaser subsequently, after delivery of the car, comes to the conclusion that it is worth

only \$400, would not, it seems, constitute an unliquidated claim. If after the delivery of the automobile, the purchaser should discover that certain misrepresentations had been made concerning parts thereof, this might create an equity which would entitle him to defend payment of the full amount; but unless there is something of this kind in the case, if B agrees to pay \$500 for a car and accepts delivery and there is no fraud, misrepresentation or concealment, B owes \$500 to A, and A's claim is liquidated for that amount; so that if B tenders his check for \$400 "in full for one car," its acceptance by A would not bar him for recovering the balance. On the other hand, if there is a bona fide dispute as to the amount due and the claim is unliquidated, the acceptance by A of B's check for \$400 "in full for one car" would bar him from recovering anything more and it would not be necessary that these words be indorsed on the back to make it binding upon A. (*Inquiry from Okla., May, 1919.*)

Negative indorsement by payee

935. The drawer of a check made a notation thereon to the effect that the check was in full payment of account on a certain contract. The payee indorsed the check and added "This is to apply on account amounting to \$—— and is not payment in full."

Opinion: Where the payee accepts and collects check stated to be "in full of account" for less than amount of his claim, he is not debarred from recovering balance if amount of claim is liquidated or undisputed, but if amount is the subject of honest dispute, his acceptance and collection of check operate as a bar to further recovery, even though payee negatives condition and asserts check is received as part payment only. *Barham v. Bk. of Delight*, 126 S. W. (Ark.) 394. *Springfield & Memphis Rd. Co. v. Allen*, 46 Ark. 217. *Green v. Laws*, 56 Ark. 37, 18 S. W. 1038. *Nassoiv v. Tomlinson*, 148 N. Y. 326, 42 N. E. 715, 51 Am. St. Rep. 695. *Ostrander v. Scott*, 161 Ill. 339, 43 N. E. 1089. (*Inquiry from Idaho, Feb., 1916, Jl.*)

936. A check which had marked on its face, "In full of account," was indorsed, "Accepted as part payment of account only." The bank receiving the check for deposit in sending the check to its correspondent used its regular stamp guaranteeing indorsement. The check was paid by the drawee bank. Is the bank receiving the check for deposit liable for its amount to

the drawer? Should the drawee bank have paid the check? *Opinion:* If the check in question was given for a liquidated or undisputed debt, the statement that it was "in full" would not debar the payee from recovering the balance due, while on the other hand if the amount for which the check was given was the subject of an honest dispute, the payee's acceptance and collection of the check would operate as a bar to further recovery by the payee notwithstanding his conditional indorsement "part payment only." In either event, the check having been paid, it is impossible to see upon what ground the drawer can look to the bank for return of the amount. There is no question of forgery or alteration involved. It would be better for the drawee bank to refuse payment of such a check, as such bank represents the drawer and where the drawer states that the check is "in full" the bank should not pay an instrument where the payee attempts by indorsement to negative such condition, even though the indorsement may not in law have such effect. It might be better also for the bank of deposit to refuse to receive such a check, because an instrument so indorsed may lead to disputes and complications, as have arisen in this case, although as the bank of deposit represents the payee, there is not the same reason for refusing as in case of the bank of payment which represents the drawer, namely, that the conditional indorsement attempts to frustrate his object that the check shall be accepted in full payment. (*Inquiry from Mo., Feb., 1916.*)

Check for less amount where claim disputed

937. A debtor and creditor had an honest dispute as to the amount due upon an open account as shown by their respective books. The debtor sent a check for less than the amount claimed, stated to be "in full of account." *Opinion:* Where the dispute between the debtor and creditor is bona fide, the acceptance of the check for the less amount would bar recovery of any further amount. See citations in Opinion No. 939. *Hussey v. Cross*, 53 S. W. (Tenn.) 986. *Gribble v. Raymond Van Praag Supply Co.*, 109 N. Y. S. 242. *Fuller v. Kemp*, 138 N. Y. 231. *San Juan v. St. Johns Gas Co.*, 195 U. S. 510. *Chicago, etc., Ry. Co. v. Clark*, 178 U. S. 353. *Bingham v. Browning*, 97 Ill. App. 442. (*Inquiry from Ill., May, 1915, Jl.*)

938. The maker of a check given for

a debt has written thereon "in full to March 1, 1911." The payee desires to know whether the acceptance by him of the check will operate as an acknowledgment on his part that the amount of the check is in full to March 1st. *Opinion:* Where the check is given for an unliquidated debt or claim, acceptance by the payee bars further recovery; but it is otherwise where the amount is not in dispute and the check is less than the sum due. (*Inquiry from Mass., Oct., 1911, Jl.*)

939. Where check "in full" is given for a fixed and undisputed claim of greater amount, acceptance by creditor does not bar recovery of balance—but where claim is disputed and unliquidated, acceptance by creditor prevents further recovery. *Tucker v. Marvin*, 2 Pa. Dist. Rep. 97. *St. Regis Paper Co. v. Tonawanda Board & Paper Co.*, 107 App. Div. (N. Y.) 90. *Scheffenacker v. Hooper*, 113 Md. 111. (*Inquiry from Md., March, 1913, Jl.*)

Checks without funds

Criminal liability for issuing bad checks

Note: A statute recommended by the American Bankers Association to punish the giving of checks or drafts without sufficient funds in bank and making the issue of the insufficient check *prima facie* evidence of intent to defraud has been passed in nearly all the states, with various modifications. Its effect is weakened in some states where payment within ten days relieves the drawer. See opinion No. 1005.

Worthless check for existing debt

940. Where a person gave a worthless check and obtained money or anything of value therefor, he could be prosecuted criminally, but if he simply gave the check in payment of some existing indebtedness, there would not be a criminal offense. See opinion No. 953. (*Inquiry from Ark., July, 1913, Jl.*)

Remedy against California depositor who continually overdraws

941. Is there any legal method to restrain a depositor from continually and intentionally overdrawing his account? *Opinion:* A bank has a right to close a customer's account if it chooses, and the bank would be justified and within its rights under the law in closing the account of this particular depositor, handing him the balance to his credit. A law was passed in California in

1907, making it a crime for a person to issue willfully, with intent to defraud, a check on a bank knowing that he has not sufficient funds or credit with the bank to pay the same. In 1915 the legislature amended the penalty by making the crime punishable "by imprisonment in the County Jail for not more than one year or in the State Prison for not more than fourteen years." (*Inquiry from Cal., April, 1918.*)

Habitual overdrafts by Colorado corporation

942. A corporation having its account in a Colorado bank has been in the habit of overdrawing. The bank seeks to punish the president and treasurer of the corporation, although none of the checks bears their signatures. *Opinion:* Where a statute makes it a misdemeanor for any person, with intent to defraud, to issue a check upon a bank wherein the maker has insufficient funds, and a corporation depositor habitually overdraws its account, the corporation as well as the issuing officer is liable to prosecution, and the president and treasurer who do not sign such checks but have knowledge of and power to prevent their issue are, probably, also subject to prosecution. *Sess. L. Colo.*, 1915, Chap. 71, p. 196. *People v. Clark*, 14 N. Y. S. 642. *Amer. Fork City v. Charlier*, 43 Utah 231. *U. S. v. Winslow*, 195 Fed. 578. *St. v. Carmean*, 126 Iowa 291. *Crall v. Com.*, 103 Va. 855. *Overland Cotton Mill Co. v. People*, 32 Colo. 263. *St. v. Parsons*, 12 Mo. App. 205. (*Inquiry from Colo., July, 1918, Jl.*)

Return of bogus check through clearing house

943. Where a bank has inadvertently cashed a check drawn by a person having no account with the bank and it returns the check to the collecting bank fifteen minutes after the time limit fixed by the Clearing House rules for the return of dishonored checks, does the failure to return the check within the precise time limit fixed by the rules constitute an irrevocable payment? *Opinion:* While payment of a "not good" check to a bona fide holder, whether such payment be made over the counter or by credit to the account of a depositor, is ordinarily held a finality and irrevocable, in the case of presentment through the Clearing House there is a conflict of authority, some courts holding that failure to return the check within the precise time limit fixed by the rules of the Clearing House constitutes an irrevocable payment (*State Bank v. Weiss*, 91 N. Y. Suppl. 276. *Nat. Exch.*

Bank v. Ginn [Md.], 78 Atl. 1026. Preston v. Canadian Bank, 23 Fed. 179) while others hold that such rules are sufficiently elastic to permit of return to the presenting bank within a few minutes after the expiration of the time limit in case such bank would lose no rights by the delay, in which case the return and refusal of payment is valid. Citizens Central Nat. Bank v. New Amsterdam Nat. Bank, 112 N. Y. Suppl. 973. (*Inquiry from Colo., Feb., 1920, Jl.*)

Worthless check to Florida bank for advance interest

944. A owed a bank \$500, evidenced by a note which at maturity the bank agreed to renew. A sent a renewal note upon which the bank surrendered the original. A also sent a worthless check for the advance interest. *Opinion:* The giving of the worthless check did not violate the Florida criminal laws, because A did not obtain anything of value thereby. (*Inquiry from Fla., Sept., 1912, Jl.*)

Note: The "Check without Funds" statute has been declared constitutional in Florida. *McQuagge v. State* 87 So. 60.

Necessity of notification under Florida statute

945. Where a person has a Florida bank cash his check on a bank in another state, in which he does not have funds sufficient to pay it, but the letter of the cashing bank advising him of the non-payment and demanding reimbursement was returned undelivered, is a criminal prosecution proper? *Opinion:* Under the "Checks without Funds" statute advocated by the American Bankers Association and passed in a number of states, the non-delivery of the letter of notification would not bar a prosecution. But the Florida law includes as a part of the definition of the crime the failure to "make full and complete restitution" * * * "within twenty-four hours after written notice of the presentation to and nonpayment by" the drawee bank. The act further provides that "a receipt from the Registry Department of any United States Post-Office shall be deemed prima facie evidence of the actual delivery of notice as provided in this Act." Until the person is served with written notice of non-payment and he does not make good within twenty-four hours he cannot be prosecuted. The statute recommended by the American Bankers Association should be substituted for the existing statute. (*Inquiry from Fla., March, 1921*)

Check paid from account subsequently opened

946. An active official of a bank took an assignment of John Doe's check and later, when John Doe opened an account, he presented the check and received payment. Was this proper? *Opinion:* In one view the bank should not have paid this check, it having been dated and drawn at a time when John Doe had no account. Nevertheless, the check was an order on the bank to pay, and it would seem that the holder who had given value for it had a right from his standpoint to present it and receive payment and from the bank's standpoint, it might be contended the check was properly chargeable to John Doe's account, as the check constituted an order to the bank to pay, although dated and delivered before he opened the account. (*Inquiry from Ill., June, 1918.*)

Overdraft on Nebraska bank negotiated in Iowa

947. Is the drawer of a check on a Nebraska bank subject to the "Checks Without Funds" Act of that state where although it is dated "Jackson, Nebraska", it is issued and negotiated in Iowa? *Opinion:* Whether the maker of such a check against insufficient funds could be prosecuted under the Nebraska Bad Check Law is doubtful. The check was actually drawn and negotiated in Iowa, and it would seem that the offense was committed in that state. If the maker, although drawing the check in Iowa, negotiated it in Nebraska, he would be clearly amenable to the Nebraska law although it was drawn in Iowa. (*Inquiry from Iowa, May, 1917.*)

Bogus check on Kansas bank

948. A person issued a check on a Kansas bank where he never carried an account. The bank seeks to hold him liable for obtaining money under false pretenses. *Opinion:* The burden is upon the state to prove the drawer's intent to defraud, but it establishes a *prima facie* case where it shows that the drawer issued a check on a bank where he never carried an account. *Gen. St. Kan.* (1909), Chap. 31, Sec. 2584. *St. v. McCormick*, 57 Kan. 440. *In re Snyder*, 17 Kan. 542. (*Inquiry from Kan., July, 1913, Jl.*)

Overdraft on Washington bank negotiated in Michigan

949. A man drew two checks on his bank in Washington without having sufficient funds to meet them, and obtained cash

thereon from a bank in Michigan. The drawer has returned to Washington. *Opinion:* The purchasing bank can bring an action to recover the amount of the protested checks. If the drawer can be located in Michigan, he probably can be punished criminally for obtaining money under false pretenses. Mich. Comp. Laws, Sec. 11575. (*Inquiry from Mich., April, 1911, Jl.*)

Bogus check on Connecticut bank negotiated in Mississippi

950. A Mississippi bank submits copy of unpaid draft for \$100, given by Mr. Smith on a New London, Conn., bank, marked "No account." Is there any way of collecting same or punishing the drawer? *Opinion:* The bank's only recourse on this draft is against the drawer who issued it and if he is worth suing the bank should bring an action against him for the amount. Mr. Smith can be punished criminally under the Mississippi Code (Sec. 897) if he obtained cash thereon from the bank. The statute gives him ten days after receipt of written notice of non-payment to make payment; otherwise the burden of proof is on the bank to show that the money was obtained under false pretenses. The statute provides that the failure of the drawer to pay the amount within ten days after receipt of written notice of non-payment shall be prima facie evidence of obtaining the amount under false pretenses. (*Inquiry from Miss., March, 1919.*)

Missouri bank officer allowing overdraft

951. Is there a law in Missouri punishing a bank officer for allowing an overdraft? *Opinion:* There appears to be no law in Missouri which would punish the bank officer who allows an over-draft. There is a law passed in 1917, by the Missouri Legislature, punishing a person issuing an over-draft, but the same does not extend to bank officers who pay them. The National Bank Act has a provision which punishes the certification of an over-draft but this does not apply to a state bank. (*Inquiry from Mo., Sept., 1917.*)

Overdraft on New York bank cashed in New Jersey

952. A New York business man residing in New Jersey induced a bank in the latter state to cash a check for him drawn on a New York bank. The check came back protested. What can be done to him because of his failure to pay the amount

thereof? *Opinion:* Where money is obtained upon a bad check in New Jersey, the maker who negotiates his worthless check, which came back protested, could be criminally punished for obtaining money under false pretenses. This, of course, upon the assumption that the check was negotiated to the bank by the maker and not by a man to whom the check was made payable. If the latter was the case, the payee may not have known that the check was bad when he negotiated it, assuming also that, at the time the check was negotiated by the drawer, or maker, his account in bank was not good for the amount. If his account was good for the amount at the time he cashed the check, but later, before it was presented, same was withdrawn, it might be a more difficult matter to prove him guilty of a crime. (*Inquiry from N. J., Jan., 1916.*)

Check without funds in payment of account

953. In payment of an account at the end of a month a merchant gave a check on his bank in which there were no funds to make payment. Is he criminally liable? *Opinion:* The New Mexico statute provides that any person who with intent to defraud makes or delivers a check on a bank knowing at the time that the maker has not sufficient funds for its payment, is guilty of attempted larceny and if money or property is obtained thereon, is guilty of larceny. The Supreme Court of New Mexico in *State v. Davis*, 194 Pac. 882, held that it was not a violation of this statute for one to issue a check in payment of an outstanding account, where credit was not given on the strength of the check so issued, because in such case "there can be no intent to defraud, which is the gist of the offense. A check so given in payment of the account does not pay the account until the check is paid and as nothing of value is obtained in such a case, or could be obtained, there could be no such fraudulent intent." (*Inquiry from N. Mex., March, 1921.*)

The Ohio bad check statute

954. What are the provisions of the law in Ohio declaring it to be a crime to draw a check on a bank without sufficient funds? When passed? What is the penalty attached? *Opinion.* A law to punish the giving of checks without funds, was first passed in Ohio in 1915. It now constitutes Section 176 of the new Banking Code passed in 1919, and is as follows: "Any person who,

with intent to defraud, shall make or draw or utter or deliver any check, draft or order for the payment of money upon any bank or other depository, who, at the time thereof has insufficient funds or credit with such bank or depository, shall be guilty of a felony, and upon conviction thereof shall be fined not less than fifty dollars and not more than two hundred dollars, or imprisoned in the Ohio State Penitentiary for not less than one year nor more than three years or both" * * * (*Inquiry from Ohio April 1920*).

Deposit by payee of maker's bad check

955. The payee of a check deposited it and drew against it as uncollected funds. The maker had insufficient funds on deposit to meet it and it was returned to the bank in which it had been deposited. Both maker and payee were financially unable to make good the loss. Is there criminal liability? *Opinion:* The legislature of Pennsylvania passed a law in 1919, providing: "That any person who, with intent to defraud, shall make or draw or utter or deliver any check, draft, or order for the payment of money, upon any bank, banking institution, trust company, or other depository, knowing that the maker or drawer has not sufficient funds in, or credit with, such bank * * * for the payment of such check, although no express representation is made in reference thereto, shall be guilty of a misdemeanor." The law further provides that in any prosecution, the making of a check which is refused because of lack of funds shall be *prima facie* evidence of intent to defraud "unless such maker or drawer shall have paid the drawee thereof the amount due thereon, together with the interest and protest fees, within ten days after receiving notice that such check, draft or order has not been paid by the drawee." It seems under this statute the maker can be prosecuted if he had insufficient funds at the time he gave the check but the burden of proving fraudulent intent is on the prosecution unless there is proof of notice to the maker and non-payment by him within ten days after notice. Successful prosecution of the payee would depend upon whether it could be proved that he knew the check was bad when he deposited and checked against it. (*Inquiry from Pa., March, 1920.*)

Checks drawn and indorsed in representative capacity

Check of third person payable to agent or fiduciary negotiated or deposited to personal credit

956. The question involved is whether a Kentucky bank took a good and enforceable title to a check from the payee or was put upon inquiry, the same being as follows: "Pay to the order of ——— Constable in full payment of judgment, interest and costs in favor of ——— v. ——— on the docket of ——— J. P. (Signed) ——— (Signed) ———." *Opinion:* The courts have differed on this question, some holding that where a check is made payable to a person as agent or trustee and is negotiated by the trustee, the purchaser takes an enforceable title free from equities. For example, in *Central State Bank v. Spurlin*, 82 N. W. (Iowa) 493, it has been held that the word "Trustee" attached to the name of the payee is simply descriptive of the person and does not affect the negotiability of the instrument by carrying notice that some person other than the named payee is interested in the proceeds; hence the note was negotiable by the individual named as payee, and one purchasing from him was not put upon inquiry by reason of the suffix "trustee." See, also, *Zellner v. Cleveland*, 69 Ga. 633; *Thornton v. Rankin*, 19 Mo. 193. But in Tennessee and Mississippi the indorsee is put on inquiry. Thus in *U. S. Fidelity & Guaranty Co. v. Peoples Bank*, 157 S. W. (Tenn.) 414 a check payable to a guardian was deposited in his personal account and the proceeds misappropriated. The bank was put on notice and held liable. See also, *Bank of Hickory v. McPherson*, 59 So. (Miss.) 934 where a similar ruling was held with reference to a check made payable to "A. B., Commissioner." (*Inquiry from Tenn., March, 1916.*)

Drawee not liable if payee misappropriates money

957. A bank on which a check is drawn payable to John Jones, Agent, Frisco Railway Co., asks whether it has the right to pay the amount to John Jones without incurring liability in case he misappropriates the money. *Opinion:* The bank will not be liable if Jones misappropriates the money. The bank makes payment as ordered and is not responsible for his disposition of the proceeds. (*Inquiry from Ark., March, 1915.*)

*Payment of check upon payee bank to
confidential clerk of drawer—Notice
from form of check—Apparent
authority of clerk*

958. A bank carries a company's account, and the latter's confidential clerk has been stealing for some time. His method has been to draw a check on and make same payable to the bank, stating to the officer of the company authorized to sign checks, that the same was in payment of a draft or for pay roll, and in the latter case the words "for pay roll" were written in corner of check. The bank's custom was to have the clerk indorse his name thereon and give him the cash. The company is endeavoring to hold the bank liable for negligence for paying checks made to its own order. *Opinion:* There is a conflict of authority under the Negotiable Instruments Act whether the payee of a check can be a holder in due course. In a few states it has been held that the payee, who gives value to the holder of a check, can enforce same free from equities, but in other states, among them Missouri, the contrary has been held. The Missouri cases are: Long v. Shafer, 185 Mo. App. 641. Charles Sav. Bk. v. Edwards, 243 Mo. 553. In the case of Sims v. U. S. Trust Co., 103 N. Y. 472, a depositor drew his check on his bank for \$5,000 payable to the order of a trust company, his intention being to transfer the deposit from one institution to another. He entrusted the check to his confidential clerk with directions to deposit it to his credit with the trust company. The clerk disobeyed instructions and himself received the proceeds from the trust company which he misappropriated. The court held that the check drawn to the order of the trust company, imported ownership of the money by the drawer and his desire that the custody of the money should be transferred from the bank on which the check was drawn to the trust company. This did not warrant the trust company in supposing that the drawer intended to pay the money to holder. From the above it would appear that the bank would have no standing as a bona fide holder of the check payable at the bank's order to look to the drawer for the amount. But there is another phase of the question in this particular case, namely, that the drawer of the check is a depositor in the bank. As a guide for future transactions it would be well not to honor checks of this kind when presented by an officer or

employee not authorized to draw such a check and insist that checks for pay-roll and other purposes be made payable to bearer. But as a matter of defending against liability in this particular case, the fact appears that it was the custom of the company to make their checks for payroll purposes payable directly to the bank, and also to draw checks in like manner for amounts of petty cash and to intrust such checks to the employee in question for the purpose of procuring the cash thereon. It seems, therefore, that the employee was invested with apparent authority from this course of dealing to receive the cash on the check in this instance although he in fact had no actual authority in the particular case. The general rule would seem to apply that where one of two innocent persons must suffer for the fraud of a third, he who has reposed the confidence must bear the loss. (*Inquiry from Mo., Feb., 1917.*)

959. Some of the customers of a bank send their checks to the bank for the purpose of purchasing drafts or to draw money for pay rolls, making their checks payable to the bank. The question has arisen whether the bank would be liable if a clerk should wrongfully apply the check. Is the bank safe in cashing checks or issuing drafts payable to parties other than its customers, without an order stating the purpose of the check when same does not indicate purpose for which it is drawn. *Opinion:* It is an unsafe practice for the bank to cash checks of customers made payable to the bank's order when presented by clerks to the bank, unless the customer files a letter of authority authorizing payment of such checks in this way. If the clerk should misappropriate the money there might be a liability on the part of the bank. In view thereof the bank should insist on having the checks drawn payable to bearer or to the order of the withdrawing clerk or if made payable to the bank that a letter of authority should be filed as suggested. (*Inquiry from Wash., April, 1916.*)

*Payment by drawee to corporation officer
of official check to officer's order*

960. A check was presented to a bank by an officer of a corporation who had authority to check on the company's funds and who had signed same officially to his own order. He was paid the cash, but did not indorse the check. The corporation failed, and a receiver was appointed. A claim is made that the bank is responsible

because the instrument was not indorsed by the party who received the money thereon. *Opinion:* The check having been signed by a duly authorized officer, and the money having been paid by the bank to a person authorized by the corporation to receive payment, this constituted a complete acquittance to the bank even though the check was not indorsed, and it was not responsible for the application of the money, even assuming it was misapplied in whole or in part. (*Inquiry from Kan., June, 1918.*)

Payment of treasurer's check to personal order

961. Should a drawee bank pay the check of a treasurer of a corporation on its account drawn to his personal order without inquiry? *Opinion:* The latter view is that where an officer of a corporation has the check-signing power, the bank is safe in paying his official checks drawn to his personal order. But in view of the language of some of the cases it would be safer for a bank paying such checks to require a resolution of the corporation authorizing the bank to pay its checks when made out to the official's own order or to bearer as well as to third persons. *Havana Central Rd. v. Knickerbocker Tr. Co.*, 198 N. Y. 422. *Clafin v. Bk.*, 25 N. Y. 293. *Gale v. Chase Nat. Bk.*, 43 C. C. A. 496. *State v. Miller*, 85 Pac. (Ore.) 81, 82. *Goshen Nat. Bk. v. State*, 141 N. Y. 379. (*Inquiry from Ill., April, 1911, Jl.*)

Check drawn by supervisor to "myself"

962. A bank paid a check of a supervisor drawn on public funds to the order of "myself," and indorsed by him. He misappropriated the money and the surety company on his bond sues the bank for reimbursement. Is the bank liable? *Opinion:* The bank is not liable to the surety company as the supervisor presumably had the right to draw out the money himself, as well as to order it paid to third persons, and the bank was not responsible for his misappropriation thereof. (*Inquiry from N. Y., April, 1915.*)

Form of check to corporation

963. A depositor makes out a check payable to the treasurer of a life insurance company, without any addition to the individual name of the officer. Does this insure that only the company will receive the money? Is it sufficient to add to the name, the designation, "Treasurer." *Opin-*

ion: If the check is made out in the individual name of the treasurer, there is nothing to prevent the payee from negotiating the check for his own purposes. If the proceeds of the check are turned over to the company well and good. The check should be drawn payable to the company itself. (*Inquiry from Ga., Feb., 1920.*)

Unauthorized indorsement by secretary of check payable to trust company

964. A check made payable to and owned by the N Trust Company was indorsed without authority in the name of the trust company by its secretary to his individual order, followed by his personal indorsement, and then was negotiated by him to the P Banking Company, which paid him part thereof in currency, credited the balance to his personal account and thereafter collected the draft. *Opinion:* The P Banking Company was liable to the N Trust Company for the proceeds, as the indorsement of the secretary was without express or implied authority of the trust company and the bank took no title. *Knoxville Water Co. v. East Tenn. Nat. Bk.*, 131 S. W. 447. *Blood v. Maveuse*, 38 Cal. 590. *First Nat. Bk. v. Hogan*, 47 Mo. 472. (*Inquiry from S. D., Dec., 1912, Jl.*)

Unauthorized indorsement by agent of check payable to company

965. A customer gave his check drawn payable to a company to the company's agent, who had the same certified at the bank before indorsement. After certification the agent indorsed the company's name and then his own name individually, and thereupon John Jones also indorsed the check and the same was cashed for the agent by a bank where John Jones had a personal account, relying upon John Jones's warranty. The check was paid by the drawee, but the company did not receive the amount. *Opinion:* Assuming the agent had no authority to indorse for the company, the cashing bank which paid the check upon the unauthorized indorsement is liable to certifying bank, and can recover from John Jones upon his indorsement. If the agent's indorsement was authorized, the amount is chargeable against the drawer's account. *Goshen Nat. Bk. v. Bingham*, 118 N. Y. 349. (*Inquiry from Conn., Jan., 1915, Jl.*)

Authorized indorsement by agent

966. The agent of B the payee of a check, indorsed it and presented it for pay-

ment, receiving in payment thereof a certificate of deposit. The same day, after banking hours, the drawer of the check called at the bank to stop payment and stated that he would not accept the indorsement of the payee's agent. The certificate of deposit was deposited in another bank with the indorsement "For deposit to credit of B" When the certificate was presented to the issuing bank for payment it refused to pay because it was not indorsed by the payee, but later paid when the indorsement was supplied. Is the drawee bank liable to the drawer of the check? *Opinion:* There is no liability to the drawer. After the bank had paid the check it was too late for the drawer to countermand the order. The fact that the check was not indorsed by the payee in person but by the agent does not affect the validity of the payment. The Negotiable Instruments Act provides "that the signature of a party may be made by a duly authorized agent." It might have been proper for the bank to refuse to honor its certificate of deposit until indorsed by the payee in person or until the authority of the agent was established; but the bank was liable on the certificate as soon as issued and was under obligation to pay same when presented properly indorsed. *Kahn v. Walton*, 46 Ohio St. 195. *Albers v. Com. Bank*, 85 Mo. 173. *Loan, etc., Bk. v. Farmers, etc., Bk.*, 74 S. C. 210. (*Inquiry from S. C., Jan., 1917.*)

Abuse of check-signing power by authorized agent

967. The agent for a grain elevator was given plenary power to draw checks. He permitted a third person to purchase options from a commission house in the name of the elevator and deposited the margin required from such purchaser to the credit of the elevator. Sometimes the buyer had a profit, in which case he withdrew his profits by having the agent issue regular grain checks, except that no bushels were filled in, but the word "option," or "opt" appeared on some of them. The agent also took options from the commission house, purporting to be using the credit that this third person had with the elevator as margin on his deal. This option was also taken in the name of the elevator and when the agent had a profit on the deal, he closed it out and issued to himself a cash grain check, without any bushels marked, but with the word "option," or "opt,"

marked thereon. The bank did not know the nature of the margin deposits, neither did it notice the marks "option" or "opt." The agent absconded and left the elevator company insolvent. Is the bank liable for the repayment of these checks? *Opinion:* Since the agent had full authority to draw checks, the bank cannot be held liable for the checking out of money without right, in the absence of notice of excess of authority. *Nat. Bank v. Clifton Mfg. Co.*, 33 S. E. (S. C.) 750. The terms "option" or "opt." are not sufficient to charge the bank with notice. (*Inquiry from N. D., June, 1916.*)

Official check to personal order deposited in personal account

968. John Jones presented for credit to his individual account a check for \$7,000 drawn on another bank to his own order by himself as treasurer of a company. The check was indorsed by him in blank. It afterwards develops that the treasurer is misappropriating the company's funds. *Opinion:* It has been held by the Appellate Division of the New York Supreme Court in a similar case that the mere form of the check charged the bank of deposit with notice that the treasurer was using corporate funds for his private purposes and made it liable to the corporation therefor. *Havana Central Rd. v. Knickerbocker Tr. Co.*, 198 N. Y. 422. (*Inquiry from Mo., April, 1910 JI.*)

Note: The above decision was subsequently reversed by the New York Court of Appeals which held that if it be conceded a duty of inquiry rested upon the bank of deposit, such inquiry was sufficiently made and the duty discharged by presentment to the drawee bank, and payment of the check was an answer to the inquiry.

Cashier's check for private debt

969. Is it improper for a creditor to take a cashier's check for his personal debt? *Opinion:* One who receives a bank's check signed by its cashier in payment of the personal debt of the cashier must refund the money to the bank. *Gale v. Chase National Bank*, 104 Fed. Rep. 213. Where a cashier paid his personal note by drawing and delivering a draft in the name of a bank, it was held that the bank could recover from the creditor. *Home Savings Bank v. Otterbach*, 135 Iowa 157. (*Inquiry from N. Y., April, 1917.*)

Treasurer's official check for private debt

970. The check of a corporation is signed in the name of the corporation by "A, Treasurer," or by A in some other official capacity, and given in payment of a draft drawn on A individually. What is the liability of a bank accepting such a check? *Opinion:* Such a check would carry notice from its form and charge the holder with the duty of inquiry as to the authority of A to use the corporate funds to pay his private debt. *Kenyon Realty Co. v. Nat. Deposit Bk.*, 140 Ky. 33. *Empire State Surety Co. v. Nelson*, 126 N. Y. S. 453. *Emerado Farmers El. Co. v. Farmers Bk. of Emerado*, 127 N. W. 522. *Havana Central Rd. v. Knickerbocker Tr. Co.*, 198 N. Y. 422. (*Inquiry from Ga.*, Sept., 1912, *Jl.*)

Partnership check for partner's private debt

971. A bank asks whether it can be held responsible to a firm when it accepts the firm's check in payment for indebtedness of one of the individual members. *Opinion:* It is generally held by the courts that a check or note signed in the name of a partnership by one of the partners tendered in payment of a personal debt carries notice to the creditor and puts him on inquiry as to the partner's authority. If the partner exceeded his authority, the creditor will be liable to refund. This principle also applies to officers of corporations who issue official checks to their personal order and use them in payment of a private debt, as well as to all fiduciaries who use trust moneys to pay personal debts. See *Noyes v. Crandall*, 6 So. Dak. 460. (*Inquiry from Ill.*, Nov., 1919.)

Undated checks

972. What is the effect of leaving a check undated? *Opinion:* A check, though not dated, is a valid and negotiable order on the bank to pay on demand, but the absence of date may (although the point has not been decided) afford justification for drawee's refusal to pay until reasonable time for inquiry as to age of check, for, if check has been outstanding an unreasonable length of time, payment is at bank's peril. *Neg. Inst. A.*, Sec. 6 (Comsr's. dft.). *Bk. of Houston v. Day*, 122 S. W. (Mo.) 756. *Lancaster Bk. v. Woodward*, 18 Pa. 357. (*Inquiry from Ga.*, Aug., 1914, *Jl.*)

973. Should an undated check be paid upon presentation? *Opinion:* Under the Negotiable Instruments Law "the validity and negotiable character of an instrument

are not affected by the fact that it is not dated." The undated check being a valid order to pay on demand can be paid by the bank upon presentation. *Neg. Inst. A.*, Sec. 6 (Comsr's. dft.). (*Inquiry from N. Y.*, Jan., 1911, *Jl.*)

Stale checks

974. A check dated October 10, 1911, was presented for payment June 25, 1913. The drawee refused payment on the ground that the check was "stale." *Opinion:* The bank's refusal was justified. Until the "reasonable time" rule of the Negotiable Instruments Law is more fully interpreted the exact period of time required to make a check stale remains uncertain. *Merchants & Planters Bk. v. Clifton Co.*, 56 S. C. 320. *Lancaster Bk. v. Woodward*, 18 Pa. 357. *Neg. Inst. A.*, Secs. 53, 71, 186 (Comsr's. dft.). (*Inquiry from Ariz.*, Sept., 1913, *Jl.*)

975. Should a bank cash a check, presented several months after its date, without notifying the drawer? *Opinion:* No rule has been established, either by law or custom, fixing the precise time at which a check becomes stale so that the bank upon which drawn would be liable if it paid without inquiry and loss resulted. In the absence of a positive rule of law or custom, it would seem reasonable for a bank to adopt a six months' period in which to pay a check without inquiry, and where presented after such period to communicate with the drawer before making payment. See *Lancaster Bank v. Woodward*, 18 Pa. St. 357. *Morse on Banks & Banking*, Sec. 443. *Daniel on Negotiable Instruments*, Sec. 1632. (*Inquiry from Ore.*, April, 1920, *Jl.*)

976. When does a check become stale, and what are the duties of a bank respecting payment of stale checks? *Opinion:* There is a dearth of authority upon this question. In *Merchants & Planters Nat. Bk. v. Clifton Mfg. Co.*, 56 S. C. 320 (33 S. E.) 750, it was held that a check drawn on Christmas eve "at the beginning of the season when business is suspended for a greater or less period everywhere" does not become stale in six days so as to put the bank upon inquiry when the check is presented at the end of that period. It is, however, customary for banks to pay checks without inquiry though presented a much longer period after date. In *Lancaster Bk. v. Woodward*, 18 Pa. St. 357, where a bank paid a check more than a year after its date at a time when the drawer's deposit

was not sufficient and it appeared that the drawer had in the meantime paid the debt for which the check was given, it was held that the bank could not recover in an action against the drawer for the overdraft. It is said (Daniel on Negotiable Instruments) that "the certain age at which a check may be said to be stale is as uncertain as the fixing of a day on which a young lady becomes an old maid." The same question arises as to the period of time when the check becomes stale or overdue so as to subject a purchaser thereafter taking, to equities. The Supreme Court of the United States has held that negotiation six months after date did not subject the holder to equities of the drawer against the payee. *Bull v. Bank of Kasson*, 123 U. S. 105. (*Inquiry from Mass., Sept., 1917.*)

Rights of holder

Deduction of debt of presenting check holder

977. The cashier of a bank, who is also a notary, was permitted to act as such in the bank under an arrangement that the fees were to become a part of his salary as cashier. Such fees were not, however, to be paid to him when earned, but were to be deposited in a special account in the bank's books and credited to his account at the end of the year. A person for whom the cashier rendered notarial service failed to pay charges therefor, and several months thereafter such person presented a check over the bank's counter and the cashier deducted from the check the amount of his bill. The person has brought suit against the bank to recover the amount so deducted. *Opinion:* Assuming the holder presenting a check drawn on the bank for payment was indebted to the bank, the bank had no right to deduct the amount of his indebtedness from the amount of the check presented for payment, and deliver him the balance. It cannot collect its debt in this way. This has been held in several cases. See for example, *Percival v. Stratham*, 112 Iowa 747. *Brown v. Lecke*, 43 Ill. 497. The drawer of the check has the right to have the check paid the payee, without any such deduction. His contract with the bank is that it will pay his checks according to his order and direction and if the bank could deduct a debt to itself, owing by the payee, it would be violating its contract with the drawer. But while the bank has no right to deduct the debt to the bank, having done so, a further interesting question arises in a suit by the check holder for

the money, whether he can hold the bank liable. In Texas, as elsewhere, the rule is a check does not assign the amount drawn for to the holder and if bank refuses to pay the holder, the latter must look to the drawer for redress. *Games v. Thomson*, 79 S. W. Rep. 1083. Now if in this case, the bank paid part of the check, but did not pay all of it, it is questionable whether the holder has any right of action against the bank on the check for the unpaid portion. But if, on the other hand, the bank charges the whole of the amount to the drawee's account, then the whole of the check was paid and, having turned over only a portion of the check to the holder, it might be held liable to him for conversion of the unpaid portion. The holder's right of action against the bank is a somewhat uncertain question; but there would probably exist a liability to the drawer of the check, its depositor, because of a part dishonor of his check. (*Inquiry from Tex., Oct., 1916.*)

Conversion of check by bank

978. The holder of a check presents it to a bank for certification and the bank, instead of returning it to the holder uncertified, there being insufficient funds and the drawer also having stopped payment, hands the check over to the drawer. The original holder threatens to bring suit against the bank to recover the check. *Opinion:* The bank is liable to the holder for conversion of the check, unless it can affirmatively prove that the drawer had a good defense thereon against the holder. It is doubtful whether the bank could be held as acceptor under the Negotiable Instruments Act. *Precker v. London*, 73 N. Y. S. 145. *Lowell v. Hammond Co.*, 60 Conn. 500. *Neg. Inst. A., Sec. 137 (Comsr's. dft.)*, *Sec. 156 (Md. dft.)*. *Wisner v. First Nat. Bk.*, 220 Pa. 21. Amendment of *Sec. 137 supra* by Laws of Pa. 1909, No. 169. (*Inquiry from Md., April, 1919, Jl.*)

Holder cannot sue drawee

979. Has the holder of an unaccepted and uncertified check any right of action against the bank which refuses to pay same? *Opinion:* Except in few states where check is an assignment, the holder of a check (not certified) has no right of action against the bank which refuses to pay same but sole recourse is upon drawer and prior parties. *Marble v. Merchants Nat. Bk.*, 115 Pac. (Cal.) 59. *Neg. Inst. A., Sec. 189 (Comsr's. dft.)*. (*Inquiry from Wash., Dec., 1912, Jl.*)

Note: With the almost universal enactment of the Negotiable Instruments Law, the rule that a check, of itself, constitutes an assignment of the deposit to the payee, disappears. But there may be an equitable assignment of a deposit by drawer to holder, accompanied by delivery of a check, upon which the assignee may recover of the bank. See *Dunlap v. Commercial National Bank of Los Angeles*, 195 Pac. (Cal. A.) 688.

Obligation of drawee to indorse reasons for refusal

980. A drawee bank returned a check and declined to indorse thereon the reasons for its refusal. Is there any law which would compel the drawee bank to so indorse the check? *Opinion:* There appears to be no law which would compel it to do so. In the absence of some Clearing House rule that the drawee must indorse the reason for its refusal upon the check, there seems to be no requirement which would compel the drawee to indorse the check before returning same as insufficient. It might be customary for banks to mark the reasons of non-payment upon checks before returning same, even if there is no Clearing House rule on the subject but there is no legal requirement that they must do so and unless there is a Clearing House agreement so to do, the return without indorsement of reasons for non-payment is within the bank's rights. (*Inquiry from Idaho, April, 1920.*)

Liability of parties

Drawer's liability on unpaid check

981. John Doe drew two checks of the amounts of \$196.50 and \$53.50, which he gave to Smith in payment of a note held by Smith. Smith surrendered the note and received the proceeds of the smaller check but the larger check was dishonored because of insufficient funds. Doe afterwards indorsed the larger check "O. K. after January 11, 1913," but subsequently refused to pay same. *Opinion:* Smith has a right of action against Doe based on the unpaid check and Smith's possession of the note is not necessary. Doe's indorsement did not alter his obligation on the check. (*Inquiry from Okla., April, 1916, Jl.*)

Right of bank to look to indorser or drawer

982. A check drawn on a bank outside the state was cashed by a bank for the payee named who indorsed it. Payment being stopped it was protested and the indorser notified. The latter then requested bank to

take the check on its return to another bank in same town where he would make arrangements to have it paid. On the day the check was returned the drawer telegraphed the holding bank to again send the check to the drawee bank where it would be paid. This the bank did, and the indorser threatens it with suit for damages for returning check without first notifying him. *Opinion:* The bank holding check was perfectly within its rights in doing as it did. It owned the check, and not only the indorser but the drawer of the check was liable to it, and it had the right to look to either party for payment. If it chose to look to the drawer, it was none of the indorser's concern, and he certainly has no ground for an action for damages. (*Inquiry from Mo., March., 1919.*)

Drawee's liability on check deposited in insolvent bank

983 The payee of a check deposited it in a Philadelphia bank which closed its doors. When it was presented to the drawee bank through another bank in Philadelphia, payment thereof had been stopped by drawer in order to protect payee from loss. The collecting bank threatens suit. Is the drawer liable? *Opinion:* The drawer is liable on this stopped check to the bona fide owner thereof, whoever he may be. If the payee has parted with title to this check to the Philadelphia bank and the latter, before closing its doors, had parted with title to the other bank who claims to be the rightful owner, and threatens suit, the drawer is liable to it. It may be that the check was merely deposited with the failed bank for collection and the payee still retains title, and then the money would be owing by the drawer to the payee. (*Inquiry from N. J., July, 1919.*)

Recovery of overpayment

984. A check for \$3.00 was presented to drawee bank for payment by the clerk of a merchant who did not do business with it. The figures \$3.00 were written very poorly, and taken to be \$7.00, and check was paid in latter amount. When called upon to return \$4.00, the merchant refused to do so, although the clerk who cashed the check told him he had actually received \$7.00. Does the bank have to stand the loss? *Opinion:* The bank upon which a check is drawn is no more responsible for the amount than the holder who presents it for payment, and where it pays \$7.00 on a

\$3.00 check, the figures being so poorly written as to lead to the mistake, it has a right of recovery of the excess from the person receiving payment. If the clerk was acting within the scope of his authority and used the money in his employee's business, the merchant would be liable; but if acting on his own account, sole recourse would be upon the clerk. (*Inquiry from Ga., May, 1916.*)

Dealings with paid checks

Return of cancelled vouchers without receipt unsafe

985. Should a bank return cancelled vouchers without a receipt therefor? *Opinion:* Under the statement (new) system as distinguished from the pass-book (old) system the pass-book is simply used for the entry of deposits, and the cancelled vouchers with the list of amounts thereof showing total and balance are returned to the depositor without any entry in the pass-book, the depositor receipting for the same. Any bank which adopts this system would be unsafe in mailing or otherwise parting with possession of the cancelled vouchers before it obtains a receipt therefor. It would not be an impracticable method for a bank to make a monthly statement and mail a notice to its depositor to call and receipt for the same with cancelled vouchers. *Morse on Banks and Banking* (4th Ed.), Vol. 2, Sec. 460. In re Brown 2 Story 502, 519. *Regina v. Watts*, 2 Den. (Crown C.) 14. *Burton v. Payne*, 2 Car. & P. 520. *Partridge v. Coates*, Ry. & Mood. 153. (*Inquiry from Ore., Oct., 1913, Jl.*)

986. A bank claims to have paid a check and to have returned it to the depositor as a paid voucher. The latter claims he never drew such a check and never received such a voucher. What is the liability of the bank? *Opinion:* If the case comes into court, it will resolve itself into a question of fact for the jury. It is unsafe to return a canceled voucher without a receipt, for this is parting with the bank's evidence of payment, and all it has left is its book entries which very often do not prevail against the positive testimony of a customer that no such transaction took place. (*Inquiry from Ill., Jan., 1918.*)

Second payment of check

987. The drawer of a check, after payment and return to him as a cancelled voucher, sends same to the payee as proof

of payment. The latter, designedly or inadvertently, sends the check through the same channels and it is paid a second time. What steps should be taken to adjust the matter? *Opinion:* A check once paid is discharged and becomes *functus officio*; and where a check, after payment, falls into the hands of the payee, who negotiates it a second time, and it is again paid by the drawee bank, the latter cannot charge the amount to the drawer's account, but can recover from the forwarding bank, and the ultimate liability to refund rests with the payee. *Aurora State Bank v. Hayes-Eames El. Co.*, 88 Nebr. 187, 129 N. W. 279. *Balsam v. Mut. Alliance Trust Co.*, 132 N. Y. S. 325. See also *Nat. Bank Com. v. Farmers etc. Nat. Bank*, 87 Nebr. 841. (*Inquiry from Ill., April, 1920, Jl.*)

Drawee's liability where check, after payment on unauthorized indorsement, re-delivered as evidence

988. B owed an account to A company. B gave a check to the duly authorized agent of A company, drawn on the U bank. The agent indorsed the check "A Company by D, Manager," procured it to be cashed by one N, and absconded. After the check was honored by the U bank, the A company claimed that the indorsement by the agent was without authority, and, therefore, a forgery. After the cancelled check was returned to B, it was borrowed by an agent of the A company to be used as evidence in a controversy with the surety company which bonded the agent. The check is now in the hands of the P bank, which cashed the check for N, and subsequently had to refund same to the drawee, the U bank. The A company has entered suit against B on the book account. B refuses to pay as long as the check is outstanding, in the hands of one who may bring suit upon it, and prevail in case B failed to prove want of authority in the agent to indorse the check. What are B's rights in the premises? *Opinion:* It is doubtful if the drawer could be held liable on the check, even though he failed to prove the indorsement unauthorized. The check came back to him, and he never redelivered it as a check; it was simply borrowed from him for other purposes. Furthermore, after the P bank refunded the money because of claim of unauthorized indorsement, they would probably be estopped from asserting the indorsement was authorized against the drawer who, relying upon such refund, had paid the debt for

which the check was given. If this point were doubtful, a bond of indemnity could be asked as a prerequisite to paying the account, to protect against liability on the check. (See *Silverman v. Nat. Butchers' etc. Bank*, 98 N. Y. Suppl. 209, 50 Misc. 169, as having an indirect bearing on the point). (*Inquiry from Pa., Aug., 1916.*)

Check on another bank paid through error and charged to customer's account

989. A bank has paid and charged to the account of and returned to its customer, a township trustee, a check not drawn by him, but by a trustee of another township on another bank, the error being due to similarity in appearance of the checks of the two trustees and not being discovered by the customer for a year, at which time he is unable to produce the check. The customer asks credit for the amount. *Opinion:* Of course, originally the stated payment was not properly chargeable to the customer's account and the only question would be whether, by a year's delay in acquiescing in the correctness of the account, it is too late now for him to dispute it. This is a very unusual case. If it was a case of a forged or altered check, there are decisions to the effect that it is the depositor's duty to examine the returned statement and voucher within a reasonable time and if he fails to do this and the bank would suffer an injury from which it might have protected itself if it had been required to correct the error in time, the depositor cannot recover. See, for example, *First Nat. Bk. v. Allen*, 100 Ala. 476, 14 So. Rep. 335. *Janin v. London & San Fran. Bk.*, 92 Cal. 14, 27 Pac. 1100. *Critten v. Chem. Nat. Bk.*, 171 N. Y. 219, 63 N. E. 969. *Weinstein v. Nat. Bk. of Jefferson*, 69 Tex. 38, 6 S. W. 171. But the check in this case is not forged or raised and it presents a little different proposition. It was paid and charged through error. It is impossible to cite any decision involving a similar case. It is very doubtful, however, whether the bank can escape liability to its customer. Although the check in question is lost, it would seem that the bank could procure a copy to be made and proceed thereon by first presenting the same to the bank on which drawn and in case of refusal of payment look to the trustee who drew the check for reimbursement. This check evidently has never been paid but has been cashed by the bank under mistaken supposition that it was the drawee, and lost. It would seem on a proper presentation of the

facts, the trustee who drew the check would admit liability and reimburse the bank. (*Inquiry from Ind., Oct., 1914.*)

Stipulation acknowledging correctness of account on non-report of errors

990. What is the effect of printing on the outside of envelopes, containing statements of account and canceled vouchers, the following provision? "If any error in this statement is not reported within twenty days after its receipt, it shall be regarded an acknowledgment that the balance shown on this statement is correct." *Opinion:* In order that such provision should take effect as an agreement it would have to be proved that it was brought to the attention of the depositor and that he acquiesced therein. Furthermore, even if the depositor so agreed, it is doubtful if he would be debarred from afterwards proving an error in the statement. The courts construe such agreements most strongly against the bank. Many banks do attempt to protect themselves in this way and there is no harm in printing such a provision. (*Inquiry from Mass., July, 1918.*)

Voucher checks

Negotiability where clause requires payee's receipt

991. A folded voucher check is used on the inside of which is a ruled statement form for making up the statement and on the face of the check is the clause "Upon the payee executing in ink the receipt on left end of this voucher-check and indorsement on back". Is the instrument negotiable? *Opinion:* If the clause simply read, "Upon the payee indorsing on back pay to the order of," etc., it would doubtless be held negotiable because certificates of deposit which provide for payment on return of receipt properly indorsed are quite generally so held, but, in addition, the clause makes the check payable only on condition that the payee executes the receipt on the left end. If the payee indorsed the check on the back and negotiated same but omitted to execute the receipt, the check would not be payable. Therefore, it is quite likely, should ever a question arise in which the negotiability of the check was an important element, that the court might hold it not negotiable because payable only on a condition. (*Inquiry from Miss., Dec., 1918.*)

*Effect of clauses "Given in payment of %c"
"when properly indorsed, correctness
acknowledged"*

992. A form of voucher-check is used with imprint at the bottom: "This check given in payment of account as per statement above. When properly indorsed it shall constitute an acknowledgment of its correctness, and receipt for the payment of account. No other receipt is necessary. Return if incorrect." The check is an ordinary check, ruled on the face of which is a form for making up a statement. Question is raised as to its negotiability and it is asked if an ordinary form of check with a blank line headed by the word "For," the line to be filled out by a specific statement of transaction, would be considered a proper voucher check to be used as a substitute? *Opinion:* The form of check used contains a memorandum that it is "given in payment of account as per statement." These words would not affect negotiability, being simply a statement of the transaction which gave rise to the instrument. The further words, "When properly indorsed, it shall constitute an acknowledgment" etc., would not make the instrument non-negotiable. There seems to be nothing objectionable in this form of check. An ordinary bank check with the addition of a blank line headed by the word "For" when filled out with a specific statement such as "For your invoice December 1st, 1918," would be considered an abbreviated form of voucher check, and, of course, negotiable. (*Inquiry from Miss., Dec., 1918.*)

Indorsement acknowledging receipt in full

993. The A. E. R. Co., whose principal office is in Tucson, Arizona, pays bills by voucher drafts drawn upon the company in Tucson, on the backs of which are the words, "This voucher is indorsed as an acknowledgment of the receipt of payment in full of account as stated within." The bank asks: Does this constitute a receipt for payment in full of account as stated within? *Opinion:* The above indorsement signed by the payee of the draft, or creditor, would constitute a receipt in full. Where the claim for which the voucher draft is given is unliquidated or the subject of dispute, such receipt in full would bar the creditor from recovering anything more. Where, however, the amount of the claim was settled, liquidated, or undisputed, if the voucher draft was for less than the real debt, it would not bar the creditor from after-

wards recovering the full amount. (*Inquiry from Ariz., Jan., 1919.*)

Form of non-negotiable voucher check

994. A bank sends a form of voucher check, both sides of which are intended for use—the printed side being a check on the bank for the amount of an invoice and the reverse side containing bill for invoice with form of signature acknowledging receipt of payment and statement that when dated and properly receipted the voucher is payable at the bank. *Opinion:* Presumably the matter on the reverse side of the paper would form a part of the terms of the check, in which event it would be a non-negotiable instrument, not being payable absolutely and at all events but on condition that the voucher be properly receipted. A bank whose customer used this form would assume responsibility for complying with the condition respecting the receipting of the voucher, and would have no right to pay it without such receipt. (*Inquiry from N. Y., Aug., 1917.*)

Wrongful dishonor

Note: The following law recommended by the American Bankers Association has been passed in the states below named: "No bank shall be liable to a depositor because of the non-payment through mistake or error and without malice of a check which should have been paid, unless the depositor shall allege and prove actual damage by reason of such non-payment and in such event the liability shall not exceed the amount of damage so proved." 1915, Idaho, Montana, New Jersey, Oregon; 1917, California; 1919, Alabama, Michigan, Missouri, North Carolina, Ohio, Penn., West Virginia; 1921, Arkansas (different from A. B. A. Measure), Illinois, Tenn.

Liability of bank for substantial damages

995. What is the liability of a bank which wrongfully refuses to pay a check drawn on it? *Opinion:* Where a bank through error and without malice refuses to pay the check of a customer drawn against sufficient funds, all the courts which have passed on the question except those of New York hold that the customer, if a merchant or trader, may recover substantial damages without proving actual damage. Where the customer is a non-trader most cases require proof of substantial damage as a basis of recovery. The best method to abrogate the rule that substantial damages will be

presumed without proof of actual damage would be in procuring legislation which will provide that damages will be limited to such as the customer can prove. See decisions in opinion No. 996. (*Inquiry from Ill., June, 1912, Jl.*)

996. A bank through error and without malice refused to pay its customer's check for \$11.40, although in sufficient funds. The check was presented a second time and paid at the request of the payee, who stated that the drawer's credit with him was not damaged. The customer sued the bank for \$1,000 damages. *Opinion:* Assuming that the customer was a merchant or trader, the bank would probably be held liable for substantial damages, without proof of actual damage or any malice on the part of the bank. *Schaffner v. Ehrman*, 139 Ill. 109. *Third Nat. Bk. v. Ober*, 178 Fed. 678. *Marzetti v. Williams*, 1 Barn. & Ad. 415. *Rolin v. Stewart*, 14 Com. Bk., 595. *Birchall v. Third Nat. Bk.*, 15 Weekly Notes 174. *Patterson v. Marine Nat. Bk.*, 130 Pa. 419. *Goos v. Bk. of Commerce*, 39 Neb. 437. *First Nat. Bk. v. Railsback*, 58 Neb. 248. *Svensden v. St. Bk. of Duluth*, 64 Minn. 40. *James v. Continental Nat. Bk.*, 105 Tenn. Amer. Nat. Bk. v. Morey, 113 Ky. 857. *Western Nat. Bk. v. White*, 131 S. W. (Tex.) 828. *Levine v. St. Bk.*, 141 N. Y. S. 596. *Siminoff v. Goodman Bk.*, 121 Pac. (Cal.) 939. *Reeves v. First Nat. Bk. of Oakland*, 129 Pac. (Cal.) 800. *Winkler v. Citizens St. Bk.*, 131 Pac. (Kan.) 597. *Atlanta Nat. Bk. v. Davis*, 96 Ga. 334. *First Nat. Bk. of Huntsville v. Stewart* 85 So. (Ala.) 529. (*Inquiry from Ill., June 1912, Jl.*)

997. A postdated check is by mistake paid prematurely. Subsequently but prior to the date of the first mentioned check another check is presented for payment and payment is refused for insufficient funds. The funds would have been sufficient but for the error above mentioned. The depositor sues for \$10,000 damages. What is the liability of the bank? *Opinion:* The bank is liable in substantial damages, which will be fixed by a jury at such sum as they think proper. Of course, anything like \$10,000 is out of the question. Should the jury award an excessive sum, past experience shows the higher court will reduce it and affirm only on condition that plaintiff accepts the modification. (*Inquiry from Ariz., March, 1921.*)

Refusal of checks drawn against Liberty Bond credit

998. A bank arranged a credit with its customer of the value of \$300 in Liberty Bonds against which he was permitted to draw checks, the same as if the money was on general deposit. The bank asks whether it would be liable in damages for failing to honor checks to the full extent of the credit. *Opinion:* In view of the case as presented by the bank, it appears that it was under obligation to honor the customer's checks to the amount of his credit and for refusal to honor, although by mistake, it would be liable in damages to its customer for injury to his credit. Damages, however, would be limited to such amount as reasonably and fairly, in the natural course of things, would result from such refusal. (*Inquiry from Ark., March, 1920.*)

Habit of overdrawing can be shown in mitigation

999. A depositor who was in the habit of overdrawing his account made a small deposit, for which a credit slip was placed on file. Later in the day a check was presented and payment refused although drawn against sufficient funds. *Opinion:* Assuming that the depositor was a trader, he can recover damages for dishonor of the check without proving special damage, but the fact that he had been in the habit of overdrawing his account could be used in mitigation of damages. (*Inquiry from La., June, 1913, Jl.*)

1000. A bank, through a mistake in its bookkeeping, refused the payment of two checks of its depositor, one for \$10, another for \$25. The depositor sued the bank for \$10,000 for not paying his checks when there were sufficient funds. *Opinion:* The bank was liable to the depositor (1) if a merchant or trader, for substantial damages though no actual damage is proved; (2) if not a merchant or trader, for such actual damages as are alleged and proved. *Levin v. Commercial German Tr. & Sav. Bk.*, 63 So. (La.) 601. *Hooper v. Herring*, 63 So. (Ala.) 785. *Birchall v. Third Nat. Bk.*, 15 Weekly Notes (Pa.) 174. *Western Nat. Bk. v. White*, 130 S. W. (Tex.) 828. (*Inquiry from Miss., Oct., 1914, Jl.*)

Exclusion of evidence of habitual overdrawing erroneous

1001. Through an error of a trust company's bookkeeper a check for \$42 was

returned marked "N. S." Suit was brought and a judgment recovered for \$1200 against the trust company. The court refused to receive evidence showing circumstances in mitigation of damages and would not permit the introduction of evidence showing the fact that depositor had at least half a dozen checks returned to him for want of sufficient funds. The depositor (plaintiff) suffered no actual damages through the return of check. The trust company calls for such suggestions as may be useful on the appeal taken to the superior court. *Opinion:* The attitude taken by the Courts of Pennsylvania and of some other states on this subject is very unjust to the banks; so much so, that two years ago the American Bankers Association prepared a draft of a proposed law for enactment in various states to correct the judicial rule so that recovery would be denied the depositor unless he affirmatively proved actual damages, the proposed law limiting the amount of recovery to the actual damages so proved. There seems to be no particular suggestion to offer, unless it be that you should urge that it was error to exclude testimony of the depositor's habit of overdrawing, in mitigation of damages. Damages in these cases are awarded on the theory of slander of the depositor and should be subject to the rule that facts and circumstances may be offered in mitigation to show want of malice and good faith. The best remedy is through legislation. (*Inquiry from Pa., Feb., 1917.*)

Note: The law above referred to was passed in Pennsylvania in 1919.

Suit for damages by non-trading depositor

1002. A customer who was a carpenter threatened suit against a bank for failure to pay a check drawn against sufficient funds. The bank credited a deposit by the customer to the wrong account through a clerical error. *Opinion:* Where a check is refused payment because of clerical error, and the depositor is a merchant or trader, substantial damages are by most courts presumed without his proving actual damages, but where a non-trader, some courts hold he must prove actual damage to recover anything more than nominal damages. In Pennsylvania the question has not been passed upon. Third Nat. Bk. of St. Louis v. Ober, 178 Fed. See note in preceding opinion. (*Inquiry from Pa., Sept., 1913, Jl.*)

Where check returned unpaid without presentment

1003. A bank received for deposit

from its customer a check drawn on a small country bank, and it immediately sent the item to its correspondent bank for collection. The check was returned unpaid by the correspondent and the bank collected the amount from its depositor who in turn collected the amount from the drawer. It afterwards developed that the check had never been presented. The drawer claims damages for wrongful dishonor of the check on ground that check was never presented. *Opinion:* Where a check which has never been presented is returned unpaid, implying lack of funds, there is an injury to the credit of the drawer for which the holder will be responsible to him in damages. In this case the bank would be held liable to the drawer for the wrongful act of its correspondent and in turn would have recourse on such correspondent whose act caused the injury. Lorick v. Palmetto Bk. & Tr. Co., 74 S. C. 185. Peabody v. Citizens St. Bk. of St. Charles, 108 N. W. (Minn.) 272. Bk. v. Bowdre Bros., 72 Tenn. 723. Harter v. Bk. of Brunson, 92 S. C. 440. (*Inquiry from S. C., Nov., 1917, Jl.*)

Liability for wrongful dishonor not decided in Washington

1004. Is the statement that actual damages only are allowed as claimed by the Attorney General's office, where the bank through error does not pay a check, correct? *Opinion:* It does not seem that the Supreme Court of Washington has had before it a case involving liability of a bank to a depositor for damages for erroneously refusing payment of his check. But the courts elsewhere quite generally hold that the depositor is entitled to substantial damages without proving actual damage. (*Inquiry from Wash., March, 1919.*)

Postdated checks

Issuer of subsequently dishonored postdated check not punishable criminally

1005. A bank asks (1) whether it is criminal to issue a bad postdated check, and (2) if funds are not in bank to pay such a check on its date, should the depositor take the same action for recovery as in the case of check dated on the day it is given? *Opinion:* 1. It is not criminal to issue a postdated check, subsequently refused because of insufficient funds. The statute, which punishes the issue of checks without funds does not apply to a postdated check. Section 12 of the Negotiable Instruments Act expressly provides that: "The instru-

ment is not invalid for the reason only that it is antedated or postdated, provided this is not done for an illegal or fraudulent purpose. The person to whom an instrument so dated is delivered acquires the title thereto as of the date of delivery." 2. The action taken should be the same. A postdated check is presentable and payable on the day of its date or for a reasonable time thereafter and if it is not paid when presented because of insufficient funds, the holder should have the same protested and due notice of dishonor given and can bring action against the drawer and prior parties for the amount of the check and protest fees. See *Smith v. State* 226 S. W. (Ark.) 531. (*Inquiry from N. Y., Nov., 1919.*)

Duty of collecting bank

1006. What should a bank do with a postdated check delivered to it for collection? *Opinion:* Where a bank receives for collection and returns a postdated check, it is no part of its duty to present the same for acceptance. It can either hold it, present it at maturity, or, if time permits, may return it at once with advice that it is not yet due. (*Inquiry from N. C., Dec., 1909, Jl.*)

1007. What course should the holder of a postdated check take with respect to its payment? *Opinion:* A postdated check should be held until the day of maturity, and then presented and protested if not paid. (*Inquiry from Tenn., Dec., 1911, Jl.*)

Payment before date unauthorized

1008. Should a bank pay a postdated check before its date? *Opinion:* It is not illegal to date a check ahead but if a postdated check is paid before its date, the payment is at the risk of the bank. *Bk. v. Ringel*, 51 Ind. 393. (*Inquiry from Ind., Feb., 1911, Jl.*)

1009. A bank pays a postdated check and subsequently checks correctly dated are presented and refused on account of insufficient funds. What is the liability of the bank? *Opinion:* Payment of the postdated check before its date is at the risk of the bank, which has no right to charge it up against the customer before the due date, nor to refuse checks which would be good but for such premature charge. *Morse on Banks and Banking* Sec. 389. *Bolles on Modern Law of Banking* Sec. 184. (*Inquiry from Mo., Jan., 1912, Jl.*)

1010. May payment be demanded upon a postdated check regardless of the fact that

the date has not yet arrived, and is a bank in any danger by paying it before the date thereof? *Opinion:* A postdated check can be negotiated before its date, but it is not payable or protestable until the day of its date arrives. If the bank pays it before its date it takes the risk of payment being stopped before the due date. (*Inquiry from Mo., Sept., 1918.*)

1011. A bank inquires whether there is authority for banks to pay postdated checks before arrival of actual date of check. *Opinion:* A postdated check is not presentable, payable or protestable until the day of its date arrives. If the bank upon which a postdated check is drawn pays same before the date arrives, it does so at its own risk for the drawer has the perfect right to draw out the money before the date of such check. Of course, a postdated check is negotiable before the day of its date and is subject of purchase and if the drawee bank desires to purchase same and advances the money before the day of its date, it can do so; but the sole recourse would be on the drawer and not upon the fund in bank in the event the deposit was withdrawn before the date of the check. (*Inquiry from N. J., March, 1920.*)

1012. A bank paid its customer's postdated check for \$100 seven days before its date. When a second check of \$3 was presented the bank refused payment because of insufficient funds. The customer sued the bank for damages. *Opinion:* The postdated check was not payable or chargeable to the drawer's account until the day of the date and if prematurely paid and charged, a refusal to pay a subsequent check, good but for the erroneous charge, is a wrongful dishonor. *Smith v. Maddox-Rucker Bk. Co.*, (GA.) 68 S. E. 1092. (*Inquiry from N. C., July, 1916, Jl.*)

1013. On November 30 a bank paid a check dated December 7 and afterward on the same day dishonored a check dated November 29 because of "insufficient funds." There would have been sufficient funds but for the payment of the postdated check. *Opinion:* The bank had no right or authority to pay the postdated check before the day of its date arrived, and no right to refuse payment of another check where the funds would have been sufficient except for premature payment of the postdated check. The wrongful refusal to pay the check subjects the bank to damages recoverable by the drawer, but the holder of the dishonored

check has no recourse upon the bank but must look to the drawer and prior indorsers. (*Inquiry from Ohio, Feb., 1913, Jl.*)

1014. A check dated June 1 was paid on May 31. The maker notified the bank on the morning of June 1, before banking hours, to stop payment. *Opinion:* The money prematurely paid by the bank to a bona fide holder of the check is non-recoverable, but the bank, notwithstanding the stop order before the due date, would probably have the right to charge the amount to the drawer's account, if the holder had an enforceable right against the drawer. *Bedford Bk. v. Ocoam*, 125 Ind. 184. *Unaka Nat. Bk. v. Butler*, 113 Tenn. 574. (*Inquiry from Tenn., Sept., 1916, Jl.*)

Negotiation before date

1015. A gave his postdated check in payment for supplies. The holder indorsed it for value to B, who presented it on its date. Payment was refused by the drawee because A had previously stopped payment. *Opinion:* The check, although postdated, was negotiable before the day of its date, and B who purchased before maturity took an enforceable title. B had no recourse upon the drawee but only upon the drawer and prior indorser. *Albert v. Hoffman*, 117 N. Y. S. 1043. *Smith v. Maddox-Rucker Bk. Co.*, (Ga.) 68 S. E. 1092. *Hitchcock v. Edwards*, 60 L. T. Rep. 636. (*Inquiry from Wash., April, 1915, Jl.*)

Recovery from drawer

1016. A shipper of poultry had the purchaser make him an additional check on the false representation that the shipment was larger than it really was. The check was postdated and before the date the payee deposited it in his bank, which accepted it in order that the payee might have sufficient credit to pay checks presented. Later payment was stopped on the check and it was returned. The payee's bank did not have sufficient balance in his account to charge up the check. May it recover from the drawer? *Opinion:* The bank is a holder in due course and may recover the full amount from the drawer. Under the Negotiable Instruments Act, an instrument is not invalid because it is postdated, provided it is not done for an illegal or fraudulent purpose; a postdated check is negotiable prior to its date and an indorsee for value is not put on inquiry because of negotiation of such a check prior to its date. *Albert v. Hoffman*, 117 N. Y. Supp. 1043. *Triphonoff v. Sweeney*, 130

Pac. (Ore.) 979. The bank gave value by crediting the check to the payee's account and using the proceeds to pay his checks. The stopping of payment does not preclude recovery. (*Inquiry from Ohio, May, 1921, Jl.*)

Premature protest

1017. A check dated the 15th of the month was presented on the 12th and payment was refused. Should the check be protested? *Opinion:* There is no legal authority for protesting a postdated check, payment of which has been refused on presentment before the due date. The bank on which the check is drawn has no authority to pay the same until the day of its date arrives. *Harden v. Birmingham, etc., Bk. (Ala.) 55 So. 943.* (*Inquiry from Ga., Dec., 1916, Jl.*)

1018. The inquiry is made as to whether a postdated check should be protested before date, instructions having been sent to protest, if not paid. *Opinion:* While a date is not essential to the validity of a check and an undated check is payable on demand and protestable as soon as presented, still where the check bears a postdate (although such postdate may be inadvertent), it is not presentable and protestable until the day of its date arrives. (*Inquiry from Ga., July, 1916.*)

1019. A firm received a check dated fifteen days after it was received, which it deposited for collection. The check was presented before it was due and was protested by the drawee. *Opinion:* A postdated check is not payable until the day of its date arrives, and a drawee bank which prematurely protests the postdated check of its customer does so without legal right and is probably liable to him in damages therefor. *Godin v. Bk. of Com., 6 Duer (N. Y.) 76.* *Triphonoff v. Sweeney, (Ore.) 130 Pac. 978.* *Winkler v. Citizens St. Bk., (Kan.) 131 Pac. 597.* (*Inquiry from Tenn., June, 1913, Jl.*)

1020. A customer of bank A dated a check six days ahead and sent it to an out of town creditor with the request to hold check until date. On the day of its date the customer deposited in the drawee bank A where he runs an account, funds in excess of check. The creditor inadvertently deposited the check as cash, and it reached bank A two days before date. The bank protested the check because of insufficient funds. Is the check subject to protest, and if not, is the bank liable for damages? *Opinion:* A

postdated check is not due until the day of its date arrives, and it is not protestable before that time. The bank should not have protested the check. Courts often hold banks liable in damages to depositors for mistakenly refusing payment, and protesting good, regularly dated checks, on the theory that the customer's credit is injured thereby. It would seem the same ruling would apply to a postdated check, unless the fact that the date of the protest, antedating that of the check, would itself carry notice to the holder, that it was the bank's mistake, and that there could be no dishonor of a postdated check before its date, so as to negative any basis for damages. (*Inquiry from Va., July, 1915.*)

1021. Would it be proper to protest a postdated check sent as a cash item before the due date, provided the instructions on the remittance sheet called for the protest of all items of over ten dollars, the check being in excess of that? *Opinion:* It would not be proper to protest a check before its due date. A postdated check is not payable until the day of its date arrives, and hence before its date, there can be no dishonor which would authorize a protest. (*Inquiry from Wyo., Nov., 1913.*)

Premature protest fees not chargeable

1022. A postdated check was received by a bank for collection thirty days before the due date and was protested and returned in accordance with printed advice accompanying the check. The forwarding bank refuses to pay the fees and contends the collecting bank was in error in protesting. *Opinion:* The drawee causing the protest cannot charge protest fees. The printed advice to protest should not be construed to cover a postdated check before the time when the check becomes payable. (*Inquiry from La., June, 1913, Jl.*)

1023. May a bank, with which a postdated check is deposited for collection, recover for the customer, the amount of protest fees, which have been charged by the drawee where protest is made prior to the date of the check? *Opinion:* A postdated check is not payable or protestable before the day of its date and cannot be duly presented for payment before such date. Hence the drawee is not entitled to the fees and they may be recovered? (*Inquiry from Iowa, Jan., 1921.*)

1024. A postdated check reached the drawee bank two days before its date and was protested by that bank which refused

to waive protest fees. *Opinion:* A postdated check is not payable until the day of its date arrives, and the drawee bank is not entitled to any fees for causing premature protest to be made. (See A. B. A. Journal for June 1913, pp. 829, 830). (*Inquiry from Md., June, 1914.*)

Not protestable for non-acceptance

1025. May a postdated check be protested for non-acceptance? *Opinion:* A postdated check is not presentable until the day of its date arrives and if presented before such date, it cannot be protested for non-acceptance. (*Inquiry from Okla., Oct., 1912, Jl.*)

Protest at maturity

1026. After the day of its date arrives is a postdated check protestable for non-payment? *Opinion:* Such check is protestable the same as an ordinary check. (*Inquiry from Mich., Oct., 1911, Jl.*)

Set off of postdated check

1027. A bank purchased a postdated check drawn on another bank, from an indorser in due course before maturity. In due time it was returned marked "Payment stopped." The drawer had an account in the purchasing bank. *Opinion:* The bank purchasing the check can set off the drawer's deposit against his indebtedness upon the check. *Albert v. Hoffman*, 117 N. Y. S. 1043. *Blair v. Allen*, Fed. Cas. No. 1483, 3 Dill. 101. (*Inquiry from Utah, Oct., 1915, Jl.*)

Instrument payable at future date

1028. An instrument drawn on a check form, bearing date May 16, 1918, was presented at a bank and paid May 20th. In the body of the check form was written, "Due and payable Tuesday, May 21, 1918." *Opinion:* The instrument is not a postdated check but a bill of exchange drawn by a customer upon the bank, payable on May 21. The bank is governed by the words "due and payable Tuesday, May 21, 1918," contained in the body over the drawee's signature, and should not pay it before that time. The instrument is a bill of exchange and is subject to the rule governing bills of exchange which gives the holder the right to present for acceptance and protest for non-acceptance at any time after he receives the instrument and before its maturity. *Neg. Inst. A., Sec. 185 (Comsr's. dft.). Nat. Park Bk. v. Saitta*, 127 App. Div. (N. Y.) 624. *Lawson v. Richards*, 6 Phila. Rep. 479. (*Inquiry from Ark., June, 1918, Jl.*)

CLEARING HOUSES

Incorporation

1029. Is it legal for banks to incorporate as a clearing house? *Opinion:* Very likely it would be held that there is sufficient incidental power in a national or state bank to become an incorporator or member of a clearing house corporation, assuming that the general corporation laws of the state are sufficiently broad to permit the organization of corporations without capital stock for such purposes; but the functions of the corporation thus formed, would have to be limited to such operations as would facilitate the legitimate business of the banks in the clearing of checks, the making of examinations of members and such other operations as are now lawfully done by the unincorporated clearing house associations and could not extend to any business undertaken by or on behalf of the Associated banks, nor to anything which would be construed as a combination in violation of the Anti-Trust Law or against public policy. It has been held that it is within the power of a national bank to join with other banks in an unincorporated clearing house association. This being so, the conclusion is reasonable that there is also power to become a member of a corporate association, assuming there are state laws broad enough in scope to permit the formation of such a corporation. There are no direct decisions on the subject; although there is a statement in the American and English Encyclopedia of Law, without citation of authorities to the effect that clearing houses may be incorporated. (*Inquiry from Ga., Sept., 1912.*)

Note: By statute in Mississippi (Code Sec. 3628 et seq.) banks are prohibited from becoming members of unincorporated clearing house associations and are required to incorporate under the general corporation law and the charter must prohibit the banks from making and enforcing regulations upon certain enumerated subjects.

Right of majority to dissolve

1030. Have the majority of the members of an unincorporated clearing house association the right to dissolve the association and make provision for the division of the assets? *Opinion:* Concerning unincorporated, non-profit associations generally, it has been held that one who leaves

the association abandons his interest in the property and those who remain succeed to it. *Curtiss v. Hoyt*, 19 Conn. 154, 167; also that when a number of members secede from the association, even though they are a majority, they lose all interest in its property. *McLaughlin v. Wall*, 105 Pac. (Kan.) 33. *Alchenburgs v. Lodge*, 138 Ill. App. 204, 209; also that members have no right to sue for a dissolution and a distribution of assets. *Robertson v. Walker*, 3 Baxt. (Tenn.) 316, 318. In *Moore v. Hillsdale Co. Tel. Co.* 137 N. W. (Mich.) 241 the right of a majority of the members of an unincorporated association to dissolve it and transfer its interests to a corporation was denied. The court said: "It was not intended by those associating that the withdrawal of a member should work a dissolution * * *. It was intended and agreed that the internal affairs of the association should be controlled directly by its officers, ultimately by a majority of its members. There is no reason why these mutual and innocent agreements and understandings of members should not be given effect, and we find in them and in the business carried on, no foundation for the claim that less than all the members may, by withdrawal, or by an attempted transfer of interests to a third party, compel either a sale of the property of the association or a dissolution."

In *Peoples' Sav. Bank v. First Nat. Bank*, Superior Court of Washington for King County, Nov. 24, 1916, the members of a clearing house, in order to get rid of an objectionable member, planned to retire from the association and organize a new clearing house, excluding such member therefrom. His suit to enjoin them from so doing was denied. The court held no property rights were involved and the right to membership was not a property right. The court said: "To successfully restrain the dissolution of the Clearing House Association, plaintiff must show that its members are doing an unlawful act in dissolving their association. It must be conceded that any one member singly, could resign, even two or three might withdraw lawfully and they might thereafter organize a Clearing House Association of their own and prescribe such arbitrary and exclusive tests of membership as to exclude

many others. If a few can lawfully withdraw, then all can lawfully withdraw, or in other words, dissolve the Association."

From the law, so far as developed, it would appear that even a majority of members of a voluntary association cannot dissolve it, in the absence of organic agreement to that end, and make disposition of the assets, against the wishes of the minority but it is competent for them to withdraw from the association and form a new association of their own; and if such withdrawal is by virtually all of the membership, this practically works a dissolution. (*Inquiry from Wash., Sept., 1916.*)

Clearing-house collection charges and the anti-trust law

1031. The clearing house of New Orleans fixed a minimum scale of uniform charges for the collection of out-of-town items and provided for penalties for non-compliance therewith. A dissatisfied individual had the United District attorney at New Orleans lay the matter before the federal grand jury, contending that there had been a violation of the Sherman Anti-Trust Act. The District Attorney consented to be guided by the advice of the Attorney General of the United States, who advised that the prosecution be dropped. While the investigation was pending, the New Orleans Clearing House Association requested the general counsel of the American Bankers Association to formulate his opinion and forward it to the Attorney General. *Opinion:* A contention that the out-of-town rules of the New York Clearing House, which in their essential features are the same as those of the New Orleans Clearing House, were in violation of the Sherman Act was made successively to Attorneys-Generals Knox, Moody, and Bonaparte, with a request that proceedings be instituted for a restraining order, but such contention was not deemed worthy of affirmative action. Apparently the Department of Justice considered that the decision of the United States Supreme Court in the Live Stock cases (*Hopkins v. U. S. 171 U. S. 578; Anderson v. U. S., 171 U. S. 604*) demonstrated that the rules did not violate the act. Those cases held that the adoption by the Kansas City Live Stock Exchange of a rule fixing minimum rates of commission to be charged for selling live stock did not violate the act as it had only an indirect relation to interstate commerce. The court said: "The contract

condemned by the statute is one whose direct and immediate effect is a restraint upon that kind of commerce which is interstate." The distinction made in the Hopkins case between agreements fixing minimum charges for facilities or services in connection with interstate commerce which relate to or affect such commerce only indirectly and are not in restraint thereof and agreements whose direct and immediate effect is to restrain interstate commerce, is recognized by the Supreme Court in all the subsequent cases under the Sherman Act. *Montague v. Lowry*, 193 U. S. 38. *Northern Securities Case*, 193 U. S. 197. *Field v. Barber Asphalt Paving Co.*, 194 U. S. 618. *Swift v. U. S.* 196 U. S. 375. *Loewe v. Lawlor*, 208 U. S. 274. The subject of the agreement here is much more remote than in the Hopkins case. It is not a charge for service in selling an article of commerce—which charge itself has only an indirect relation to commerce—but a charge for collecting payment of negotiable instruments, which by decision of the supreme court of the United States, equally with contract of insurance, are not subjects of commerce nor transactions of commerce, but at most mere instrumentalities or incidents thereof. See *Nathan v. Louisiana*, 8 How. 73, *Paul v. Virginia*, 8 Wall. 168; *Hoopes v. California*, 155 U. S. 648. The case is not within the Federal Anti-Trust Law. (*Inquiry from Texas, Feb., 1911, Jl.*)

Collection charges as violation of anti-trust laws, state and federal

Effect of incorporation

1032. Is an agreement between the members of a clearing house regarding exchange or interest charges a violation of the anti-trust laws? What effect would the incorporation of the association have? *Opinion:* The federal Anti-Trust Law would not be violated. The Texas Anti-Trust Law (*White's Penal Code Tex. [1916] Chap. 7, art. 976*) provides in part, "That a trust is a combination of capital, skill or acts by two or more persons, firms, corporations or associations of persons, or either two or more of them for either, any, or all of the following purposes: 1. To create or which may tend to create or carry out restriction in trade or commerce or aids to commerce, or to create or carry out restriction in the free pursuit of any business authorized or permitted by the laws of this state." The courts have not passed upon

the legality of such an agreement as that in question.

The question whether the banks could escape the prohibition of anti-trust laws by incorporation has not come before the courts. The Mississippi statute (Chap. 124, Laws of 1914, Section 65) requires clearing houses to incorporate and also requires that the charter prohibit the enforcing of rules fixing fees for collections, rates of discount or interest on loans or deposits and rates of exchange.

Probably if the fixing of uniform charges by agreement of members of an unincorporated clearing house would violate anti-trust laws, the same charges provided by an incorporated clearing house would be held a like violation. See Attorney-General v. A. Booth & Co., 106 N. W. 868. (*Inquiry from Tex., April, 1917.*)

Inter-city clearing-house collection charges agreement

1033. Is it a violation of the Sherman Anti-Trust Law for the clearing houses of different cities to enter into an agreement, with penalties for non-compliance, that their members will maintain fixed uniform charges for the collection of out-of-town checks? *Opinion:* An agreement among banks of a clearing house, or even among clearing houses of different cities, fixing reasonable uniform charges for making collections, does not violate the Anti-Trust Act. In all the cases down to the very latest, the case of Hopkins v. United States, 171 U. S. 578 has been recognized and re-affirmed. That case held that the adoption by the Kansas City Live Stock Exchange of a rule fixing minimum rates of commission to be charged for selling live stock did not violate the Anti-Trust Act, as it has only an indirect relation to interstate commerce. Standard Oil Co. v. United States, 221 U. S. 1, reaffirms the principle that contracts which have only an indirect relation to interstate commerce are not within the purview of the Sherman Act. In view of the recent enactment of the Federal Reserve Act under which a clearing system will be established, and charges fixed by the Federal Reserve Board, the question may not be of as much importance as formerly. (*Inquiry from Va., Jan., 1914.*)

Uniform interest rates as violation of anti-trust law

1034. Does a rule of a clearing house providing uniform interest rates to be ob-

served by all members violate the Sherman Anti-Trust Act? *Opinion:* The Sherman Anti-Trust Act is not violated. The leading authority on the subject is Hopkins v. United States, 171 U. S. 578, in which the Kansas City Live Stock Exchange adopted rules with penalties for violation, fixing minimum rates of commission to be charged for selling live stock. It was held that such charges were not in violation of the Sherman Anti-Trust Act, as they had only an indirect relation to interstate commerce and were not a direct restraint upon such commerce. Under the principles of this case, which have been recognized in subsequent decisions of the supreme court, an agreement between clearing house members fixing uniform rates of interest is not in violation of the Sherman Act. (*Inquiry from N. Y., Feb., 1918.*)

Inter-city agreement for maximum interest rates

1035. Would the Sherman Anti-Trust Law be violated by an agreement between banks in various clearing house cities in different states as to maximum interest rates on deposits? *Opinion:* The Sherman Act (Act of July 2, 1890) provides: "Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal". What is made unlawful and punishable by this Act is the restraint, monopoly or attempted monopoly "of trade or commerce, among the several states or with foreign nations." The restraint must be direct and not merely incidental, and also undue, that is, unreasonable. U. S. v. Keystone Watch Case Co., 218 Fed. 502; Standard Oil Co. v. U. S., 221 U. S. 1. The case bearing the nearest analogy to the clearing house agreement is Hopkins v. United States, 171 U. S. 578 considered in Opinion No. 1031. The Hopkins case was quoted with approval in the Standard Oil case supra.

Even assuming that the depositors of money are engaged in interstate commerce, the agreement would at most only indirectly affect such commerce and possibly enhance the expense to those engaged in the business. Such an agreement is too remote from interstate commerce to fall within the prohibition of the Federal Anti-Trust Act as interpreted by the Supreme Court. (*Inquiry from Va., June, 1916.*)

Penalty for violation of maximum rate of interest rule

1036. Has a clearing house association the right to enforce a fine for violation of a clearing house rule with respect to rates of interest on time deposits? *Opinion:* The question of the right of a clearing house to enforce a fine or penalty against one of its members for violation of a rule prescribing a rate of interest for deposits or uniform charges for collections, has never been considered or decided by any of the higher courts in any of the states, not by any of the federal courts. The enforcement of such a penalty would not violate the Federal Anti-Trust Law. See Opinion No. 1031 involving the New Orleans Clearing House rules, and Opinion No. 1033 involving agreements between clearing houses of different cities as to uniform charges for the collection of out-of-town checks.

There are cases to the effect that the rules adopted by the members of a clearing house are in the nature of contracts between and binding upon members, but all these cases relate to some application of such rules with respect to the primary function of clearing checks. There is no case which passes upon the validity and enforceability of such rules as compel uniform interest and exchange charges.

A member might contend that the rule was against public policy, unreasonable, and void. Certain analagous cases bear on this contention. Under the by-laws of building and loan associations fines imposed upon stockholders for default in payment have been upheld when reasonable in amount and equitable in application. *Roberts v. American Building & Loan Association*, 36 S. W. (Ark.) 1085. Although *Vierling v. Mechanics and Traders Savings, Loan & Building Association*, 53 N. E. (Ill.) 979 holds that a fine of ten cents a share for failure to pay a monthly installment of ten dollars is unreasonable and will not be enforced, a majority of the cases are inconsistent with this ruling and in accord with the *Roberts* case. See, for example, *Iowa Savings & Loan Association v. Heidt*, 77 N. W. (Ia.) 1050. *Leahy v. Mooney*, 81 N. Y. Supp. 360, 39 Misc. 829 indicates that an agreement between members of an unincorporated association imposing a reasonable fine upon any member who violates an agreed rule is valid and enforceable. (*Inquiry from Wash., Aug., 1916.*)

Uniform service charge for small accounts and for return of items not good

1037. Would it be in conflict with the Clayton or the Sherman law for a local bankers association to call on all its members to make a service charge of a particular amount on small accounts? What about a charge for checks returned not good? *Opinion:* An agreement for such a uniform service charge would not be a violation of either of the statutes mentioned. The leading authority on the subject is *Hopkins v. United States*, 171 U. S. 578, in which the Kansas City Live Stock Exchange adopted rules with penalties for violation, fixing maximum rates of commission to be charged for selling live stock. It was held that such charges were not in violation of the Sherman Anti-Trust Act, as they had only an indirect relation to interstate commerce and were not a direct restraint thereon. (*Inquiry from D. C., Feb., 1918.*)

Inter-city agreement of members to purchase notes through each other rather than through note-brokers

1038. Would the Sherman Anti-Trust Law be violated by an agreement between banks in various clearing house cities in different states for the purchase of paper through each other rather than through note brokers? The bank asking advice states that there is now ruinous competition between banks and note-brokers for paper; that the banks through the large purchases of paper are increasing the note-brokers' business at the expense of the business of the banks themselves; and that some adjustment of this situation must be made if the banks are to continue earning reasonable profits for their stockholders. *Opinion:* There is more question as to the legality of such an agreement than as to one respecting the rate of interest on deposits. Commercial paper originating in one state and sold in another would very likely now be held a subject of interstate commerce. In *Bracey v. Drast*, 218 Fed. 482, the court said. "We do not think it can be longer questioned that stocks, bonds, debentures and other securities are subject-matters of interstate commerce," citing a long list of supporting authorities. If this be true, the question is whether the agreement is an undue or unreasonable restraint of trade or commerce, as to which there are no judicial precedents. So far as commodities are con-

cerned, *U. S. v. Southern Wholesale Grocers Ass'n.*, 207 Fed. 434, held that a contract between many engaged in the same business, to refrain from selling to an individual or a class violated the act. *Standard Sanitary Mfg. Co. v. U. S.* 226 U. S. 20, held that agreements, embracing 85% of the manufacturers and 90% of the jobbers in enameled iron ware which provided for the regulating of prices, sales only to jobbers in the combination, and prohibition of purchases from manufacturers not in the combination violate the act. It would seem that a condition of "ruinous competition," such as that described in the case in question might be regulated by the suggested agreement without violating the Anti-Trust Act. Such an agreement would probably be regarded as a legitimate arrangement for self-protection and not unreasonable. Unless it would constitute an unreasonable restraint of trade it would not violate the act. (*Inquiry from Va., June, 1916.*)

Pledge of securities to secure draft in settlement of debtor balances

1039. The suggestion is made that clearing house settlements be made by drafts on Reserve City banks. To meet the danger that the drafts should not be good in the case of the failure of a bank it is further suggested that each bank deposit with the clearing house association, securities sufficiently large to protect such drafts. Is such a deposit legal or would this constitute a preference so that the securities would have to be returned to the general funds of the insolvent bank? *Opinion:* In the absence of a statute to the contrary such a deposit would be legal and would not constitute a preference. So far as national banks are concerned, the National Bank Act (Rev. Stat. Sec. 5242) provides in effect that all transfers of securities after the commission of an act of insolvency or in contemplation thereof with a view to the preference of one creditor to another, shall be void. But this does not make invalid a pledge of securities by a going concern to secure its indebtedness. Rev. Stat. Sec. 5236 provides for ratable dividends to creditors of insolvent national banks; but it has been held that a secured creditor of an insolvent national bank may prove and receive dividends upon the face of his claim as it stood at the time of the declaration of insolvency, without crediting collaterals held by him, subject always to the proviso that dividends must cease when from them and

the collaterals realized the claim has been paid in full. *Merrill v. National Bank of Jacksonville*, 173 U. S. 131. The contemplated pledge of assets to secure drafts in payment of debtor balances, made at a time when the bank was a going concern and not in contemplation of insolvency, would be valid and not preferential. *Philler v. Patterson*, 168 Pa. 468 (involving a national bank) (*Inquiry from Pa., Nov., 1920.*)

Modification of rule by custom

1040. Under the rules of a clearing house "not good" checks presented through the clearing house must be adjusted directly between the banks before two o'clock. In the case of a suburban institution, this method of adjustment proved inconvenient or impracticable, and instead of it sending "not good" checks directly back to the presenter banks, located in town, and they in turn, sending "not good" checks directly back to it before two P. M. on the day of presentment, under the clearing house rule, the custom was adopted of returning checks presented by, and drawn upon, the bank, through the following day's clearing. Does this constitute a waiver of the clearing house rule? *Opinion:* The banks are bound by the custom as a modification of the written constitution. A written contract (the clearing house rules constitute an agreement binding the members) may be modified by a parol agreement founded on a sufficient consideration. *Beatty v. Larzelere*, 194 Pa. St. 605, *Whitehill v. Schwartz*, 27 Pa. Super. Ct. 526. Where the parties mutually agree to a subsequent modification of their contract, the promise of each is supported by a sufficient consideration. *Thomason v. Dill*, 30 Ala. 444. In Pennsylvania a written contract may be modified by parol, *Chalfant v. Williams*, 35 Pa. St. 212. Where the suburban bank has acted in accordance with the custom and not returned a "not good" check until the day following its presentation, court of equity would estop the other banks in the clearing house from urging the rule to the prejudice of the suburban bank, in view of their conduct and custom for a long number of years in modification thereof. (*Inquiry from Pa., Feb., 1917.*)

Articles of association

1041. Note.—The following has been prepared by General Counsel American Bankers Association as a general form of

Articles of Association to be used in the organization of clearing houses in the smaller cities and towns. Details therein may, of course, be changed to suit local conditions. Before framing by-laws, it is recommended that new Associations operate, at first, under temporary rules, until experience indicates the particular form of by-laws that may be required:

The undersigned, banks of..... do hereby associate together as a clearing house for the purpose of effecting at one place, the daily exchange of checks between the several members and of settling balances with each other (and also of providing such safeguards in their intercourse with each other and the public at large as may be desirable) and agree to be governed by the following articles of association:

1 The name of this Association shall be the.....Clearing House Association.

2. The officers shall be a president, vice-president, secretary and treasurer, who shall be elected by ballot on the organization of the Association and annually thereafter on the second Monday in January at (fix hour), or failing a meeting at that time, at a special meeting thereafter called by the president for the purpose and shall hold office until their successors are elected.

3. The officers shall constitute an executive committee to arrange for the place and manner of the exchanges and the details of the same, and to enforce the by-laws or rules of the Association. They shall assess the cost of the working of the Association upon the members in proportion to capital and surplus (or according to total resources or total clearings). The treasurer shall make a report of receipts and expenditures at the end of each fiscal year.

4. The president shall call meetings of the Association whenever in his opinion its interests may require or whenever requested so to do by the executive committee, or upon request of any two members, and at all meetings each member shall be entitled to one vote. There shall be no quorum unless a majority of members are present by duly authorized representatives.

5. The secretary (acting as manager) shall have immediate charge of the business of the clearing house and his decisions concerning questions of practice and details at the clearing house shall rule until modified by the executive committee.

6. The hour for making exchanges shall be eleven o'clock a.m. of each business day, when the settling clerks from all of the

associated banks shall report with their respective demands, separately made out against each bank in detail and the totals summed up. The work of clearing shall not be delayed longer than five minutes after eleven a. m. on account of the failure of any bank to be represented at that time. At twelve o'clock the settling clerks shall return for settlement, when the manager shall issue his checks or warrants upon the debtor banks in favor of creditor banks for the balances, which checks shall immediately be presented, and on presentation be settled by the debtors to the satisfaction of the creditors in whose hands only they are available.

7. In case of failure to respond promptly to the checks of the manager on the part of any member of the Association, they shall be immediately returned to the manager, who shall call upon the other members to make up the sum for which payment has been refused in proportion to the amount of checks upon the defaulting member sent into the clearing house at the preceding settlement, which sums so furnished shall constitute a claim in the hands of the responding members and all checks received from the clearing house by the defaulting member shall be delivered, if required, to the members owning the same without mutilation. The agency of the clearing house in the matter, it is understood, is only as trustee and in no case is the Association to be held responsible for any loss that may occur.

8. Errors in the exchanges and claims arising from return of checks or from any other cause are to be adjusted directly between the members who are parties to the same and not through the clearing house.

9. All checks in the exchanges, returned as "not good" or "mis-sent" shall be returned by two p. m. directly to the bank from whom received and said bank shall immediately refund to the bank returning the same, the amount which it had received through the clearing house settlement therefor. If not returned by two p. m. the responsibility of the bank which sent said checks through the exchanges shall cease.

10. These articles of association shall become binding upon the respective members from the time they are signed by each respectively, provided that at the time of such signature there shall be deposited with the secretary a properly certified copy of a resolution of the board of directors of an incorporated member, or a certificate of assent of an unincorporated member authorizing the signing of said articles. New

members may be admitted to the Association at any meeting by a two-thirds vote of all the members and these articles shall become binding on such new members when signed and assented to as above provided.

11. Amendments to these articles of association may be made at any meeting by vote of a majority of all the members. Notice of proposed amendments shall be given in writing to each member at least ten days previously.

12. By-laws governing the business of the

Association in the making of exchanges, providing for the imposition of fines and other details (and also fixing exchange and collection charges and providing for examination of members) may be adopted at any meeting of the Association by vote of a majority of all the members and may be amended by like vote. Notice of the proposed adoption of by-laws or of proposed amendments thereto shall be given in writing to each member, at least ten days previously. (Sept., 1911.)

COLLECTION

Bank's obligation to undertake collection

Bank's obligation where return postage not enclosed

1042. Can a bank be held liable in any way for not presenting and reporting on a sight draft mailed to it for collection when no stamped envelope is enclosed for return of report? *Opinion:* In the absence of contract or agreement, express or implied,—or controlling usage, a bank which receives paper for collection is under no obligation to accept the agency. But if the bank is unwilling to undertake the collection “the duty ought to be declined.” *Bank of Washington v. Triplett*, 1 Pet. (U. S.) 37. Such declination, it would seem, should be by an immediate return of the paper; but where return postage is not forwarded, the bank would probably incur no liability in failing to return same. (*Inquiry from Ill., July, 1916*)

Bank's obligation where no fee enclosed

1043. We receive drafts from firms quite frequently having no fee enclosed. Do we take any chance in throwing them in the waste basket? We always return a draft received from a bank even though no fee is enclosed but do not care even to waste as small a thing as a stamp on some firms. If the drafts were paid we could collect a fee, but when not paid, what should we do? The firms ignore our letter when we return the unpaid draft and request a fee, small though it be, for handling. *Opinion:* A bank which receives a draft for collection through the mail is under no obligation to accept the agency in the absence of an agreement express or implied or controlling usage. But its duty in such case is to promptly decline the agency by returning the paper. But where return postage is not forwarded there

would probably be no liability in failing to return same. The point has never come before the courts for decision. (*Inquiry from Tenn., May, 1921.*)

Notice to remitter that draft held awaiting fee

1044. Does a bank incur any legal liability when a sight draft drawn on a local business firm or individual, with protest waived, is received for collection from another firm, and the bank does not enter it for collection or notify the drawee, or present it, but notifies the remitter that it will be held awaiting an advance fee of fifteen cents to cover cost of entering, presenting or notifying and returning? *Opinion:* Under such circumstances a bank is within its rights and does not incur legal liability by holding the draft and notifying the remitter that it will be held awaiting the advance payment of fifteen cents to cover cost of entering, presenting or notifying and returning. Such a draft is merely a method adopted by a creditor of obtaining payment from his debtor through the services of a bank as collecting agent, and is not governed by the strict rules governing presentment, demand and notice which apply to drafts issued or negotiated for value. (*See Crouse v. First Nat. Bank of Penn Yan*, 137 N. Y. 383.) (*Inquiry from Ill., June, 1920, Jl.*)

Right to return draft and refuse collection

1045. A bank receives a draft on its customer payable “with exchange and collection”, and, as its customer refuses to pay these charges, it asks whether it can return the draft and refuse to handle same, or whether it must stand the expense itself. *Opinion:* A bank is not obliged to undertake a collection and can return a draft and refuse to handle same. But if it accepts the agency, its duty as collecting agent imme-

diately attaches. In the present case the bank, by presenting the draft to the customer, probably undertook the collection and its duty then would be to protest and promptly return. (*Inquiry from Mont., May, 1920.*)

Duty of drawee bank to act as collection agent

1046. Is a drawee bank bound by instructions contained in a letter inclosing checks for payment, sent direct to it by mail, or can it claim that it is not the agent of the sender, having received checks for payment, not for collection? *Opinion:* It is customary and lawful for the drawee bank to act in the dual capacity as agent of the drawer to make payment or refuse payment, and as agent of the holder to remit the funds, or make protest, or otherwise follow instructions. Having accepted the agency to collect, it would be liable the same as an independent agent who had no relation to the drawee. But in the absence of agreement, express or implied, or a controlling usage, a bank may decline to undertake a collection and return the paper. Where a check is forwarded by mail direct to the drawee and the bank does not care to assume the duties of collection agent, it might probably rely on its strict rights as payor, and notify the sender that it pays the check and holds the funds ready for delivery to him or his authorized agent at the counter of the bank. Just what the status and duty of the bank would be under such circumstances has never been decided. (*Inquiry from Wash., Jan., 1920.*)

Collection agencies generally

Power of express company to act

1047. May an express company engage in the practice of collecting checks? *Opinion:* It would seem that express companies have the power to engage in such practice; there is nothing in the ruling of the Interstate Commerce Commission of Jan. 5, 1909 to preclude them from so doing. (*Inquiry from Tenn., May, 1911, Jl.*)

When express company not a suitable agent

1048. A collecting bank forwards items by express for collection which it has been instructed to have protested in the event of non-payment; the bank knows that the express company does not undertake to have the items protested. *Opinion:* The company is not a suitable agent for collection of protestable items and the bank is negligent in selecting such agent. (*Inquiry from Ala., Oct., 1911, Jl.*)

Bank supervisor cannot compel bank to pay express company

1049. Can the Superintendent of Banks in the case of private or state banks or the Comptroller of the Currency in the case of national banks, compel such banks to pay items presented through express companies? *Opinion:* There is nothing in the law which would authorize the Superintendent of Banks or the Comptroller of the Currency to compel banks within their supervision to pay checks drawn on them when presented by express companies. Payment of a check is a matter of contract between bank and drawer, and a bank supervising officer has no mandatory power over the bank as to how it shall perform its contract obligations. Presentation by an express company is lawful unless the check itself excludes presentment by that agency. The bank could rightfully refuse to pay to an express company if a check was presented by it that had stamped on it "Not payable through an express company," but if there is no such restriction a check presented by an express company and refused payment would be protestable and the bank liable for damages. (*Inquiry from Ala., Dec., 1913.*)

Drawee as collection agent

1050. What is the legal status of a drawee bank to which a check is forwarded directly? *Opinion:* A drawee bank which receives a check for collection acts in a dual capacity, (1) as agent of the drawer to pay or refuse payment, (2) as agent of the holder to collect and remit or to take the necessary steps upon dishonor to hold parties contingently liable. (*Inquiry from Wis., Mar., 1916, Jl.*)

Duty of drawee where depositor provides list of checks to be paid

1051. When a customer of a bank makes deposits he gives the bank a list of the checks he wishes paid, with instructions to pay no others. Is it proper for the bank to permit such a practice? One of such checks sent to the drawee bank for collection was not paid because not listed as a check to be paid. However, it was not protested, nor was it returned promptly. What is the liability of the drawee bank? *Opinion:* Where a bank receives a deposit with instructions to apply it only on certain specified checks, it must obey such instructions if it receives the deposit at all. *Judy v. Farmers & Traders Bank*, 81 Mo. 404; *Myers v. Twelfth Ward Bank*, 58 N. Y. Supp. 1065, *Dolph v. Cross*,

133 N. W. (Iowa) 669. However, the practice seems unbusinesslike and the bank should insist on its discontinuance or the closing of the account. The following considerations apply to the relation between the holder of the check refused payment and the bank: were it presented by an independent agent, the sole function of the bank would be to refuse payment, but in the case stated it was forwarded by mail and the drawee bank became an agent of the holder. As such agent it is its duty to present the check for payment and its duty as drawee is to pay the check if the drawee has a sufficient deposit. *First Nat. Bk. v. First Nat. Bk.*, 154 S. W. (Tenn.) 965. Where, as here, there is no deposit applicable for the payment of the check, the collecting bank must give notice of dishonor to its principal promptly (*Jefferson County Sav. Bank v. Hendrix*, 39 So. (Ala.) 295 and protest for non-payment where this is required to preserve the rights of the owner against parties to the check or where it has been instructed to protest. *Chapman v. McCrear*, 63 Ind. 360; *McBride v. Ill. Nat. Bk.*, 121 N. Y. Supp. 1041. Failure of duty renders the bank liable for any resulting loss.

The decision in *Wisner v. First Nat. Bank*, 68 Atl. (Pa.) 955, that the provision of the Negotiable Instruments Act that "Where a drawee to whom a bill is delivered for acceptance...refuses within 24 hours...to return the bill accepted or non-accepted to the holder, he will be deemed to have accepted the same" applied to checks, and that a failure to return a check within 24 hours was an acceptance, was nullified by the amendment of April 27, 1909, providing that the mere retention of the bill by the drawee, unless its return has been demanded, will not amount to an acceptance and that the above quoted provision "shall not apply to checks." Hence, there was no acceptance in the case submitted, but the drawee bank would be liable for any damage resulting from its failure to protest and return the check promptly. (*Inquiry from Pa., June, 1921, Jl.*)

Is mailing to drawee a demand of payment or entrustment for collection?

1052. A draft drawn in Iowa on an Iowa bank was sent by a bank in a neighboring state to drawee for collection and there being insufficient funds to the credit of the drawer the latter bank asks if it can legally hold the item and protest on the

third day. *Opinion:* The Iowa law (Supp. Code Iowa 1913, Sec. 3060a 198) provides that demand made on any one of the three days following the day of maturity shall be as effectual as though made on the day on which demand may be made under the provision of the Act. There has been some difference of judicial view whether the drawee is to be regarded as collecting agent of the sender or whether the sending by mail constitutes in itself a demand of payment of the drawee; if the latter, then the draft would have to be protested on the day received, but if the drawee is to be deemed a collecting agent, to collect the draft of itself, then the receiving through the mail would not be a demand, but simply an entrustment for collection, and the collecting agent might hold for the three following days and then protest. (*Inquiry from Iowa, Oct., 1915.*)

Necessity of bank license at place where collection made

1053. Has an out-of-town bank which has no license to do business at the place where the drawee bank is situated a right to send a personal representative to collect checks drawn on latter? *Opinion:* For the purpose of collecting checks a license is not required as collection is not exclusively a banking function. Banks have the power to act as agents in making collections as an incidental branch of their business, but it would not be held that an individual would have to take out a license in order to qualify himself to demand payment of a check. It is perfectly competent for a personal representative of a bank to present items for payment under the conditions stated. (*Inquiry from N. C., Dec., 1913.*)

Restriction in check of channel of collection

"Not payable through any post office, express company or federal reserve bank"

1054. Where checks have stamped across their face: "This check is not payable through any post office, express company or federal reserve bank" may the bank refuse payment when they are presented across the counter by an express company or a federal reserve bank? *Opinion:* The depositors have the legal right to so stamp their checks and the bank may refuse payment of checks so stamped when presented across the counter by a postmaster, an express company or a federal reserve bank. (*Inquiry from La., Oct., 1919.*)

"Not payable through express company"

1055. Has a drawer a right to insert words in his check restricting the collection through specified channels, as, for example, "Not valid if paid through the Y Express Company?" *Opinion:* He has such a right. *Farmers Bk. v. Johnson*, 68 S. E. (Ga.) 85. *Commercial Nat. Bk. of Charlotte v. First Nat. Bk. of Gastonia*, 118 N. C. 783. (*Inquiry from Tenn.*, May, 1911, *Jl.*)

"Not payable through express company or postmaster"

1056. Does the stamp, "Not payable through any express company or postmaster" affect the negotiability of checks? May the bank refuse payment when checks are presented by such excluded agents? *Opinion:* The decisions on the subject are not numerous, but such as exist are to the effect that a check upon which the drawer has stamped "Not payable through an express company" is valid and negotiable; the addition, "nor to a postmaster," would be valid equally, and the bank can legally refuse to pay either a postmaster or express agent. (*Inquiry from S. D.*, Sept., 1916, *Jl.*, and Jan., 1918, *Jl.*)

1057. Does the placing of the words, "not payable through an express company or post-office" affect its negotiability? If presented by either of these agents may payment be refused? If so, is protest proper? *Opinion:* Where the drawer of a check stamps or writes thereon a provision "Not payable through an express company or post office," such provision is valid and does not affect the negotiability of the check but it is the duty of the drawee bank to obey the direction of the drawer and refuse to pay such a check so presented, and the bank so refusing to pay would not incur any liability to the drawer of the check or to the holder or owner by reason of such refusal nor could the check be lawfully protested upon refusal to pay for such reason,—on the contrary, if protested under such circumstances the holder or owner causing protest would be subject to an action for damages at the suit of the drawer. (*Inquiry from Tex.*, See *A. B. A. Journals* May 1913, 521, Nov., 1913, 371, Sept., 1916, 234, May 1917, 902.)

"Payable through A. B. bank"

1058. May a bank have its customers stamp on their checks at the time of issue, "Payable through the A. B. Bank"? *Opin-*

ion: Such a provision is valid and does not destroy the negotiability of the check, and a check so drawn can be refused payment if presented through another channel. See *Journal* September 1916, pp. 234-235. *Farmers Bank of Nashville v. Johnson King & Co.*, 134 Ga. 486, 68 S. E. 85. (*Inquiry from Mich.*, Nov., 1916.)

Custom to ignore "payable through A. B. bank" invalid

1059. Is evidence admissible to show a custom to ignore the notation "payable through (specified bank)" on demand drafts with bill of lading attached, unless a special letter of instruction accompanies the draft? *Opinion:* Such a notation is a material part of the draft which can not be disregarded, and the legal effect of which can not be changed by custom. Evidence of custom is admissible to explain the meaning of a provision in a contract, but such evidence is not admissible to change the legal character of an instrument. A bank would be taking a risk in ignoring such direction. See *First Nat. Bank v. Taliaferro*, 72 Md. 164, 19 Atl. 364. *Farmers Bank of Nashville v. Johnson King & Co.*, 134 Ga. 486, 68 S. E. 85. *Commercial Nat. Bank v. First Nat. Bank*, 118 N. C. 783, 24 S. E. 524, 32 L. R. A. 712, 54 Am. St. Rep. 753. *Bartholomew v. First Nat. Bank*, 18 Wash. 683, 52 Pac. 239. (*Inquiry from Iowa*, Aug., 1915.)

"Payable at par through N. Y. Clearing House"

1060. Is a bank justified in placing upon its checks, "This check is payable at par through the collection department of the New York Clearing House?" *Opinion:* There appears to be no reason why it would not be proper for a bank to place upon its checks the clause suggested; the practice was common in New York a few years ago and there did not appear to be any difficulty attending the payment of checks so drawn. At the same time, the imprinting of such clause might possibly give rise to certain questions. It has been held by the courts that where a check has imprinted thereon a clause making it payable through a designated agency or channel of collection, if the check is presented through another agency the bank is justified in refusing payment. If one of the checks bearing such clause was presented over the counter or by mail through another bank, the bank would not be obliged to pay it, and the refusal to pay might raise the question of the propriety of

such refusal, and if it paid and the drawer should for example stop payment, the question might come up whether payment other than through the New York Clearing House was valid and chargeable. (*Inquiry from N. J., Sept., 1915.*)

Title to paper in process of collection

Right to check against uncollected funds

1061. What is the law with respect to the title to, and the right to check against the credit of, paper in process of collection? *Opinion:* The majority of courts hold (some decisions contra) that upon credit to a depositor of a check indorsed in blank, title passes to the bank and the depositor has an immediate right to check against the credit unless there is a contrary understanding or agreement based on (1) general usage not to pay against uncollected funds, (2) notice printed in pass-book or on deposit slip, (3) special agreement with particular depositor, (4) the crediting of the deposit as paper and not as cash. *Taft v. Quinsigamond Nat. Bk.*, 172 Mass. 363. *Cragie v. Hadley*, 99 N. Y. 133. *St. Louis v. Johnston* 27 Fed. 243. (*Inquiry from Conn., Feb., 1910, Jl.*)

1062. A bank received for deposit a check of its customer drawn on an out-of-town point and credited him with the amount. Before the check was paid, the customer demanded certification of a check against his deposit. *Opinion:* The authorities are in conflict whether the giving of credit for a deposited check makes the bank debtor or agent for collection, but the relation is generally controlled by custom or agreement making bank an agent and not obliged to pay against uncollected funds. Certification as distinguished from payment is optional with bank and not obligatory. *Lauterman v. Travons*, 73 Ill., App. 670, aff'd 174, Ill. 459. (*Inquiry from Ill., July, 1915, Jl.*)

1063. A bank credited its depositor with a check on an out-of-town place, still uncollected. The depositor presented his check against said item for certification. *Opinion:* The bank is not obliged to certify the check in any event. As to payment against uncollected funds, under the law of Illinois, in the absence of a contrary agreement or usage, a bank becomes a debtor for deposited items immediately upon credit, but the custom there is quite universal not to pay checks against such credit prior to the collection of the items it represents. *Lauter-*

man v. Travons, 73 Ill. App. 670 aff'd in 174 Ill. 459. (*Inquiry from Ill., June, 1915, Jl.*)

1064. What is the legal right of a bank to decline payment of checks drawn against uncollected funds? *Opinion:* (1) Where the checks are credited as cash and received under unrestricted indorsement without any understanding that they are received for collection, so that the bank takes title, the depositor has the right to check against the credit before collection. In this case the bank takes title at the time of deposit and becomes immediately indebted to its depositor for the amount. (2) Where, however, checks are provisionally credited under an agreement that the bank takes them as agent for collection to draw against the provisional credit, before collection, that is a mere privilege and is not a right, so that, should the collectibility of a particular deposited check be questionable, the bank would have the right to refuse payment of a check drawn against the provisional credit of such deposit. (3) Where, however, the bank charges interest for the time the uncollected check is afloat, this would evidence, it seems, an agreement or understanding that the depositor had the right to the use of the money in the interim, as that is what he is paying for. (*Inquiry from Minn., Sept., 1920.*)

Status of agent bank allowing depositor to check against paper prior to collection

1065. In view of decision of the Supreme Court of Washington in *American Sav. Bank, etc., Co. v. Dennis*, [Wash. 1916] 156 Pac. 559, is it safe for a bank in that state to pay out money on checks deposited with it, where the accompanying deposit slip contains the clause: "Checks on this bank will be credited conditionally. If not found good at close of business, they will be charged back to depositors and latter notified of the fact?" *Opinion:* In the Washington decision referred to a check was deposited by the payee with a deposit slip agreeing that the bank acted only as agent. The check was credited to the payee's account and he was allowed to immediately check against it for nearly its entire amount. Payment having been stopped the bank sued drawer and payee, and while judgment (by default) was obtained against the payee, the case was dismissed as against the drawer on the ground that the bank was agent and not owner of the check, and that "allowing a depositor to check against such paper is a

mere gratuitous privilege." The court makes no reference to the N. I. Act which provides: "Where the holder has a lien on the instrument arising either from contract or by implication of law, he is deemed a holder for value to the extent of his lien." Certainly an agent who receives a check for collection and who advances value thereon prior to collection has a lien on the instrument to the extent of the amount advanced, and if this point were urged in a subsequent case, it might lead to a different decision. The case of *Jefferson Bank v. Merchants, etc., Co.* (Mo. 1911) 139 S. W. 545 is directly contrary to the Washington decision. There a bank allowed a depositor to draw against a check prior to collection without notice it had been given without consideration. In a suit against the drawer the court said: "We are not able to see how defendant could be entitled to submit to the jury the issue of whether or not the check was indorsed to the plaintiff for collection, because the evidence is uncontroverted that plaintiff allowed the Produce Company (depositor) to draw out the whole amount of the check so deposited, on the very day of said deposit and this constituted the plaintiff a purchaser of said check for value." Judgment was given against the drawer despite the fact that the deposit book contained an agreement that as to out-of-town checks, the bank would act only as agent.

Under the Washington decision, unless overturned, it would not be safe for a bank holding a check as agent for collection, to allow it to be checked against prior to collection because, if not paid and the payee was irresponsible, the bank would have no recourse against the drawer. (*Inquiry from Wash., Feb., 1917.*)

Provisional credit of b/l draft

1066. A customer shipped a car of corn and deposited with his bank a draft drawn on the consignee with bill of lading attached, with instructions that the same should be sent to the First National Bank of X, Kansas, for collection. The draft was collected and remitted for by the collecting bank's draft, which was dishonored because of insolvency. *Opinion:* The customer's bank because of the special instructions took the draft not as owner but as agent for collection and can charge the amount back to the customer. Although the customer received credit for the draft, it would be regarded merely as provisional, which could be revoked upon non-payment. The customer

would be entitled to payment of the proceeds in full by the receiver of the collecting bank. *Bk. v. Bk.*, 62 Kan. 788. *Peak v. Ellicott*, 30 Kans. 156. (*Inquiry from Kan., Apr., 1909, Jl.*)

Suit for negligence in collection of b/l draft

1067. A customer gave a bill of lading draft to A, a South Carolina bank, drawn on an Ohio concern. A forwarded draft to bank B in same state, for collection and credit. B returned draft over three months afterwards, with statement that it could get no word from bank C in Ohio to which draft had been sent for collection. Who should be the parties in a suit against bank C? *Opinion:* The owner of the draft should be made the party plaintiff. If A discounted the draft and became owner without right to return same to customer if unpaid, then A would be the party plaintiff. If on the other hand, A acted merely as agent for the customer, giving him a conditional credit subject to be charged back, the customer would be the party injured by the negligence of bank C and the one to bring suit. There might also be a liability of bank B for negligence in failing sooner to trace and report the item. (*Inquiry from S. C. June, 1918.*)

Collection of real estate paper

Real estate contracts

1068. What responsibility is incurred by a bank in accepting real estate contracts for collection of principal and interest? *Opinion:* So far as the collection of commercial paper is concerned, a bank is bound to exercise reasonable skill, care and diligence, and is liable for negligence in making the collection. But the question here relates to real estate contracts. It is not exactly clear as to nature of the contracts involved. Assuming they are installment notes secured by mortgage, so that it would be within the power of the bank to undertake such collections, it would seem that the bank's duty and responsibility would be governed by the same general rules, namely, the exercise of due care and diligence in making presentment of the paper at maturity and, assuming the notes were negotiable instruments, causing protest if not paid; also demanding payment on the due date of any installment of interest and notifying parties contingently liable of dishonor. (*Inquiry from Cal., Nov., 1920.*)

Mortgage notes

1069. (1) A mortgage note is left at a bank for collection. Does the mere collection of the note and the turning of the proceeds over to the owner make the bank liable for the securing of a release of the mortgage? (2) Where a bank takes a real estate contract for collection, and payments are collected in accordance with the terms of the contract, and turned over to the vendor or his assignee, does this undertaking of the bank make it liable for the carrying out of other provisions in the contract, in the absence of any specific agreement that the bank is to assume any such liability? *Opinion:* (1) An entry of satisfaction of a mortgage may be made by the person appearing of record to be entitled to receive and receipt for the debt, (*Summers v. Kilgus*, 14 Bush [Ky.] 449) or by his attorney in fact, or by a duly accredited agent, although his authority does not take the form of a power of attorney. (*Storch v. McCain*, 85 Cal. 304. *Douglass v. Douglass Bagging Co.*, 94 Mo. 226. *Rem. Codes & St. Wash.*, 1915, Ch. IV, Secs. 8798, 8799). The bank is only the agent for collection of the mortgage note, and while it might, as agent of the mortgagee or his assignee, execute a satisfaction piece of the mortgage, the Washington statute nowhere makes it the duty of an agent to perform such office; indeed, the mortgagor is given ample remedy against the mortgagee, or his assigns, in case of refusal to comply with a valid demand to execute such release. (2) The ordinary duty of a bank receiving a note, or other instrument embodying a contract, for collection extends no further than to make proper demand of payment, and some times in case of non-payment, to take such further action as necessary to secure and preserve the liability of all parties, by protest and notice as may be required by the law of the jurisdiction. (*Carpenter v. Nat. Shawmut Bank*, 187 Fed. 1). In the absence of a specific agreement, the bank becomes the agent of the payee to receive payment, and the agency extends no further. (*Cheney v. Libby*, 134 U. S. 68. *Ward v. Smith*, 7 Wall. [U. S.] 447. *Rudolph Wurlitzer Co. v. Rhea*, 147 Iowa 382, 126 N. W. 345. *Crow v. Mechanics, etc., Bank*, 12 La. Ann. 692. (*Inquiry from Wash.*, July, 1919.)

Clearance of checks in same town

Form of indorsement by collecting bank and time when check irrevocably paid

1070. (1) In the clearance of checks in

small towns where they have no clearing house, should the collecting bank indorse checks collected from other banks with their regular paid stamp (marked "Paid"), or with their regular indorsement stamp (marked "Pay to order of any bank, banker or trust company, previous indorsements guaranteed")? (2) As between clearing banks, when is a check considered paid, after which time it cannot be returned for want of insufficient funds. When the checks are delivered to the other bank and the money received in payment or when the item is charged to the account of the drawer by the drawer bank? *Opinion:* (1) It is proper for a bank presenting a check to the drawee to stamp the same "Paid," or "Received payment," with name and date, as an acknowledgment of the receipt of the money. (*First Nat. Bank v. City Nat. Bank*, 182 Mass. 130. *White v. Continental Nat. Bank*, 64 N. Y. 316. *Figuers v. Fly*, [Tenn.] 193 S. W. 117. See *Nat. Park Bank v. Seaboard Bank*, 114 N. Y. 28). (2) Where a representative of the drawee bank receives checks on his bank at the bank which holds such checks, and takes same back to the bank upon which drawn, and thereafter returns to the holder bank and delivers cash or exchange in settlement, such checks in the absence of agreement, are paid at the time of such delivery and the drawee bank cannot thereafter return such checks because of insufficient funds up to the time the checks are posted to the account of the drawer. (*Columbia-Knickerbocker Trust Co. v. Miller*, [N. Y.] 109 N. E. 179). (*Inquiry from Tex.*, Feb., 1920, JI.)

Circuitous routing of checks

Statutory rule in Florida, Georgia, Vermont and South Dakota

1071. What legal authority is there in Florida covering the question of indirect routing of out-of-town items taken for collection. *Opinion:* The legislature of Florida enacted a statute approved June 8, 1909, Chap. 5951, which provides in part "that when a check * * * is deposited in a bank for credit or for collection, it shall be considered due diligence on the part of the bank in the collection of any check * * * so deposited, to forward en route the same without delay in the usual commercial way in use according to the regular course of business of banks." This would seem to be a legislative sanction for a bank in Florida indirectly, routing items for collection through correspondents according to the

usual course of business of banks, so that, if loss resulted therefrom, the collecting bank would not be liable to its customer. (*Inquiry from Fla., Aug., 1915.*)

Note: Sec. 35, Georgia Banking Law, 1919, is similar to above. Sec. 2853 Gen. Laws Vermont provides: "If a person or bank owning a check or draft, or to whom it has been forwarded or with whom deposited for collection, forward the same in the usual course of business, it shall be considered due diligence in the collection of such check or draft, and the maker, indorser, guarantor or surety of the same shall be holden."

Sec. 1898, Rev. Code South Dakota, 1919, provides: In order to hold the maker, indorser, guarantor or surety of any check or draft deposited with or forwarded to any individual or bank for collection, or owned by any individual or bank, it shall be sufficient for said individual or bank to forward the same to their direct correspondents in the usual commercial way, according to the regular course of business; and the same shall be considered due diligence in the collection of such check or draft."

Routing through a correspondent

1072. A bank sends checks upon other banks in the county to its correspondent for collection instead of sending them directly to the various banks. By adopting this course there is a delay of about a day. Does such delay release the indorsers? *Opinion:* The sending of the checks to the bank's correspondents for presentment to the drawee at another place in the same county would not violate the requirement of reasonable time. In *Plover Sav. Bank v. Moodie*, 110 N. W. (Iowa) 29, a bank in Iowa received a check drawn upon a bank 45 miles distant and mailed it to its Des Moines correspondent for collection. The indorser pleaded delay by reason of the circuitous method, but he was held liable. The court held that the method of banks in presenting checks through a chain of correspondents is a matter of common knowledge and presentment according to that method is within a reasonable time. (*Inquiry from Ill., Aug., 1919.*)

Check on Kentucky, deposited in Illinois forwarded through New York

1073. A check drawn on a bank in Kentucky was deposited Dec. 17 by payee in Bank A in Illinois for collection. It was forwarded to New York City, thence to a Kentucky bank, then to another Kentucky

bank which sent it to drawee bank for payment Dec. 23. Payment was refused, and on Dec. 29 the drawee bank sent the check back for better indorsement. The drawer then had sufficient funds in bank to meet the check. Bank A having reindorsed the check, sent it back through the same channels. The latter bank again refused payment because in the meanwhile the drawer had failed and his funds had been attached. The payee seeks to hold Bank A responsible because of delay in unusual routing. *Opinion:* Many authorities in the past have held that a collecting bank is negligent where instead of sending check direct, it has forwarded it circuitously, and the drawer had failed or his funds had been attached in the interim between the time of possible and actual presentment and under these authorities the forwarding bank in Illinois would be responsible. But later authorities are recognizing and sanctioning as sufficient diligence, the custom of banks of circuitous presentment. In this case there seems to have been no delay connected with the forwarding or re-forwarding of the check, and assuming that this method of routing was customary the payee would probably have no case of negligence against Bank A. See *Wilson v. Carlinville Nat. Bank*, 187 Ill. 222, 58 N. E. 250, 52 L. R. A. 632. *Hilsinger v. Wickett*, 86 Ohio St. 286, 99 N. E. 305. (*Inquiry from Ill., March, 1913.*)

Sending through Federal Reserve Bank

1074. A bank has a correspondent in Des Moines, Iowa and asks if it will be liable for negligence if, instead of sending a check drawn on a bank in Des Moines to its correspondent there, it sends it to the Federal Reserve Bank for collection and credit? *Opinion:* The Supreme Court of Iowa has held that it is not negligence for a collecting bank, instead of sending a check direct to the town on which drawn for collection, to mail the same to its correspondent in a central city, because this is the usual custom of banks and will be held reasonable diligence. *Plover Savings Bank v. Moodie* 135 Iowa 685, 110 N. W. 29, 113 N. W. 476. Therefore, the bank in this case would not be held negligent if it forwarded checks drawn on Des Moines or other Iowa points to the Federal Reserve Bank of its district instead of to its regular correspondent in Des Moines. (*Inquiry from Iowa, April, 1920.*)

The rule in Minnesota

1075. What do the courts of Minnesota hold with respect to the indirect routing of

checks drawn on other points, deposited in Minnesota banks for collection. *Opinion:* The Supreme Court of Minnesota in *Richardson Grain Separator Co. v. East Hennepin State Bank* (1919) 174 N. W. (Minn.) 415, 416 holds that "When a bank receives an out-of-town check for collection, it must forward it for presentment by a reasonably direct and not a circuitous route. See 8 *Corpus Juris*, 542. *Gregg & Co. v. Beane*, 69 Vt. 22, 37 Atl. 248. *First Nat. Bank v. Miller*, 43 Neb. 791. 62 N. W. 195. The usual commercial route is sufficient. *Sublette Exchange Bank v. Fitzgerald*, 168 Ill. App. 240. When the holder of a check utilizes the agency of a bank to make his collections, he may expect the customary speed of banks and no more." (*Inquiry from Minn., Oct., 1919.*)

Forwarding through commercial center

1076. A city in southern Montana is a commercial center for points along two forks of a railroad running from there south into Wyoming. A bank at the southern end of one of these forks holds a check on a town along the same line, a little distance to the north. Instead of sending direct to the town of the drawee, the check is forwarded to the central clearing point in southern Montana. The question arises whether this is reasonable diligence. *Opinion:* Such circuitous method of presentment, although declared negligent in some early cases, has been held reasonable diligence under the Negotiable Instruments Act. A special state statute legalizing the customary mode of presentment through bank correspondents is desirable in the interest of certainty. *Gregg v. Beane*, 69 Vt. 22. *Givan v. Bk. of Alexandria*, 52 S. W. (Tenn.) 923. *Plover Sav. Bk. v. Moodie*, 135 Ia. 635. (*Inquiry from Mont., Sept., 1909, Jl.*)

Check on North Dakota forwarded from there through Chicago

1077. A check was deposited in a bank at B, fifteen miles distant from the drawee bank and forwarded to a bank at Chicago for collection; had the check been sent direct, a return would probably have been made within four days. The check was returned fifteen days after sent, marked "payment stopped." Can it be charged back to the customer's account? *Opinion:* The Negotiable Instruments Act of North Dakota requires that presentment for payment must be made within a reasonable time, and it has been held that a bank is authorized

to forward a check by a reasonably circuitous route. Forwarding the check to Chicago might be held justified, but it would seem that a delay of fifteen days before notice of dishonor was given to the indorser, the depositor, would be unreasonable and he probably would be held discharged by the delay, and the bank at B, therefore would be unable to charge the check back to his account. (See *A. B. A. Journal* September 1913). (*Inquiry from N. D., Nov., 1916.*)

Check on interior Pennsylvania forwarded through Pittsburgh

1078. Where a bank in Baltimore, holding for collection a check on an interior city in Pennsylvania, mails same to its Pittsburgh correspondent and the latter after making the collection defaults as to the proceeds, is the routing through Pittsburgh instead of direct to an agent in the city of the drawee negligent? *Opinion:* Such routing is not negligent. *First Nat. Bk. v. Miller*, 37 Neb. 500. *Gregg v. Beane*, 69 Vt. 22. *First Nat. Bk. of Grafton v. Buckhannon Bk.*, 80 Md. 475. *Plover Sav. Bk. v. Moodie*, 135 Ia. 635. *First Nat. Bk. v. Mackey*, 157 Ill. App. 484. (*Inquiry from Pa., Sept., 1913, Jl.*)

Check on South Dakota forwarded from there through Chicago

1079. A bank in South Dakota receives from the payee a check drawn on a bank eighteen miles distant. Instead of forwarding direct to a bank in the drawee's town, the collecting bank mails the check to its Chicago correspondent and it reaches the drawee by a circuitous route. Payment was refused and the notice of dishonor does not reach the payee until five days after the payee delivered the check. Did the collecting bank exercise due diligence? *Opinion:* Under the state statute which defines due diligence in making collections, the collecting bank did in this case exercise due diligence in adopting such method of presentment. The payee is responsible as indorser. *Givan v. Bk. of Alexandria*, 52 S. W. (Tenn.) 923. *Plover Sav. Bk. v. Moodie*, 135 Ia. 635. (*Inquiry from S. D., Sept., 1910, Jl.*)

Forwarding direct to drawee or payor

State statutes authorizing forwarding direct to payor

1080. Note: The American Bankers Association has drafted legislation in the

following form: "Any bank, banker or trust company, hereinafter called bank, organized under the laws of, or doing business in, this State, receiving for collection or deposit, any check, note or other negotiable instrument drawn upon or payable at any other bank, located in another city or town whether within or without this State, may forward such instrument for collection directly to the bank on which it is drawn or at which it is made payable and such method of forwarding direct to the payor, shall be deemed due diligence and the failure of such payor bank, because of its insolvency or other default, to account for the proceeds thereof, shall not render the forwarding bank liable therefor, provided, however, such forwarding bank shall have used due diligence in other respects in connection with the collection of such instrument." Such legislation has been adopted in

Alabama (1919).

Arkansas (1921) provides that bank having exercised reasonable care to select proper correspondent "negligence shall not be predicated upon the fact that it may have forwarded such instrument or account directly to the bank on which it is drawn or at or by which it is payable"

Georgia (1919).

Idaho (1921).

Illinois (1921).

Michigan (1919).

Minnesota (1919); statute limited to cases where drawee is only bank in place where located.

Missouri (1919).

Nebraska (1919).

Nevada (1919).

New Hampshire (1919)

New Jersey (1919).

New Mexico (1919).

North Carolina (1919)

Ohio (1919).

Oregon (1919).

South Dakota (1919).

A similar law was passed in Louisiana in 1916 and in Montana in 1917.

In the absence of statutory permission, the weight of American authority (a few cases contra) is that it is negligent for a collecting bank to send a check or other item direct to the drawee or payor and in case of loss, the collecting bank is liable; except where such method of forwarding has been authorized or instructed by the principal. The basis of the judicial rule is that the debtor is not a proper agent to entrust with his own obligation to collect from himself. But the custom to send direct

to payor outweighs judicial considerations, and statutes, as shown above, have been enacted to legalize the custom and overturn the judicial rule.

Tennessee bank liable for loss from direct presentment but administrator depositing check not liable

1081. A, as administrator of an estate, received from B his check certified by an Alabama bank, C, and deposited it in a Tennessee bank, D, which forwarded it directly to the drawee bank C, and that bank issued its New York draft in payment to D. Upon presentation payment was refused because of no funds, and in the meantime C failed. The inquiry is as to the liability of A to the estate. *Opinion:* In Tennessee it has been held improper and negligent for the collecting bank to forward a check directly to the payor bank, and the collecting bank is liable for any loss which results. *Winchester Milling Co. v. Bank of Winchester*, 120 Tenn. 225, 111 S. W. 248. A, the administrator, therefore, would have recourse upon bank D, and B, the drawer of the check, would be discharged as his own check after being certified, was taken up and paid by C which issued the New York exchange. Upon the question of the administration liability to the estate, he has simply employed the customary bank channels and, probably, is not responsible in case of loss. It has been held, for example, that an executor or administrator, instead of receiving payment, may in the exercise of good faith and due prudence, settle with the debtor by accepting other security or property. Even if A were unable to collect from bank D, he probably would not be held liable to the estate. *Hastings Estate*, 4 Pa. L. J. Rep. 471. (*Inquiry from Ala., April, 1917.*)

Collecting bank liable for loss from forwarding direct to drawee, unless authorized or permitted by statute

1082. A number of checks on bank A are forwarded by B to C and by C to D, in Arkansas, who forwards them direct to A for payment and they are charged to the accounts of the drawers. A is in the hands of bank examiner and does not remit. Bank B objects to being charged back with the amount of the checks unless returned properly protested. *Opinion:* Under the general rule, bank D would be responsible for forwarding the checks direct to the drawee, for loss resulting therefrom and could not charge the checks back to prior correspondents, unless it was authorized to send direct

or such method of forwarding has been sanctioned by statute. *Auten v. Bank*, 67 Ark. 243. (*Inquiry from Ark., March, 1920*)

Note: The legislature of Arkansas, in 1921 passed the law authorizing forwarding direct to payor but such statute, of course, is not retroactive.

Liability of Maryland bank forwarding direct to payor

1083. Bank A forwarded to its correspondent B in Pennsylvania, a check drawn on a North Carolina bank. B sent it to C, a Maryland bank, which advised B that the drawee bank, to which the check had been forwarded, had failed and had not remitted. B charged the amount of check to A's account, and the latter asks if it has not the right to look to C for the loss, and if B also would not have the same right. *Opinion:* The same rule has been held in Maryland as in Pennsylvania, that a depository bank is not liable for the defaults of correspondents, but merely undertakes to use due care in selecting a sub-agent, and if it exercises such care it is not responsible for the sub-agent's acts and defaults. *Citizens Bank of Baltimore v. Howell*, 8 Md. 530. *Farmers Nat. Bank v. Nelson*, 100 Atl. (Pa.) 136. Under the Maryland law, therefore, C is a sub-agent of A, and if it had used due care in sending the collection to another correspondent, it would not have been responsible. But having forwarded direct to the drawee, this was not due care under the rule of a majority of courts, and makes it responsible, and A would have the right to look directly to it for the loss. As A cannot hold B liable that bank would probably have no right of action against C. (*Inquiry from Conn., Feb., 1916.*)

Liability of Illinois bank for forwarding direct and delay in reporting non-payment

1084. Bank A sent to its correspondent B an item for collection and credit. In its two following monthly statements B credited A's account with it, but a month later reported inability to collect. Investigation showed that B had sent check direct to drawee, a private bank, which had charged the check to its customer but had failed to remit to B. Several years later B charged the item to A's account and A disclaims responsibility. *Opinion:* B should have promptly reported non-payment to A and would be liable in damages for its failure to do so. But B also forwarded the item direct to the drawee and the courts have many times held that a collecting bank is negligent

in so doing and is liable for any loss resulting. See opinion No. 1080. *Drovers Nat. Bank v. Anglo-American Co.*, 117 Ill. 222, 58 N. E. 250. B, therefore, is liable to A for the amount of the check and must look to the payor for recourse. *First Nat. Bank v. Whittier*, 221 Ill. 319, 77 N. E. 563. (*Inquiry from Ill., Sept., 1916.*)

Liability of Texas bank to drawer of check forwarded direct

1085. A person gave a bank his personal check on another bank, which the former handled for collection. The drawee bank in payment of the check forwarded to the collecting bank a draft payable to it. Payment was refused because the drawer bank had been closed. Has the drawer of the check a right of action against the collecting bank? *Opinion:* When the check was charged to the account of the drawer and the drawee's draft was forwarded, the check was paid and the drawer was discharged. *Smith Roofing & Contracting Co. v. Mitchell*, 45 S. E. (Ga.) 47. *Planters Mercantile Co. v. Armour Packing Co.*, 69 So. (Miss.) 293. *Pinkney v. Kanawha Valley Bank*, 69 S. E. (W. Va.) 1012. *Winchester Milling Co. v. Bank of Winchester*, 111 S. W. (Tenn.) 248. The Texas rule is that it is negligent for a collecting bank to mail a check directly to the drawee and that in case of loss the collecting bank is liable. *First Nat. Bank of Corsicana v. Bank*, 34 S. W. (Tex.) 458. A violation of this rule would make the bank liable in the absence of authorization by the drawer. The fact that the collection was undertaken for the drawer of the check, instead of the payee, would seem to make no difference in the application of this rule. (*Inquiry from Tex., March, 1921.*)

Texas bank liable for forwarding direct

1086. Is it negligence for a Texas collecting bank to forward a check directly to the drawee bank? *Opinion:* Such an act is negligent under the Texas law and if loss results the sending bank is liable. *Bk. v. Bk.*, 34 S. W. (Tex.) 458. (*Inquiry from La., July, 1909, Jl.*)

Colorado bank liable for forwarding direct

1086a. A Colorado bank forwarded a check direct to the drawee which failed and its remittance draft was dishonored. Can it charge the amount back to the correspondent from whom it received the check. *Opinion:* Under the rule in Colorado the collecting bank is liable. *German Nat.*

Bank v. Burns, 12 Colo. 539. (*Inquiry from Colo., Feb., 1921.*)

No statutory prohibition of forwarding direct to payor

1087. Is there a statute in any state which forbids making the drawee bank an agent for the collection of checks on itself? *Opinion:* There does not appear to be any such prohibitive statute; but the judicial rule adopted in a large number of states is that the collecting bank is negligent, if it forwards direct, and is liable for any resulting loss, unless such method of forwarding is authorized or instructed by the principal. Statutes legalizing the method of forwarding direct have now been passed, however, in a considerable number of states. (*Inquiry from Mass., April, 1920.*)

Mississippi bank liable for forwarding direct

1088. A bank sent a check received for collection direct to the drawee. The collecting bank received in payment the drawee's draft, which was protested because of the latter's failure. *Opinion:* Sending check direct to drawee is negligent and sending bank is liable for resultant loss. *Pickett v. Thomas J. Baird Inv. Co., 133 N. W. (N. D.) 1026.* (*Inquiry from Miss., April, 1914, Jl.*)

Pennsylvania bank liable for forwarding direct

1088. A Pennsylvania bank forwarded a check direct to the drawee whose remittance draft was dishonored. *Opinion:* In the absence of authority to send direct, the Pennsylvania bank is liable to its principal. Citing *Merchants Nat. Bk. v. Goodman, 129 Pa. 422. Wagner v. Crook, 167 Pa. 259.* (*Inquiry from Pa., Sept., 1913, Jl.*)

Correspondent liable for forwarding direct

1089. The payee of a check deposited it in a bank for collection and the bank mailed it to a correspondent, which latter bank mailed check directly to the drawee. After charging the amount to the drawer, the drawee failed without remitting to the correspondent. *Opinion:* The drawer is discharged; the payee is relieved from responsibility and the correspondent of the first bank is responsible because of mailing the check direct to the drawee. *Power v. Bk., 6 Mont. 251. Minneapolis Sash & Door Co. v. Metropolitan Bk., 76 Minn. 136. Bk. of Rocky Mt. v. Floyd, 142 N. C. 187.* (*Inquiry from Mont., Oct., 1911, Jl.*)

Liability of Virginia bank for forwarding direct

1090. A check was forwarded by bank A to drawee which received it and charged it to depositor's account and then drew a draft to the order of A which received it next day when drawee went into the hands of a receiver. Where does the liability rest? *Opinion:* While the courts of Virginia do not seem to have passed upon the question, the courts generally hold that it is negligent to forward checks directly to the drawee bank and that the forwarding bank is liable for any resulting loss. It would appear that bank A would be the loser from drawee's failure. See for example, *Pinkney v. Kanawha Valley Bank, 68 W. Va., 254, 69 S. E. 1012; American Nat. Bank v. Savannah Trust Co., 90 S. E. (N. C.) 302. Wagner v. Crook, 167 Pa. St. 259, 31 Atl. 576, 46 Am. St. 672.* (*Inquiry from Va., March, 1920.*)

Liability of Wisconsin bank forwarding savings pass-book direct to payor

1091. A Wisconsin bank accepted for collection over its counter a savings pass-book of an Oregon bank. This item was sent direct to the bank issuing the pass-book, which bank remitted its draft on a Chicago bank. This draft was never paid because the drawer bank was placed in the hands of the state superintendent of banks. What is the liability of the Wisconsin bank handling the item for collection? *Opinion:* The state of Wisconsin has not yet passed the law authorizing banks to send items direct to the payor bank; therefore the general rule operates that it is negligent for a collecting bank to mail an obligation direct to the payor and in case of loss the collecting bank is liable. (*Inquiry from Wis., Feb., 1921.*)

Forwarding direct to payor where only bank in place

States where custom not sanctioned and where sending to only bank justified

1092. Is it negligent for a collecting bank to mail a check directly to the drawee bank, which is the only bank in the place? *Opinion:* In a number of states it has been held that the fact that the drawee is the only bank in the place, and that it is customary in such case to mail to the drawee, does not remove the negligence in so sending. *Minneapolis etc. Co. v. Metropolitan Bank, 76 Minn. 336. Pinkney v. Kanawha Valley Bank, 68 W. Va. 254. Winchester Milling*

Co. v. Bank of Winchester, 120 Tenn. 225. On the other hand, some courts have held to the contrary; see *Wilson v. Carlinsville Bank*, 187 Ill. 222, 58 N. E. 250 (where there was a custom to send direct to the only bank in the place and the depositor knew of the custom) *Hillsinger v. Trickett*, 86 Ohio St. 286, 99 N. E. 305. *First Nat. Bank of Shreveport v. City Nat. Bank*, 106 Tex. 297, 166 S. W. 689. The courts of Mississippi do not seem to have passed upon the point, but because of the conflicting opinions of the courts of other states it would hardly be safe to send an item direct to the drawee even though the only bank in the place. If a bank should print on its deposit slip a clause by which the depositor would agree to sending items direct, this would probably protect it. (*Inquiry from Miss., June, 1914.*)

Note: The Shreveport Bank case has been followed in *Waggoner Bank & Trust Co. v. Gainer Co.* 213 S. W. (Tex.) 927. In *Wingfield v. Security Nat. Bank* 162 N. W. (S. Dak.) 309 it was held negligent to forward direct to the only bank in the place, but in 1919 the South Dakota legislature passed the A. B. A. Act authorizing forwarding direct. In Minnesota, the rule that it is negligent to send direct has been modified by statute, passed in 1919, authorizing such method where the payor is the only bank in the place.

Minnesota bank not liable for sending direct if payor only bank in place

1093. A bank owning a certificate of deposit indorsed before delivery by a person living in North Dakota sent it to its correspondent in Minnesota for collection, which sent it directly to the issuing bank in Montana. After a delay of several days the issuing bank issued a draft in payment, which was dishonored because of the closing of the doors of that bank. The certificate of deposit was not protested because of the issuance of the draft. (1) Is the indorser liable? (2) Is the Minnesota correspondent bank liable? *Opinion:* The indorser is not liable. Under the Negotiable Instruments Law (in force in every state of the Union except Georgia) an indorser before delivery is liable as an indorser, rather than as a joint maker, surety or guarantor. An indorser is discharged by payment, and even in case of non-payment his liability is conditioned upon due notice of dishonor. Presumably the certificate of deposit would be held paid by the action of the issuing bank. Winches-

ter Milling Co. v. Bank of Winchester, 111 S. W. (Tenn.) 248. However this may be, failure to give due notice of dishonor would discharge the indorser. (2) The rule of *Minneapolis Sash & Door Co. v. Metropolitan Bank*, 78 N. W. (Minn.) 980 that it is negligence to send an item direct to the payor bank, whether or not there is another bank of good standing in the place was limited by Laws Minn., (1919) c. 319 which authorizes forwarding direct where there is no other bank in the place where the payor bank is located. The liability of the Minnesota correspondent will therefore depend upon whether there was another bank in the place where the bank issuing the certificate was located. If there was, it will be liable, but if the issuing bank was the only bank in the place, the Minnesota collecting bank will not be responsible. (*Inquiry from Minn., June, 1921, Jl.*)

Sanctioned by custom in Texas

1094. A customer deposited for collection a check which was forwarded by mail by a correspondent bank in Dallas to the drawee bank, the only bank in the place. The drawee sent the Dallas bank its draft, but in the meantime failed. *Opinion:* Assuming a custom can be proved of sending a check to the drawee where the only bank in the place, the Texas courts will probably hold the Dallas bank free from negligence, and the customer would have to look solely to the assets of the drawee. *Schumacher v. Trent*, 44 S. W. (Tex.) 460. *First Nat. Bk. v. Quinby*, 131 S. W. (Tex.) 429. *First Nat. Bk. v. City Nat. Bk.*, 34 S. W. (Tex.) 458. *First Nat. Bk. of Memphis v. First Nat. Bk. of Clarendon*, 134 S. W. (Tex.) 831. *Merchants Nat. Bk. v. Dorchester*, 136 S. W. (Tex.) 551. (*Inquiry from Tex., July, 1913, Jl.*)

Note: This opinion is confirmed by *First Nat. Bank of Shreveport v. City Nat. Bank*, 166 S. W. (Tex.) 689, decided May, 1914. followed in *Waggoner Bank & Trust Co. v. Gamer Co.*, 213 S. W. (Tex.) 927. In this latter case the court said: "The Dallas correspondent, in keeping with its custom and having no reason to apprehend that by the means adopted the check would not be duly remitted for, sent it for collection to the drawee bank. It was the only bank at the place of payment. Under this condition the Gamer Company (payee) had no right to expect that a different means of collection would be used or to require a different method. The correspondent bank

was not guilty of negligence, under the circumstances, in sending the check for collection to the drawee bank."

When sanctioned by custom in Illinois

1095. Is it negligent for a collecting bank to forward checks directly to the drawee bank when it is the only bank in the place, so as to render it liable to its principal when the draft of the drawee bank is dishonored? *Opinion:* The sending bank seems to be protected when there is a long established custom to send direct to the only bank in the place where the drawee is located and the depositor knows of such custom. See opinion No. 1080. *Wilson v. Carlinville Nat. Bank*, 187 Ill. 222, 58 N. E. 250. Such custom, however, must be specially pleaded and proved or it will not avail. *First Nat. Bank v. Whittier*, 221 Ill. 219, 77 N. E. 563. Whether the bank would be protected if the depositor is ignorant of the custom is left uncertain. (*Inquiry from Ill., Aug., 1915, March, 1914, Jl.*)

Assent of depositor to forwarding direct to payor

Agreement or instruction to send direct to payor

1096. A Georgia bank uses the following form in acknowledging cash letters: "All items payable outside of, ... received by this bank for credit or collection, are taken at the sender's risk. Should returns sent by collection agents for such items be dishonored, the amount will be charged back to the bank or banker from which the items were received. This bank assumes no liability for neglect or default of collecting agents; nor for items lost in the mails, and hereby gives notice to that effect. When instructions to the contrary are not given, items may be sent to the bank upon which they are drawn, and when so sent, the above conditions are not waived or suspended." The same clause is printed on its deposit slip, and the inquiry is as to whether the bank would be held liable for negligence in forwarding items direct in view of such provision. *Opinion:* It has been held in certain cases that a bank can protect itself in sending direct by agreement with its customer. In *First Nat. Bank of Murfreesboro v. First Nat. Bank of Nashville*, 154 S. W. (Tenn., year 1913) 965 the court said: "It is shown in the proof that both the holder and the drawer of these checks agreed with the Nashville bank that remittance might be made directly to the

drawee, and they, of course, cannot now complain that such was done. So where a bank forwarded a certificate of deposit for collection to another bank saying 'We note you have a correspondent at Burr Oak,' the place of the issuing bank, and there was no other bank there, this was held equivalent to an instruction to forward to the payor and relieved the collecting bank." *First Nat. Bank v. Citizens Sav. Bank*, 123 Mich. 336. But in *Bank of Rocky Mount v. Floyd*, 142 N. C., 187, where forwarding direct to drawee was held negligent, the court held an agreement to send direct to payor would be invalid as it would relieve the bank of responsibility for its own negligence in not using due care in selecting a suitable sub-agent. The Georgia courts do not appear to have passed upon the point. In view, however, of the growing custom and necessity for sending items direct, the validity of such clauses would probably be upheld. The form of agreement stated is about as good as can be made, and all that the bank can do under the present conditions to protect itself. (*Inquiry from Ga., Feb., 1915.*)

1097. A bank submits a form of agreement to be signed by depositors, authorizing the collecting bank to mail checks direct to the drawee where there is only one bank in the place. The agreement is as follows:

"Astoria, Oregon.

To the First National Bank of Astoria:

Having deposited with you a check drawn by on at for \$, and there being no other bank in the said town to which you can send this check for collection, you are instructed to send it direct to the bank on which it is drawn, and I assume all responsibility for any failure on your part to receive full and final payment from the said bank, either by failure of said bank to make returns or by the return of a draft which you are unable to collect." *Opinion:* In view of the numerous decisions which hold sending to the drawee negligent, such agreement might possibly be held to contravene public policy as a stipulation by the bank to be relieved of its own negligence, but this would be an extreme position in view of the fact that some courts justify such method of collection and the agreement would probably be held valid. (*Inquiry from Ore., Sept., 1909, Jl.*)

Note: The Oregon legislature in 1919 passed a law providing that the forwarding of items direct to the payor shall be deemed due diligence.

Ratification of act of bank in sending check direct to drawee

1098. The bank with which a check was deposited for collection sent it directly to the drawee bank and received in return a check on another bank, which was dishonored because of the failure of the last named bank. The depository bank cancelled all indorsements on the check and delivered it to its depositor. Should the depository bank comply with the demand of the depositor that it indorse the dishonored check to him so as to give him title? *Opinion:* The bank which drew the draft on the failed bank would be responsible assuming it was duly charged, as drawer, and the collecting bank should comply with its depositor's request and indorse the draft over to him without recourse. Should any loss ultimately result because of the forwarding of the original check, direct to the drawee, the primary liability of the forwarding bank would be relieved by ratification of the depositor. In *Winchester Milling Co. v. Bank of Winchester*, 120 Tenn. 225, where the owner accepts return of the drawee's dishonored remittance draft, it is held he ratifies the negligent act of the collecting bank and cannot recover. So in *Hazlett v. Commercial Nat. Bank*, 132 Pa. 118, where the collecting bank notifies the owner that it holds the dishonored draft of the drawee, subject to his order, and the owner does not repudiate the collecting bank's action but replies instructing that the draft be held a few days and it will be paid, he condones the original negligence and cannot hold the collecting bank liable. (*Inquiry from Wash., Dec., 1914.*)

Liability or non-liability of collecting bank for default of correspondent

1099. Inquiries have been received at different times from many states as to whether a bank, receiving out of town paper as agent for collection, is liable for the defaults of its correspondents.

Where the correspondent is payor of the item to whom it has been forwarded direct, questions as to the liability of the collecting bank, based on the prevailing judicial view that the payor is not a suitable agent and that it is negligent to entrust the paper directly to such an agent, unless such entrustment is by instruction or agreement or controlling custom, or is authorized by statute, or is ratified, have been elsewhere grouped.

But the questions here referred to relate for

the most part to the default of a correspondent other than the payor and involve mainly the failure to remit or the remittance by a check or draft which is dishonored or some negligence of the correspondent resulting in loss. In most cases the defaults are caused by the insolvency of the correspondent, but in some they are due to the defalcations of its officers.

As these inquiries, which are numerous, present the same legal question whether or not a collecting bank is liable for the defaults of its correspondents, it has been thought best to make no digest of the specific inquiries but to group the substance of the replies as to the governing rule, according to the states. Upon the question stated, the courts of over thirty states are irreconcilably divided.

The courts in eighteen states have held that the collecting bank is responsible only for due care in the selection of a suitable correspondent or agent, who becomes the agent of the owner of the paper, and where due care is exercised and the collecting bank is not itself negligent in any particular, there is no liability for the default of the correspondent.

The courts in thirteen states and the supreme court of the United States have held, to the contrary, that the collecting bank undertakes to collect the paper and is an independent contractor, responsible for the acts and defaults of the agents whom it employs, unless by agreement it relieves itself from such liability.

In two of these thirteen states, Florida and Arkansas, the judicial rule has been changed by act of legislature; and in a third, Georgia, where the judicial rule was originally codified as a part of the Georgian Code, the legislature has recently changed the rule in favor of the "due care" theory. The "due care" rule is, therefore, now established in twenty-one states, in eighteen by the courts and in three by the legislatures, while only ten states hold to the rule that the collecting bank is liable for correspondents' defaults. In seventeen remaining states, however, and in the District of Columbia the rule is uncertain, except that the courts of the District would probably follow the federal rule.

Where there are a chain of correspondents in different states the liability of each bank is, of course, determined by the law of the state where the bank is located.

Collecting bank responsible only for due care in selection of suitable correspondent

The courts in the following states hold that the collecting bank is responsible only for due care in the selection of a suitable correspondent or agent, who becomes the agent of the owner of the paper and where due care is exercised and the collecting bank is not itself negligent in any particular, there is no liability for default of the correspondent.

Alabama, *Stones River Nat. Bank v. Lerman Mill Co.*, 63 So. (Ala.) 776. *Eufaula Grocery Co. v. Missouri Nat. Bank*, 24 So. (Ala.) 390.

California, *Davis v. First Nat. Bank of Fresno*, 118 Cal. 600, 50 Pac. 666. *San Francisco Nat. Bank v. American Nat. Bank* 5 Cal. App. 408. 90 Pac. 558.

Connecticut, *Haddam Bank v. Scovil*, 12 Conn. 303.

Illinois, *Wilson v. Carlinville Nat. Bank*, 187 Ill. 222, 58 N. E. 250, 52 L. R. A. 632. *Waterloo Milling Co. v. Kuenster*, 158 Ill. 259, 41 N. E. 906, 29 L. R. A. 794, 49 Am. St. Rep. 156. *Fay v. Strawn*, 32 Ill. 295. *Anderson v. Alton Nat. Bank*, 59 Ill. App. 587.

Indiana, *Irwin v. Reeves Pulley Co.*, 20 Ind. App. 101.

Iowa, *Guelich v. Nat. Bank of Burlington*, 56 Iowa 434, 9 N. W. 328, 41 Am. Rep. 110.

Kentucky, *Farmers Bank and Trust Co. v. Newland*, 97 Ky. 464. *Second Nat. Bank v. Merchants Nat. Bank*, 111 Ky. 930. 65 S. W. 4.

Maryland, *Citizens Bank v. Howell*, 8 Md. 530.

Massachusetts, *Lord v. Hingham Nat. Bank*, 186 Mass. 161, 71 N. E. 312.

Mississippi, *Third Nat. Bk. of Louisville v. Vicksburg Bk.*, 61 Miss. 112.

Missouri, *Daly v. Butchers & Drovers Bank*, 56 Mo. 94, 17 Am. Rep. 663.

Nebraska, *First Nat. Bank v. Sprague*, 34 Neb. 318. *First Nat. Bank v. First Nat. Bank*, 55 Neb. 303.

North Carolina, *Planters and Farmers Nat. Bank v. First Nat. Bank*, 75 N. C. 534. *Bank of Rocky Mount v. Murchison Nat. Bank*, 55 S. E. 95.

Pennsylvania, *Mechanics Bank v. Earp*, 4 Rawle (Pa.) 384. *Merchants Nat. Bank v. Goodman*, 109 Pa. 422, 2 Atl. 687, 58 Am. Rep. 728. *Farmers Nat. Bank v. Nelson*, 100 Atl. (Pa.) 136.

South Dakota, *Fanset v. Garden City State Bank*, 24 S. Dak. 248, 123 N. W. 686.

Tennessee, *Second Nat. Bank v. Cummings*, 89 Tenn. 609. *Givan v. Bank of Alexandria*, 52 S. W. 923. *Bank of Louisville v. First Nat. Bank*, 67 Tenn. 101. *Winchester Milling Co. v. Bank of Winchester*, 120 Tenn. 225, 111 S. W. 248.

Texas, *Waggoner Bank & Trust Co. v. Gamer Co.*, 213 S.W. (Tex. Sup.) 927. (The court does not cite earlier inconsistent rulings of intermediate Texas courts.)

Wisconsin, *Stacy v. Dane County Bank*, 12 Wis. 629.

Due care rule substituted by statute for liability rule

1100. In the following three states, the rule formerly prevailing that a collecting bank is liable for its correspondents defaults, has been changed by statute and the due care rule substituted.

Arkansas. In *Second National Bank of Alma*, 138 S. W. (Ark.) 472 the rule was declared that a bank accepting paper for collection, is liable for any default or breach of duty made by a subagent to whom it transmits the paper for collection. This rule has been overturned by Act of the Legislature passed in 1921 which provides: "Any bank, whether within or without this State, receiving for collection, or for deposit and recharge if not collected or remitted for, any check, note, bill, draft, certificate or other instrument or account, payable in another city or town, whether within or without this State, having exercised reasonable care to select a proper correspondent for the collection of such instrument or account, shall not be liable for the default of such correspondent or of any sub-correspondent selected by the latter."

Florida. *Brown v. Peoples Bank for Savings of St. Augustine*, 59 Fla. 163, 52 So. 719, held that in the absence of a controlling statute or agreement a bank which receives an item for collection payable in another city selects its agents for collection at its own risk and is liable for defaults of correspondents.

To offset this judicial rule the Legislature of Florida enacted chap. No. 5951 approved June 5, 1909, which contains the following provisions:—"Section 1. That when a check, draft, note or other negotiable instrument is deposited in a bank for credit, or for collection, it shall be considered due diligence on the part of the bank in the collection of any check, draft, note or other negotiable instrument so deposited, to forward and route the same without delay in

the usual commercial way in use according to the regular course of business of banks, and that the maker, indorser, guarantor or surety of any check, draft, note or other negotiable instrument, so deposited, shall be liable to the bank until actual final payment is received, and that when a bank receives for collection any check, draft, note or other negotiable instrument and forwards the same for collection as herein provided, it shall only be liable after actual final payment is received by it, except in case of want of due diligence on its part as aforesaid."

Georgia. The Supreme Court of Georgia in *Bailie v. Augusta Savings Bank*, 95 Ga. 277 adopted the rule that a collecting bank is liable for the defaults of its agents and correspondents and this rule was included as Section 2362 of the Georgia Code which provides: "In the absence of a contract expressed or implied, to the contrary, a bank taking paper for collection is liable for the defaults of agents and correspondents to whom the paper has been indorsed for collection." In *Youmans Jewelry Co. v. Blackshear Bank*, 80 S. E. 1005 the rule was applied under this statute and it was held it was proper to submit to the jury the question whether there was an implied contract exempting the bank, it appearing that the check received for collection had been acknowledged on a card by the collecting bank stating that the bank assumed no responsibility for the defaults of its collecting agents.

But by Section 35 of the Banking Act of 1919, which Act repeals all laws and parts of laws in conflict therewith, it is provided:

"When a check, draft, note, or other negotiable instrument is deposited in a bank for credit, or for collection, it shall be considered due diligence on the part of the bank in the collection of such check, draft, note or other negotiable instrument so deposited, to forward and route the same without delay in the usual commercial way, according to the regular course of business of banks, and the maker, indorser, guarantor, or surety of any check, draft, note or other negotiable instrument so deposited shall be liable to the bank until actual final payment is received; and when a bank receives for collection any check, draft, note, or other negotiable instrument and forwards the same for collection as herein provided, it shall be liable only after actual final payment is received by it, except in case of want of due diligence on its part as aforesaid."

The above section in effect overturns the previous rule and adopts the rule that the forwarding bank is not liable where it

exercises due care in the selection of correspondents, for the defaults of such correspondents, but is only liable for its own neglect.

Collecting bank liable for defaults of correspondent

1101. In the Supreme court of the United States and in the following states it is held the collecting bank undertakes to collect the paper and is an independent contractor, responsible for the acts and defaults of the agents whom it employs, unless by agreement it relieves itself from liability.

United States, *Exchange Nat. Bank v. Third Nat. Bank*, 112 U. S. 276.

Kansas, *First Nat. Bank of Girard v. Craig*, 3 Kan. App. 166, 42 Pac. 830, holds that where collecting bank itself selects agent, it is liable for his default, distinguishing *Bank of Lindsborg v. Ober*, 31 Kan. 599; 3 Pac. 324 where the depositor selected the subagent, and collecting bank was held not liable.

Louisiana, *Martin v. Hibernia Bank & Trust Co.*, 127 La. 301, 53 So. 572. November, 1913.

Note: The Direct to Payor Act (Act 85 of 1916) authorizing banks receiving paper for collection to send items directly to the bank on which drawn or at which payable and providing that failure of payor to account for proceeds "shall not render the forwarding bank liable therefor" virtually limits the Louisiana judicial rule that a collecting bank is liable for defaults of correspondents so as to make it applicable only in case the paper is forwarded to a correspondent other than the payor.

Michigan, *Simpson v. Waldbly*, 63 Mich. 439; 30 N. W. 199.

Minnesota, *Streissguth v. National German American Bank*, 43 Minn. 50; 44 N. W. 797.

Montana, *Power v. First Nat. Bk.*, 6 Mont. 251, 12 Pac. 597.

New Jersey, *Titus v. Mechanics Nat. Bank*, 35 N. J. L. 388.

New York, *Nat. Revere Bank v. Nat. Bank of Republic*, 172 N. Y. 102, 64 N. E. 799. *Castle v. Corn Exchange Bank*, 148 N. Y. 122, 42 N. E. 518. *Ayrault v. Pacific Bank*, 47 N. Y. 575. *Allen v. Merchants Bank*, 22 Wend. 215.

North Dakota, *Commercial Bank v. Red River Valley National Bank*, 8 N. D. 382; 79 N. W. 859.

Ohio, *Reeves v. State Bank of Ohio*, 8 Ohio St. 465.

South Carolina, Harter v. Bank of Bremen, 92 S. C. 440, 75 S. E. 696. *City Nat. Bank v. Cooper*, 91 S. C. 91, 74 S. E. 366.

Liability of successive correspondents depends upon law of state of location

1102. What are the rights of a depositor who deposits a check for collection in a bank in a state (Mississippi) which holds that a collecting bank is liable only for due care in the selection of its correspondent and that bank forwards the check to a bank in another state (Louisiana) which holds the collecting bank for defaults of correspondents, where the correspondent of the latter fails and its draft in remittance is dishonored? *Opinion:* The depositor may not hold the Mississippi bank but the Louisiana bank is liable to it for the default of its correspondent. *Third Nat. Bk. of Louisiana v. Vicksburg Bk.*, 61 Miss. 112. *Martin v. Hibernia Bk. & Tr. Co.*, 127 La. 301. (*Inquiry from Miss., Dec., 1913, Jl.*)

Note. Since 1916, however, by statute in Louisiana a bank is authorized to forward direct to payor and is not responsible for his defaults. The former rule is therefore limited to cases where the defaulting correspondent is other than the payor.

Liability of collecting bank for default of correspondent selected by owner of paper

1103. Is a bank liable for the defaults of a correspondent, selected not by it, but by the owner of the paper? *Opinion:* Under the law of California the correspondent is the subagent of the owner of the paper and the bank forwarding the paper to it is not liable for its defaults. But even in states which hold that a bank is liable for its correspondents' defaults this rule does not apply where the owner of the paper himself selects such correspondent. See for example *City Nat. Bank v. Cooper*, 91 S. C. 91. (*Inquiry from Cal., Sept., 1916.*)

1104. On whom does the final responsibility rest where a check is deposited for collection in a bank in a state (New Jersey) which holds a bank liable for the defaults of its correspondents which bank forwards it to a bank located in a state (Pennsylvania) which holds a bank only to the exercise of due care in the selection of correspondents which, in turn sends the check to a bank located in a state (Missouri) which, also, holds the latter view, and there is default by the correspondent of the last bank? *Opinion:* The depository bank is liable to the depositor, but it has no redress except

against the defaulting bank. It should protect itself by agreement with its depositor. *Titus v. Mechanics Nat. Bk.*, 35 N. J. L. 388. *Daly v. Butchers and Drovers Bk.*, 56 Mo. 94. *Mechanics Nat. Bk. v. Goodman*, 109 Pa. 422. (*Inquiry from N. J., 1914, Jl.*)

Collecting bank not liable for delay and loss caused by refusal of correspondent to act

1105. A bank sent to B bank for credit a check drawn on C. B sent it to one of the two independent banks where drawee bank was situated. The first bank refused to handle the check and returned it unpresented to B, and before the latter could get the check to the other bank, C failed. B then charged the item back to A, and it is asked upon whom does the loss fall? *Opinion:* There was no negligence on the part of B, for the refusal to handle the check could not be foreseen; the check can be charged back to A, which bank can charge it to its customer provided the latter has been duly notified. (*Inquiry from Wash., Sept., 1914.*)

Limitation of liability by special agreement

Clause on deposit slip "checks and drafts credited subject to final payment"

1106. Does the phrase "checks and drafts are credited subject to final payment," on deposit tickets relieve the depository bank from liability for the default of a bank in the chain of collection? *Opinion:* It would seem that such a stipulation would relieve the bank from such liability. *Falls City Woolen Mills v. Louisville Nat. Banking Co.*, 140 S. W. (Ky.) 66. See also *Bank of Rocky Mount v. Murchison Nat. Bank*, 55 S. E. (N. C.) 95 (holding that such a stipulation would not relieve a depository bank from its own negligence). (*Inquiry from Del., July, 1916, Jl.*)

Pass-book clause that bank is agent and disclaims liability for out-of-town paper

1107. Does the printing upon pass-books of the provision: "This bank is acting only as depositor's agent and does not assume any liability for any out-of-town checks or collections beyond reasonable diligence and care," give the bank the desired exemption from liability? *Opinion:* It has been held in a number of cases that a clause in a pass-book limiting liability in the matter of collections is binding as a contract between depositor and bank, and that the bank can

thus limit the liability. However, the bank cannot exempt itself from liability for its own negligence. Whether or not the bank takes title to items deposited for collection, the provision submitted relieves it from liability except for its own negligence. (*Inquiry from Iowa, Jan., 1917.*)

Agency and disclaimer clause

1108. Inquiry is made as to whether or not it would be proper or legal for a bank to have printed on its statements, pass-books, deposit slips, etc., the following agreement or waiver: "Items other than cash are received on deposit with the express understanding that they are taken for collection only by this bank as agent at depositors' risk. In case of items payable outside of this bank will not be responsible for neglect or default of collection agents, nor for items lost in the mail, and should returns sent by collection agents for such items be dishonored, the amount will be charged back to the depositor or bank correspondent from whom received. In the absence of instructions to the contrary, items may be sent to the banks on which they are drawn and when so sent the above conditions are not waived." *Opinion:* It would be far better to have a uniform law than a waiver or agreement between banks and their customers, but the above is about as strong as can be made under the present condition of law. (*Inquiry from Miss., Feb., 1915.*)

Pass-book clause limiting liability

1109. Bank A has printed on all its pass-books "Notice—In collecting out-of-town items this bank assumes no responsibility beyond exercise of due diligence." It forwarded three bill of lading drafts taken for collection and numbered 103, 104 and 105, to a foreign bank B, and subsequently cabled it—"Referring to our collection 103, 104, 105. Drawers have authorized Jones their representative to sell goods. Surrender documents to buyers on full payment." Under instructions from depositor A again cabled B—"Collections 103, 105, deliver all documents and papers to Jones free." B twice requested by cable instructions as to whether remittance 104 was included, but received no answer as depositor refused to pay for further cables. Under direction from Jones, B delivered documents attached to 104 free, and the depositor claims A is liable for damages. *Opinion:* The clause in the pass-book limiting the liability of bank A for

out-of-town items to the exercise of due diligence would be held binding on the depositor. Such pass-book clauses have been held to have the force of contracts in a number of cases and this being so, it would be difficult to see where there was any lack of due diligence, or negligence, on the part of bank A which would make it liable. It is extremely doubtful whether B would itself be held guilty of negligence in surrendering documents against draft 104. The cabled instructions from depositor as to collection 103, 105 taken in connection with previous cable would certainly raise a doubt in the mind of B as to whether or not 104 was included and when cabled inquiries from B expressly asking for instructions were unanswered, it used its best judgment and delivered documents against 104 free. A would not be liable to its depositor as its liability by contract was limited to the exercise of due diligence. (*Inquiry from N. Y., Dec., 1919.*)

Stipulation against liability does not inure to benefit of prior or subsequent banks

1109a. A federal reserve bank by circular relieves itself from liability for correspondent's defaults which circular includes authority to send collection items direct to payor. Does such agreement give similar relief from liability to a bank which forwards items through such federal reserve bank? The notice reads as follows: "Every bank sending checks or other cash items to us, or to another Federal Reserve Bank direct, for our account, will be understood to have agreed that in receiving such items we will act only as the collecting agent of the sending bank; that we will be responsible only for due diligence and care in forwarding such items promptly; that we are authorized to send such items, for payment in cash or bank draft, direct to the bank on which they are drawn, or, in our discretion, to forward them to another agent with authority to send them, for payment in cash or bank draft, direct to the bank on which they are drawn; and that we are authorized to charge back the amount of any items (whether or not the items themselves can be returned) which actually have not been paid either in cash or bank draft which actually has been paid." *Opinion:* Such agreement would not relieve the prior bank from liability. That is to say, a New York bank, for example, in which state a bank is liable for defaults of correspondents, receives for collection a check on a Western point and deposits it in the Federal

reserve bank which relieves itself from liability by circular agreement. The Federal reserve bank forwards the item to a Western Federal reserve bank which, in turn, forwards it direct to the payor bank. There is a loss caused by the failure of the latter bank. In such case the Federal reserve bank in New York would be relieved from liability by its stipulation but the New York bank would be liable to its depositor for the default of the correspondent, unless it had itself stipulated against such liability. Assuming the Western Federal reserve bank likewise stipulated against liability, it would also be relieved. But in any case where the Western correspondent of a Federal reserve bank, or any other correspondent, is under the law of its particular state, liable for defaults of correspondents or for sending direct to payor, and the facts create a case of liability and such bank has not itself stipulated against liability, it would be liable to the New York bank which deposited the item in the Federal reserve bank of New York and the stipulation against liability of the latter bank would not inure to its benefit. (*Inquiry from N. Y., April, 1921.*)

Printing of limited liability clause on deposit ticket as well as pass-book

1110. Is it necessary for the protection of a bank in crediting foreign items to a customer's account that the phrase "Credit subject to final payment" be set forth in the pass-book, or on the deposit slip, or both? *Opinion:* A pass-book clause has been held a contract with the depositor, but it would be the wiser course to print the stipulation upon the deposit ticket also. The underlying object is to establish a contract between bank and customer changing the liability which might otherwise exist under the law. There have been certain cases where depositors have contended that they never read the clause in the pass-book and as they had not assented thereto, it was not binding on them as a contract. It is generally held, however, that such pass-book clauses are binding, but the printing of the stipulation on the deposit slip as well as in pass-book would make assurance doubly sure. (*Inquiry from Wis., Jan., 1921.*)

Bank's lien on paper held for collection

Lien for indebtedness of forwarding bank having apparent title

1111. The payee of a check indorsed it in blank and deposited it in bank C, which mailed it to bank D for collection. Before

bank D collected the same, bank C failed and payment is stopped. Bank C is indebted to D on current account, and the latter wishes to know if it has a lien on the paper for such indebtedness. *Opinion:* The indorsement in blank indicates that the paper belonged to bank C. As bank D did not collect the check but held it, it would seem that it had a lien on the check for the failed bank's indebtedness to it. See *Bank of Metropolis v. New England Bank*, 42 U. S. (1 How.) 234, 47 U. S. (6 How.) 212, *Studebaker Bros. Mfg. Co. v. First Nat. Bank*, 42 S. W. (Tex.) 573. *National Bank v. Bonsor*, 38 Pa. Super, 275. *Michie on Banking*, Sec. 159. (*Inquiry from Va., March, 1915.*)

1112. The bank of A received from the bank of C for collection a draft drawn by B. After the C bank had failed the draft was paid and the A bank, having no knowledge from the form of the draft that the C bank was not the owner, credited the latter bank with the amount. *Opinion:* Unless the A bank knew that the C bank was the collecting agent of the drawer, it had a lien upon the paper or its proceeds for a balance of account due from the failed bank. *Carroll v. Exch. Bk.*, 30 W. Va. 518. *Bk. of Metropolis v. N. E. Bk.*, 1 How. 234. *Sweeney v. Easter*, 1 Wall. (U. S.), 166. *Wyman v. Colo. Nat. Bk.*, 5 Colo. 30. *Am. Exch. Nat. Bk. v. Theummler*, 195 Ill. 90. *Garrison v. Union Tr. Co.*, 139 Mich. 392. *Continental Nat. Bk. v. First Nat. Bk.*, 84 Miss. 103. (*Inquiry from W. Va., Aug., 1913, Jl.*)

No lien for indebtedness of forwarding bank agent

1113. Bank A indorses a draft "for collection and remittance," and sends it to bank B which forwards it to bank C at point of payment. The draft was paid on day B failed, and C credited item in an account it had with B. A claims that C should have made payment to it directly and that the item was its property. *Opinion:* The restrictive indorsement "for collection and remittance" to B made it appear as a collecting agent only and in such case a creditor bank collecting the item could not credit it to the agent bank's account, thus offsetting part of the latter's indebtedness to it, but must account for the proceeds to the owner. See *A. B. A. Jl*, Aug., 1913, p. 31. (*Inquiry from Pa., Nov., 1913.*)

1114. The bank of A received for collection from the bank of C, which there-

after failed, a note drawn by B and indorsed in blank by the payee, "Pay to the order of any bank, banker or trust company." *Opinion:* This form of indorsement indicated that the bank of C was not owner but collecting agent for the note. The bank of A therefore acquired no right of lien upon the paper for an indebtedness to it of the bank of C. (*Inquiry from W. Va., Nov., 1913.*)

Negligence of collecting bank

Delay in collecting drafts on failing consignee and disobedience of protest instructions

1115. A shipper of hogs drew a draft on the consignee, payable at a bank in the home town of the consignee in Illinois. It was drawn payable on demand to the order of a bank in the shipper's town in Tennessee. The shipper placed it in this bank, with express instructions to send it with orders to protest if not paid. He was given credit for the draft and it was sent direct to the Illinois bank with a "no protest" slip attached. The latter bank did not insist on payment, for it was trying to favor the consignee, who was in a poor condition financially. On the same day that this draft was received by the Illinois bank another shipment of hogs was sent under the same conditions and circumstances as the first one, and it was handled in the same way by both banks. Six days later, thinking that the first two drafts had been paid, the shipper sent another carload of hogs, and drew another draft under the same circumstances as the first two, and it was handled in the same way by both banks. Eight days later the shipper's bank informed him that the three drafts had been returned unpaid and that he would have to make them good, which he did. Three days later the consignee failed. It can probably be shown that if the drafts had been sent with orders to protest, the shipper would have rebilled the hogs. It is clear that had the first draft been protested, the third carload would not have been sent to the consignee, and it is possible that the second carload could have been stopped in transit. The shipper made the drafts good believing that they had been properly protested. What is the liability of the banks to the shipper? *Opinion:* The Illinois bank would seem to be liable, for if it knew that the drawee was in a poor condition financially and it failed to return the drafts promptly and warn its principal. The Tennessee bank disobeyed the express instructions to send the drafts with orders to protest if not paid,

which would seem to make it liable to the shipper. The refunding of the amount to the bank by the latter would not debar him from recovering, for the payment was under a mistake of fact concerning the non-protest of the drafts. This is on the theory that the Tennessee bank was collecting agent of the shipper. If it purchased the drafts from him, the shipper would be liable only as drawer and would be discharged by the failure of due presentment and the loss as between the shipper and the Tennessee bank would fall on the latter. The assumption is, however, that the Tennessee bank was a collecting agent and the credit was provisional. It would seem that the Illinois bank is ultimately liable, and as between the shipper and the Tennessee bank, the latter is liable. (*Inquiry from N. Y., March, 1921.*)

Delay in collecting note until outlawed

1116. A bank forwarded to another bank a note which had matured nearly ten years previously, with instructions to collect, obtain a new note, or place in the hands of an attorney, and failing in any of the foregoing, to return the note within ten days of its receipt. The collecting bank undertook the collection but neglected to follow the instructions, and returned the note after it became outlawed, to the owner's damage. *Opinion:* The bank is liable for such damages as were caused by its neglect of duty. The owner lost his remedy at law and his *prima facie* damages are the full amount of the note. *Merchants & Manufacturer Bk. v. Stafford Nat. Bk.*, 44 Conn. 564. Iowa Code, 1897, Ch. 2, Sec. 3447. (*Inquiry from Cal., April, 1913, Jl.*)

Delay in collecting note

1117. A Texas bank receiving a note for collection forwarded it to a bank in Utah, with specific instructions to have the instrument collected by that bank's attorney. The Utah bank held the note for four months before returning the same uncollected. *Opinion:* The Utah bank, having undertaken the collection, must use reasonable diligence, and its retention of the note for four months without advising the Texas bank is itself a negligent act. If it can be proved that the debtor could have been forced to pay by prompt action, but has since become insolvent, the Utah bank is liable for the amount of damages proved. *Bk. of Washington v. Triplett*, 1 Pet. (U. S.) 37. *Jefferson County Sav. Bk. v. Hend-*

rix, 39 So. (Ala.) 295. *Finch v. Karste*, 56 N. W. (Mich.) 123. *Farmers Bk. v. Newland*, 3 S. W. (Ky.) 38. *Hendrix v. Jefferson County Sav. Bk.*, 45 So. (Ala.) 136. *Davis v. First Nat. Bk.*, 50 Pac. (Cal.) 666. *Fox v. Davenport Nat. Bk.*, 35 N. W. (Ia.) 688. *Dorn v. Kellogg*, 74 N. W. (Neb.) 844. *Diamond Mill Co. v. Groesbeck Nat. Bk.*, 29 S. W. (Tex.) 169. (*Inquiry from N. M., Apr. 1916, Jl.*)

Neglect to follow instructions

1118. A bank forwarded to its correspondent a draft with the following instructions: "This item is payable on presentation and is not to be held for arrival of goods, for the convenience of the drawee or for any other reason. If not paid on presentation protest and return immediately, advising by telegraph. Our customer will hold the collecting bank strictly accountable for failure to follow the foregoing instructions." The item was properly protested and handled in accordance with instructions, except that the bank failed to wire the protest. Had the sending bank paid out money in the transaction, would the collecting bank have been liable? *Opinion*: A bank acting as agent for collection is under duty to follow special instructions with regard to the collection and for any neglect to follow instructions, from which damage results, it will be liable to its principal. *Sahlien v. Bk.*, 90 Tenn. 221. *Fahy v. Fargo*, 17 N. Y. S. 344. *Allen v. Suydam*, 20 Wend. (N. Y.) 329. *Selz v. Collins*, 55 Mo. App. 55. *Meadville First Nat. Bk. v. N. Y. Fourth Nat. Bk.*, 77 N. Y. 328, 329. (*Inquiry from Kans., Sept., 1918, Jl.*)

Violation of instructions

1119. A bank received three indorsed notes for collection with instructions to protest if not paid, and upon learning that renewals had been forwarded, returned the notes to its principal without protesting or taking steps to hold indorsers. The renewals were not received by the principal, and would have been unacceptable if received, as upon non-payment the principal intended to bring suit against the maker and indorsers. *Opinion*: The collecting bank is liable to its principal for any loss sustained because of violation of instructions. *Walker v. Bk. of St. of N. Y.*, 9 N. Y. 582. *Am. Exp. Co. v. Haire*, 21 Ind., 4. *Montgomery County Bk. v. Albany City Bk.*, 7 N. Y. 459. *Chapman v. McCrea*, 63 Ind. 360. *Merchants, etc., Bk. v. Stafford Nat. Bk.*

44 Conn. 564. (*Inquiry from Pa., Aug., 1912, Jl.*)

Return for indorsement before forwarding for payment not negligent

1120. A check drawn by A in favor of himself but not bearing his indorsement, was forwarded by B bank to a correspondent bank, which returned the item to B bank for indorsement, without first forwarding for payment by the drawee. *Opinion*: The action of the bank as collection agent was proper (*Inquiry from Cal., Aug., 1912, Jl.*)

Non-presentment of time draft for acceptance

1121. Bank A received a time draft drawn on a party in the same state. The item was forwarded to its correspondent Bank B, which in turn forwarded it to its correspondent Bank C, located in the same place as the drawee. Bank C held the draft fifteen days without presenting it for acceptance, but presented it for payment at maturity, when payment was refused. *Opinion*: The collecting bank must present a time draft for acceptance when received and is negligent if it waits until maturity and merely presents the draft for payment. *Exch. Nat. Bk. v. Third Nat. Bk.*, 112 U. S. 276. (*Inquiry from Conn., Feb., 1916, Jl.*)

Forwarding draft in usual course without attempting to procure acceptance by wire not neglect

1122. A collecting bank forwarded a sight draft delivered in Kansas upon a bank in Missouri to its correspondent, which presented the same to the drawee. In the meantime the drawer stopped payment and the draft was protested and returned. *Opinion*: The bank used due diligence when it forwarded the draft in the usual course, and its customer has no reason to complain. In the absence of some special reason or instruction given the collecting bank, it was not incumbent upon it in the exercise of due diligence to attempt to procure acceptance by telegram. (*Inquiry from Kan., March, 1912, Jl.*)

Failure to trace unacknowledged item for two months

1123. An accepted draft was forwarded by Bank A to bank B for collection. Over two months later B notified A that it had sent it to bank C in town where acceptors did business. The draft was not honored, and was returned unpaid, but was never received by B. A claims it would have been

able to have collected but for the delay. *Opinion:* B was negligent in not following this item up sooner and promptly advising A, and would be responsible for any resulting loss. The acceptance having been dishonored, there was recourse upon the drawers provided they were duly notified of dishonor, and in case of loss in the mail, a reasonable delay would be excusable; but two months would probably be held unreasonable, and the drawers would be discharged from liability, in which case B would be held responsible. Aside from this, the acceptance never having been paid, A, as owner thereof, would have a right of action against the acceptors based upon a copy or written particulars of the lost instrument. (*Inquiry from Ala., Oct., 1916.*)

1124. Two months after a check was forwarded for collection the correspondent notified the forwarding bank that the item had been lost in the further process of collection. Does the delay in tracing the item and in notifying the forwarding bank render the correspondent liable? *Opinion:* It is the duty of a collecting bank to ascertain within a reasonable time whether paper entrusted to it for collection and transmitted by it to a correspondent has been received by such correspondent; and if not, to advise its customer of such fact and it is liable for loss resulting from its failure to do so. Just what constitutes a reasonable time depends upon the facts of each individual case. In a Kentucky case a delay of eight days was held to amount to negligence. It would seem from the cases that a delay for two months or longer would constitute negligence. *Manhattan Life Ins. Co. v. First Nat. Bk.*, 20 Colo. App. 529, 80 Pac. 467. *Fabens v. Mercantile Bk.*, 23 Pick, (Mass.) 330. *Kirkham v. Bk.*, 165 N. Y. 132. *Hobart Nat. Bk. v. McMurrrough*, 24 Okla. 210. *Diamond Mill Co. v. Groesbeeck Nat. Bk.*, 9 Tex. Civ. App. 31. *Milwaukee Nat. Bk. v. City Bk.*, 103 U.S. 668. See also citations in Opinion No. 1125. (*Inquiry from Tex., May, 1919, Jl.*)

*Forty-seven days' delay in tracing
unacknowledged item*

1125. A collecting bank received an item for collection and delayed for forty-seven days to notify the forwarding bank that it had received no return from the item and no reply from the tracers sent out to locate it. *Opinion:* A collecting bank which receives and forwards an item to a correspondent which is not acknowl-

edged or remitted for in due course, must promptly trace such item and notify its principal, and a delay of forty-seven days is unreasonable and will make the collecting bank responsible to its principal for the loss. *Second Nat. Bk. v. Merchants Nat. Bk.*, 65 S. W. (Ky.) 4. *Shipsey v. Bk.* 59 N. Y. 485. *First Nat. Bk. of Trinidad v. First Nat. Bk. of Denver*, 4 Dill, 290. 3 Am. & Eng. Enc. Law (2nd Ed.), p. 805. *First Nat. Bk. of Shreveport v. City Nat. Bk.*, 166 S. W. (Tex.) 689. (*Inquiry from Ark., Apr., 1919, Jl.*)

*Two years' delay in tracing unacknowledged
item*

1126. A customer deposited for collection a check drawn on a Texas bank. The collecting bank mailed the item direct to the drawee and failed to hear from the same for over two years, during which time the drawee's name disappeared from the bank directory. Depositor did not sign deposit slip relieving bank from responsibility for losses in the mail. *Opinion:* Assuming loss in mail, the failure to trace promptly was negligence, and even if depositor signed slip this would not relieve the bank from the consequences of its own negligence. (*Inquiry from Ga., Sept., 1911, Jl.*)

*Several months' delay in tracing unacknowledged
item*

1127. A bank gave its depositor credit for a sight draft and forwarded it for collection. Its correspondent forwarded the item to another bank. This third bank presented the item which was refused. It did not credit the account of the second bank, but failed to notify it of the refusal and to return the item. About six weeks after the draft was forwarded, the second bank found in checking over the monthly account that the draft was not credited and noted it as an exception on its reconciliation. It did the same with the next three monthly statements. Thereafter it discovered that the draft had not been paid but that the debt to the depositor had been paid by a check sent directly to him. The second bank then notified the first bank. Which bank must stand the loss incident to the bankruptcy of the depositor? *Opinion:* The rule is well settled that, for any neglect in failing to give notice of dishonor, the collecting bank is liable. Thus, where bank A mails a sight draft to bank B, which in turn mails same to bank C, by whom draft is presented and payment refused, but no

report is made by bank C of its dishonor, and bank B fails for several months to trace and report its non-payment to bank A, the drawer having failed in the meantime, bank B is liable to bank A for its negligence in failing to make inquiry promptly, and bank C is liable to bank B for failure to give prompt notice of dishonor. *Bird v. La. State Bank*, 93 U. S. 96. *Chapman v. McCrear*, 63 Ind. 360. *Exch. Bank v. Sutton Bank*, 78 Md. 577. (*Inquiry from Va., July, 1919, Jl.*)

Delay in reporting non-payment

1128. Bank D received from bank A a check drawn on bank B which it forwarded to bank C for collection; two and a half months afterwards C returned the check with the advice that the drawee entered the check for collection pending adjustment of some kind which it was unable to accomplish. A refused to accept a charge to its account because of the length of time check was held by B, and D refused credit to its correspondent C. It is desired to know if C can charge the item to D's account. *Opinion:* The delay of C to advise D of non-payment of the item would probably be held such negligence or laches as to make it liable for the amount. The same reason of delay which prompts bank A to refuse to accept a charge of the item to its account by D is equally applicable as between D and its correspondent C. (*Inquiry from Idaho, May, 1919, Jl.*)

1129. A business concern drew a number of sight drafts on its representative at a distant point, and received credit from bank A on them, which bank forwarded them to bank B, and the latter sent them for collection to bank C where the representative was located. The latter failed to pay the drafts on presentation. Repeated requests for reports on the drafts were unanswered by C which after holding drafts thirty days notified B that they were unpaid and offered to return them. The business concern failed, and B instructed C to return the drafts. Bank A claims C was negligent and is liable to it. *Opinion:* A bank undertaking a collection is bound to use due diligence and is responsible if it fails to exercise such diligence. In the present case bank C owed a duty to its principal to give prompt notice of the dishonor of the paper intrusted to it for collection and it would seem that a delay of thirty days in giving such notice of dishonor (particularly in view of the fact that it was several times called upon to report

on such paper) would be such negligence on the part of bank C as would render it liable for any damage suffered by its principal by reason of such negligence on its part. (*Inquiry from Miss., Jan., 1921.*)

Disobedience of protest instructions and failure to report non-payment

1130. A draft was forwarded with instructions to protest, but the correspondent marked it "No protest" and forwarded it for collection. The depository after waiting for what it considered a reasonable length of time, allowed the depositor to check out the amount of the draft. The draft was returned to it unpaid after the lapse of thirty days. The drawee having sent a check to the drawer, the depository bank notified its correspondent that the matter had been adjusted. However, the check was protested and the correspondent notified. The depositor, believing himself liable, tendered a note for the amount of the draft; this was refused until the correspondent requested that it be accepted; afterwards when it was unpaid, it was returned to the correspondent. Who should stand the loss? *Opinion:* The question here is as to responsibility for the loss as between (1) depositor (2) depository bank (3) correspondent bank. The check was received for collection and the depository bank was not liable for the neglect of its correspondent in disobeying instructions as to protest and failure to promptly report non-payment, but for such neglect the correspondent was answerable directly to the depositor. *Louisville Third Nat. Bank v. Vicksburg Bank*, 61 Miss. 112. Such neglect created a liability of the correspondent, unless subsequently waived. The subsequent taking of the debtor's check, which was dishonored, was not a waiver of such liability. The depositor, having received the money in advance of collection, subsequently gave his note for the amount, in belief that he was liable. But this note was not tendered the correspondent, but intended as repayment to the depository for the amount advanced and, although it was taken by the depository at request of the correspondent and turned over to the latter, it is doubtful if it constituted a waiver of liability of the correspondent. It would seem that the correspondent is liable to the depositor and the latter to the depository bank for the money advanced by it to him. (*Inquiry from Miss., Nov., 1920.*)

Duty to promptly return unpaid draft

1131. If a bank forwards a draft for collection, does the collecting bank assume any responsibility if it fails to return it immediately when not paid? *Opinion:* A bank receiving a draft for collection, which is unpaid, is bound to return same promptly and will be liable to its principal for any damages suffered because of negligence in this respect. See *Lord v. Hingham Nat. Bank*, 186 Mass. 161, 71 N. E. 312. (*Inquiry from N. J., Aug., 1916.*)

Seven days retention of check by drawee

1132. A drawee bank received a check for collection and held it for about seven days, and then returned it with the notation that the drawer had no account with it. The drawer of the check in the meanwhile had disappeared, and it appears he had had some business arrangement with one of the officers of the drawee bank, had been furnished with a check book, and had been in the habit of giving checks which the bank cashed. The owner of the check claims that if it had been promptly returned with notation he would have been able to make collection. *Opinion:* The owner of the check would undoubtedly have a right of action against the drawee bank for negligence. (*Inquiry from Miss., July, 1919.*)

Three days retention of checks, partly good, by drawee

1133. A collection letter contains three checks. When received the account is sufficient to pay two of them, but not all three. It is the custom of the bank to hold such a letter for three days if necessary until a deposit is made sufficient to pay all the checks. The question is, if during the three days the balance is lessened, instead of increased, so that the fund would not be sufficient to pay the two checks originally good when the letter was received, or either one of them, would the bank be liable? *Opinion:* Such a custom of holding items is not a safe one to follow. A check is payable on demand, and the bank should pay those of the checks which the account is sufficient to meet, and protest and return the others. A bank upon which a check is drawn and to which it is forwarded for collection holds the dual relation of agent of the drawer to pay his check, and agent of the holder to make collection. In the latter capacity it might be held liable for negligence in holding a check three days where the check was orig-

inally good when presented, but where the bank afterwards allowed the account to be depleted by the drawer so as to allow insufficient funds for its payment. (*Inquiry from Mo., Oct., 1917.*)

Failure to wire non-payment as instructed

1134. A grower of melons showed a bank a telegram from a commission merchant offering to buy from the grower two cars of melons, if they were of the average weight of 25 pounds and directing the grower that if they were of that average to draw on him through a named bank. The melons were shipped and the grower drew on the commission merchant and deposited the draft with his bank for collection. The bank sent the draft to the bank named with instructions to wire it if the draft was not paid on presentation. Instead of doing so, the collecting bank kept the draft for ten days and then returned it unpaid, for the reason that the melons were not of the proper size. In the meantime the grower's bank allowed him to draw out the amount of the draft in apparent reliance on the failure of the collecting bank to notify it of the failure to accept the draft. Is the grower liable to refund? Is the collecting bank liable? *Opinion:* As the collecting agent failed to obey instructions to wire notification if the draft was not paid on presentation, and as a result the grower was allowed to draw out the proceeds of the draft, such collecting agent is liable for the loss resulting from its failure. (*Inquiry from Fla., Feb., 1921.*)

1135. Bank A sent to bank B a check for \$500 with others. On its remittance sheet was marked: "Wire non-payment of all items \$500 or over." B returned the check which was marked "No protest," but failed to wire A, and asks if the "No protest" stamp protects it. *Opinion:* It is a general rule that it is the duty of a bank undertaking a collection to obey any special instruction in connection therewith. It was the duty of B to obey the instruction to wire non-payment of the item, but unless A could prove that it had been damaged by its omission to receive the wire, there would be no liability. The instruction not to protest would not help B as the instruction to wire non-payment was an independent instruction. *Citizens Savings Bank v. Northfield Trust Co.*, 89 Vt. 65, 94 Atl. 302. (*Inquiry from Idaho, May, 1917.*)

1136. Bank A receives an out-of-town customer's check from B, and there being

not sufficient funds on hand, immediately protested and returned same, but did not follow printed instructions as to telegraphing non-payment of items over a certain amount, believing, as it says, that it was not bound by the rules printed on B's letterhead. *Opinion:* It is the duty of a collecting bank to use ordinary care and diligence in taking the steps necessary to accomplish the collection and to observe such instructions as are given to it with reference to the manner in which the collection is to be made and if the bank failed to wire non-payment as instructed, although it immediately protested the item and sent the same back by mail, there would be danger of incurring a liability in the event the non-fulfillment of the instruction caused a loss to the owner of the check. *Lord v. Hingham Nat. Bank*, 186 Mass. 161, 71 N. E. 312. *Omaha Nat. Bank v. Kiper*, 60 Neb. 33, 82 N. W. 102. (*Inquiry from Mo., April, 1920.*)

Acceptance of paper in payment instead of money

1137. Is a collecting bank justified in accepting a check or draft from the drawee bank in payment of paper presented for collection? *Opinion:* While the general rule of law is that a collecting bank is authorized to take in payment money only and takes the drawee bank's draft at its own risk, still the custom is quite general to accept the drawee bank's check instead of money. Some courts uphold this custom, but others hold the collecting bank to the strict rule of law and make it responsible where the drawee bank's draft is dishonored because of its failure. (See for example *First Nat. Bank v. First Nat. Bank*, 134 S. W. (Tex.) 831. *Noble v. Doughten*, 72 Kan. 336 and *Albert v. State Bank*, 138 N. Y. Supp. 237, which uphold the custom to accept a bank draft in payment; contra, *National Bank of Commerce v. American Exchange Bank*, 52 S. W. (Mo.) 265. *Fifth Nat. Bank v. Ashworth*, 16 Atl. (Pa.) 596 to the effect that a usage to take the check or draft of the drawee bank is unreasonable and will not protect the collecting bank.) The same conflict exists where the draft taken in payment is that of an individual debtor and not that of a bank; some cases holding that the collecting bank is responsible. (See, for example, *Bradley Lumber Co. v. Bradley Co. Bank*, 206 Fed. 41) while other decisions are to the effect that custom authorizes the collecting bank to take the debtor's check instead of money. Inter-

state *Nat. Bank v. Ringo*, 72 Kan. 116. (*Inquiry from Kan., Feb., 1919.*)

1138. A New York bank A sends a depositor's check to a Pennsylvania bank B which forwards to correspondent C in Alabama and that bank accepts the drawee's check for same. The drawee fails, and A inquires as to its liability. *Opinion:* The authorities are in conflict whether it is negligence for a collecting bank to accept the drawee's check instead of money in payment of an item. The point has not been decided in Alabama. In Pennsylvania, the courts hold the collecting bank negligent. *Fifth Nat. Bank v. Ashworth*, 16 Atl. (Pa.) 596. The negligence, if it exists, would be that of the Alabama bank and B, the Pennsylvania bank, would be relieved under the Pennsylvania rule that requires a bank to use due care only in selecting a sub-agent and relieves it from responsibility in case of its correspondent's negligence or default. (*Inquiry from N. Y., Feb., 1918.*)

Effect of dishonor of drawee's draft taken instead of cash

1139. The payee of a check drawn on bank A cashed it with bank B which received from A its draft drawn on bank C in payment. The latter sent back the draft to B unpaid for want of funds, and on the same day A failed. B at once tendered the dishonored draft to A's assignee and demanded original check which had been stamped paid and charged to drawer, and the inquiry is as to its right to such check. *Opinion:* On the theory that the drawee's check was only conditional payment, B would be entitled to return of the check from the assignee of A upon tendering back the dishonored draft of that bank. But the drawer and payee of the original check would probably be discharged. In *Anderson v. Gill*, 79 Md. 312, the payee of a check deposited it in bank which accepted the check of the drawee who failed later in the day, instead of cash. Return of the original check was demanded and refused. A notary made a copy of the original and protested it. In an action by the payee to recover from the drawer of the original check, the court said the acceptance of the drawee's check was either payment of the original check or it was not. If it was payment, as it would be according to the Massachusetts doctrine, the drawer was discharged. If it was not payment, then the holder's collecting agent was responsible to the payee for having given up the check without payment and if injury resulted to

the drawer by reason of the agent's failure to use diligence in converting the drawee bank's check into money, then also the drawer was discharged. The court pointed out that had the presenting bank caused the original check to be certified, the drawer would have been discharged at once, and while the present transaction was different, the drawer was placed in a position of peril by the act of the collecting agent. The decision went on the ground that the drawer was discharged because, under the facts of the case, the holder had failed to use due diligence in collecting the check taken in payment. (*Inquiry from Ill., Jan., 1915.*)

Surrender of paper before full payment

1140. A gave his note to B who put it in bank C for collection. The bank collected less than the amount due and surrendered the note to A. The question is as to the proper party to bring suit against A, B, or the bank. *Opinion:* Bank C was guilty of negligence in surrendering the note to the maker before it was fully paid and would be liable to the owner for the unpaid portion with interest. The maker remains liable for the balance due, and the owner would undoubtedly have the right to bring action against him but would not be compelled to do so as he would have the right to hold the bank liable by reason of its negligence and could throw upon the latter the burden of suing the maker. (*Inquiry from Wyo., May., 1915.*)

Selling note to stranger instead of collecting from maker

1141. A bank holds a note secured by mortgage as agent for collection. Does the bank incur liability by not cancelling the note upon payment by one other than the maker and transferring it to the payor at his special request? *Opinion:* It is a bank's duty upon payment by the maker to surrender and cancel a note left with it for collection, and where it turns the note over to a third person who pays same and the bank omits to cancel it on the request of the payor, it might incur a liability to its principal if this procedure resulted in any damage to him, because the bank would be exceeding its authority. Its authority is to collect from the maker and not to transfer to a stranger. Should such a transaction be held a purchase and not a payment, the bank's principal might possibly be held liable as indorser in the event the maker did not pay, and the bank should not place its

principal in this position. (*Inquiry from Mo., March, 1920.*)

Exchange and remittance charges

Right to exchange charge

1142. A bank objects to a deduction of exchange on a collection item sent by it to a bank with which it has no regular business relations and desires to know if a charge should be made. *Opinion:* When a bank receives a check drawn upon it with request to remit the funds to another place, it is within its rights in making a reasonable exchange charge for the service of remitting. The contract of the bank with its depositor is to pay his checks in money at the counter. It does not include sending the money to a distant payee to whom the depositor has mailed his check; and when such payee accepts the check and it is mailed to the bank for payment, the service of sending back the money, by bill of exchange payable at the place of the payee or holder, is a service rendered for the holder of the check, for which a reasonable exchange charge is proper and legitimate. (*Inquiry from W. Va., Mar., 1919.*)

Termination of arrangement for par remittance

1143. After making arrangements with an out-of-town bank to handle items sent to it free of exchange, bank A desires to know if it would be justified in notifying the other bank that after a certain date it would discontinue remitting for such items free of exchange. *Opinion:* A is perfectly free, to notify the bank in question that it will discontinue remitting for such items free of exchange. (*Inquiry from Md., Jan., 1919.*)

Exchange charges by non-member banks

1144. What are the rights of the Federal Reserve Bank presenting their checks on non-member banks through the Express Company to avoid moderate exchange fees? *Opinion:* Presumably the Federal Reserve Bank, acting through an express company or any other collecting agency and presenting a check at the counter of the payor bank has the legal right to demand payment of the full face amount and in such case, of course, there would be no reason to issue exchange and no right to charge therefor. However, it is a serious question, whether if coercive measures are adopted by a Federal Reserve Bank to make bulk collections from non-member state banks who refuse to remit at par, this is a lawful method of presentment. The Federal Reserve Banks

have no right to require non-member banks to which they mail checks to remit at par. (*Inquiry from Mich., Jan., 1920.*)

Note: In a recent decision *American Bank & Trust Co. v. Federal Reserve Bank of Atlanta*, U. S. Supreme Court, May 16, 1921, it was held that a Federal Reserve Bank may be enjoined from malevolently accumulating checks of non-member banks and then presenting them for collection over the counter rather than through the regular channel of correspondence or clearing, thus, and by other devices, depriving such non-member banks of profits arising from exchange charges, and incidentally compelling the keeping on hand of an unnecessarily large amount of cash.

1145. Can a federal reserve bank require a non-member bank to remit at par items deposited with the federal reserve bank for the account of the treasurer of the United States? *Opinion:* The question is answered by the opinion of Attorney-General Gregory, given to the Federal Reserve Board under date of March 21, 1918 and published in the Federal Reserve Bulletin for May 1918, that "non-member banks which are not depositors in the federal reserve banks will not be subject to the limitations" as to charges to federal reserve banks. (*Inquiry from Ark., March, 1919.*)

1146. May a bank which is not a member of the Federal Reserve System be compelled to remit at par? *Opinion:* When a check is drawn upon a non-member state bank, the implied contract of the bank with the drawer, its customer, is to make payment on presentation at the bank and if a check is presented by or on behalf of a holder in another place with request for remittance, the bank is entitled to make an exchange charge for such service to the holder, which is not contemplated in its contract with its customer, the drawer. There is no statute at present which compels a state bank, not a member of the Federal Reserve System, to remit at par and it would seem that such a law would not be constitutional. Such a law would deprive a bank of its right to make a legitimate charge for service rendered. (*Inquiry from N. J., March, 1920.*)

1147. A state bank in Wisconsin has refused to remit for cash items without making a modest deduction for exchange. Some of its customer's checks are stamped as follows: "Payable in exchange at par if sent direct to bank of?" The bank wishes to know whether the Federal Re-

serve Bank may demand payment through the express company in currency for checks bearing that condition? Is it entitled to pay such checks in Chicago Exchange at par, if it does not desire to pay currency to the express company? *Opinion:* Ordinarily, a check is payable at the bank upon which drawn and if presented by an express company, duly authorized as a collecting agent, the latter has the right to demand payment of the full amount in money. But the check in question has upon it the phrase "payable in exchange at par is sent direct to bank of". This would probably be construed as covering the condition where a check is mailed direct to the bank, as distinguished from one where the check is presented by a collecting agent at the counter of the bank. In the latter case, it would seem, the check is payable in money. But even if the phrase were construed so as to read "payable in exchange at par when presented for payment at the counter of the bank," as it does not call for exchange on any particular place, a question would arise as to whether the phrase "in exchange" were not too indefinite and uncertain to amount to anything.

Again, the decisions are in conflict whether an instrument payable "in exchange" is payable in money, or in a commodity, namely a bill of exchange; some courts have held the latter and that an instrument so payable is not negotiable.

In view of the uncertainty of the legal interpretation of the phrase in question it might be better to have the checks differently worded to accomplish the object desired. (*Inquiry from Wis., March, 1920.*)

Par list of Federal Reserve Bank

1148. Does a state bank have to submit to the placing of its name on the par list by a Federal Reserve Bank? *Opinion:* If the bank is not parring checks, the Federal Reserve Bank has no legal right to retain it on the par list and an injunction will lie to prevent the Federal Reserve Bank from publishing the name of the non-member bank on such list. If however the non-member bank is actually parring checks for the Federal Reserve Bank, so that there is no misrepresentation of fact, there is probably no right to prevent the publication of the name of the bank on the par list. (*Inquiry from Ark., Jan., 1920.*)

Charges against Federal Reserve Banks

1149. Section 13 of the Federal Reserve Act provides that nothing in the section

shall be construed as prohibiting a member or non-member bank from making reasonable charges etc. "for collection or payment of checks or drafts and remission therefor by exchange or otherwise, *but no such charges shall be made against the Federal Reserve Banks.*" Does the provision that no charges shall be made apply only to charges made for the collection and remittance of checks by banks, or does it include, so as to prohibit, such charges against the Federal Reserve Banks by other agents and instrumentalities, such as express companies, bonded local agents, or "paid employees in automobiles." *Opinion:* The qualifying clause with respect to charges against Federal Reserve Banks would seem to have reference only to charges made by banks, members and non-members, for collection or payment and remittance. If there were an independent sentence in the section to the effect that no charges for the described services should be made against the Federal Reserve Banks there would be more ground for the contention that it applied to charges made by any one and entitled the Federal Reserve Banks to free services of every one it employed, provided it could secure agents to do work for nothing. But the subject of the provision has to do with charges by member and non-member banks only and not charges by other persons or agents against the Federal Reserve Banks. (*Inquiry from Ga., Feb., 1920.*)

Exchange charge cannot be made against drawer

1150. A drew his check upon the B bank, payable to C, who is located at a distance and the check was collected through the Federal reserve bank and the funds remitted by B to that bank. Did the B bank have the right without special contract to charge the drawer with the exchange or cost of remitting the funds. *Opinion:* B bank's obligation is to pay the check at its banking house and if it remits the funds to another place, such service is for the holder and it cannot make an exchange charge against the drawer without his consent. Chitty on Bills (13th Amer. Ed.) (151), 174. Scott v. Perlee, 39 Ohio St. 67. (*Inquiry from N. Y., Sept., 1916, Jl.*)

Bank paying money at request of another entitled reimbursement without exchange deduction

1151. A bank wires B bank to pay C \$12,000 and promises to remit. B there-

after receives from A bank its cashier's check of \$12,000, which is subject to the exchange charge of \$30. *Opinion:* A's promise is not fulfilled by remitting a cashier's check which is subject to exchange. B bank is entitled to receive the full amount without deduction of the charge. (*Inquiry from N. M., Sept., 1918, Jl.*)

Accountability for collection proceeds

Return of payment to drawee

1152. J gave D his check to take up a note upon which J was surety and after the check had been paid, the collecting bank returned the money to the drawee because the latter claimed payment had been made by mistake, and that J had countermanded it. *Opinion:* Such collecting bank is liable to D for the money so collected, and this liability would exist, even though the note for which the check was given was based on an illegal consideration. Ricketts v. Harvey, 78 Ind. 152. Croder v. Reed, 80 Ind. 1. Ricketts v. Harvey, 106 Ind. 564. Armstrong v. So. Exp. Co., 4 Baxt. 376. Bibbs v. Hitchcock, 49 Ala. 468. Daniels v. Barney, 22 Ind. 207. Dunlap's Paley on Agency, p. 62. Addison on Contracts, p. 648. Murray v. Vanderbilt, 39 Barb. 140. (*Inquiry from Ind., Aug., 1908, Jl.*)

Delivering proceeds to sales agent of owner

1153. A note was collected at the place of one of the makers by bank A in Idaho to which it had been forwarded by bank B also an Idaho bank which received it from C. After the money was collected and before remission the proceeds came into the possession of a sales agent of the company which owned the note, who kept the amount for his own use, and it is desired to know where the responsibility lies. *Opinion:* A bank which receives a note for collection is bound to use reasonable care and diligence, and is liable for any damage caused by its negligence. Assuming that there was no legal proceeding by which A was compelled to pay over the proceeds to the sales agent of the company, and of its own volition parted with the proceeds of this collection to him, it would seem a clear case of negligence for which it would be responsible, and whether B would be responsible for A would depend upon whether the law of Idaho makes a collecting bank liable for the negligence and default of its correspondent, or not liable if the correspondent is duly selected. In the latter event the liability would be direct by A to the owner of the

note. The courts of Idaho do not seem to have passed upon this proposition. (*Inquiry from Kan., Nov., 1918.*)

Conversion of item by collecting bank

1154. Bank A forwarded to bank B a time certificate of deposit immediately after its issuance to be collected with interest at maturity from the issuing bank. B immediately remitted the face value only, held the certificate until maturity, and then collected the face with interest. This manner of doing business is questioned. *Opinion:* B had no right to assume the rôle of purchaser; its authority was limited to holding the certificate until maturity and then collecting the same with interest and remitting to A the proceeds. It, however, forwarded to A the face immediately, at a time when no interest had been earned, and the question would be whether A's acceptance of the face before it was due constituted an acquiescence of B's action. It has been held that if the owner expressly or impliedly assents to, or ratifies, the taking, use or disposition of his property, he cannot recover for the conversion thereof. *Austin v. McMains*, 14 Ind. App. 514. But if it should be held that A's receipt of the principal before maturity was not an assent or ratification of B's act in appropriating the certificate as its own, A would have a claim on B for the interest. (*Inquiry from Ind., Jan., 1918.*)

Rescission of advice of credit or payment

Advice of credit given before collection

1155. Bank A forwards for collection to bank B a check drawn on bank C, and B's bookkeeper by an oversight credited the item as cash. Its advice of credit sent the same day as receipt, however, stated that items so credited and subsequently dishonored would be charged back; it also indicated that the item had been credited before and not after collection, sufficient time not having elapsed for this. On receipt of advice, A paid over amount to its depositor, and the check being subsequently dishonored, desires to know if it cannot hold B liable. *Opinion:* This is not a question of default of a correspondent, but the only question is whether the act of B's bookkeeper for which, of course, that bank is responsible, creates any liability of that bank by way of estoppel to deny collection of the item. It is very doubtful if a court would so hold. To constitute an estoppel B must have represented to A that the item

had been collected, upon which representation A relied to its injury. It does not seem that this advice of credit constitutes any such representation, and even were it to be so construed, B would be in a position to assert that A could not have been injured thereby, because it was possessed of knowledge that collection at the time of credit was a physical impossibility. Under the circumstances a court would probably not hold B liable. (*Inquiry from Ohio, Nov., 1914.*)

Advice of payment recalled by wire

1156. Bank A in Massachusetts, sent a bill of lading draft to B for collection; B forwarded it to C in Maryland, and C sent it to D. The latter collected, and sent its check to C in payment. C sent its advice of payment, but D having failed, recalled the advice by wire, but not before A had sent advice of payment to depositor who refuses to concede that payment was not actually made. *Opinion:* The draft was paid by drawee to D, whose check for the proceeds was dishonored. Such payment would release the drawer and any indorser for value. Under the law of Maryland as well as in Massachusetts, a collecting bank is not liable for the default of its correspondents, provided it has exercised due care in its selection. C, therefore, would not be liable unless by reason of giving the advice of payment it is estopped from denying that it had actually received the money. What it did receive was a check which it erroneously supposed was as good as money. It is a general rule that a payment by mistake is recoverable unless the position of the recipient would be changed for the worse. The same principle would apply to an advice of payment; it can be recalled unless in reliance thereon the recipient has parted with something of value so that he would be prejudiced if the adviser could deny the truth of the advice. If in good faith the customer of bank A relying on the advice has changed his position for the worse, bank C would probably be estopped. See *Behring v. Sommerville*, 63 N. J. L. 568, 44 At. 641. *East Haddam Bank v. Scovil*, 12 Conn. 303. (*Inquiry from Mass., June, 1915.*)

Charging back of uncollected items

Negligent collecting bank cannot charge back item if forwarding bank damaged

1157. What should a collecting bank do to protect itself against loss where checks

forwarded with instructions to protest have been returned without protest and charged back to it? *Opinion:* Where a check is refused payment by the drawee and the proper steps taken by the collecting bank to preserve the liability of parties contingently liable there would be a right to charge same back. But if instructions as to protest have been violated and it can be proven that, as a result of such disobedience, the forwarding bank suffered a loss, this would deprive the correspondent of the right to charge the amount of an unpaid check back. In such case the forwarding bank should refuse to consent to the charge back of the item. (*Inquiry from Iowa, Aug., 1916.*)

Bank purchasing b/l draft and collecting same through agent cannot charge back to customer upon agent's default

1158. A customer deposited a bill of lading draft in bank A, which "was credited to his account and not left for collection." The correspondent of bank A collected but failed to remit because of insolvency. May bank A charge the item back to its customer six weeks after such collection? *Opinion:* Apparently bank A became owner of the draft at the time of deposit, and such being the case the depositor was liable thereon as indorser and as soon as the draft was paid he was released from liability and the loss would fall upon bank A. Bank A, therefore, cannot charge the amount back to its customer. (*Inquiry from Wis., March, 1919.*)

Where remittance before collection promptly followed by notice of protest

1159. Bank B forwards a check for collection to bank C, and the latter remits to B before collection, but by the same mail, payment having been refused by the drawee bank, sends notice of protest which B receives a few hours prior to the remittance. The check was returned by C the morning after sending notice of protest and when received B refused to pay, claiming irregularity and delay. *Opinion:* B received the notice of protest of the item before it received the remittance. This was clear notice that the item had not been paid and was given in due season. Notwithstanding the remittance prior to collection and the misconception of same as being the proceeds of collection the case is one where bank C has the right to have the amount refunded by B, and the latter in turn can collect from its customer. (*Inquiry from Mich., Nov., 1915.*)

Recovery of proceeds paid in advance of collection

1160. A New York bank received for collection a check drawn on Bank A of North Carolina and forwarded it to its Raleigh correspondent. The Raleigh bank forwarded the item to its correspondent, Bank B, which collected from the drawee. The Raleigh bank took its correspondent's draft as cash and in advance of collection remitted to the New York bank. Bank B failed and its draft was dishonored. *Opinion:* In North Carolina a collecting bank is not liable for its correspondent's default, if duly selected, and in the absence of negligence on the part of the Raleigh bank and unless payment of the proceeds led the New York bank to do something which if repayment was made would result to its injury, the payment by the Raleigh bank is not final but can be recovered as money paid by mistake without consideration. *Bk. of Rocky Mt. v. Murchison Nat. Bk., 55 S. E. (N. C.) 95. Bk. v. Bk., 151 Md. 320. Kirkham v. Bk. of America, 165 N. Y. 132. (Inquiry from N. Y., Aug., 1911, Jl.)*

Refund after collection

Draft drawn "through bank B" collected through clearing house

1161. Bank A received from the clearing house for collection a sight draft with papers in a sealed envelope attached, the draft stating "through bank B." This was cleared as a cash item with other items on B in the afternoon on day of receipt, being accepted as such, and the balance of the items between the two banks being settled by draft. A immediately remitted for this item to the clearing house, but in the forenoon of the next day B tendered same back and demanded refund of the amount, saying payment had been refused by the drawee, and the question is whether or not A is liable to B for refund of money. *Opinion:* What little authority exists, is to the effect that where a draft is drawn upon a person "in care of" or "through" a specified bank, presentment to the bank named is sufficient, and the bank named is the place of payment, and it would seem that the proper place to present the draft in question for payment was at the B bank and that the draft was so presented and paid. In consequence such payment would seem to be a finality and non-recoverable, in the absence of some clearing rule existing between the two banks, making the afternoon settlement condi-

tional, and subject to revocation the next day. B could not be regarded in the light of a purchaser of the draft, for A was only an agent to collect and had no authority to sell. The only theory upon which B could claim recourse would be that it did not act as payor of this draft, but as agent for collection from the drawee; but this theory is negated by the form which the transaction took, namely, presentation for payment of the amount by the exchange of checks and drafts and settlement of balance. The draft was paid by B presumably out of the funds to the credit of drawee provided for that purpose and was not simply taken for collection. The proceeds having been promptly remitted by A before notice of a contrary intention, it seems B would be estopped from denying that it had paid the draft, and A not liable to refund the amount to it. See *Bartholomew v. First Nat. Bank*, 18 Wash. 683, 52 Pac. 239. *Brooks v. Higby*, 11 Hun. 235. (*Inquiry from Kan., Jan., 1918.*)

Collection by insolvent bank

Drawer discharged by payment to insolvent collecting bank

1162. A check on a Florida bank cashed in Kansas City, forwarded through the mail and the proceeds remitted by the drawee to the last collecting bank, which fails before itself remitting. The Kansas City bank seeks to recover from the drawer. *Opinion:* When the proceeds were remitted by the drawee to the collecting bank, this constituted payment which discharged the drawer. The owner bank in Kansas City which first cashed the check, would, therefore, have no recourse upon the drawer but must look to the assets of the failed bank for reimbursement. *Planters Mercantile Co. v. Armour Packing Co.*, 69 So. (Miss.) 293. (*Inquiry from Fla., April, 1917, Jl.*)

1163. Bank A sent check to B which forwarded to C. That bank collected from drawee bank, and remitted to B by New York draft. Before this was collected C failed and bank A's customer wants to know if the drawer of the check who gave it to him in payment for goods should make the amount good to him. *Opinion:* The customer's debtor tendered in payment of a debt his check which the drawee bank paid and cancelled, the drawer holding it the same as a receipted bill. The fact that the collecting agent who received payment failed and did not pay over the money collected, does not make the drawer responsible. His debt has

been paid, and under the Florida statute which relieves the first collection bank from liability to its customer for defaults of correspondents, the customer must bear the loss. (*Inquiry from Fla., April, 1914.*)

Indorser discharged by payment to insolvent collecting bank

1164. A bank cashed for the indorser a check drawn on another bank and sent it for collection. In due course the drawee bank paid the item but the bank to which the payment was made went into liquidation before remitting the money. Has the bank any recourse against the person for whom it cashed the check? *Opinion:* The indorser was discharged by payment. (*Inquiry from S. C., Feb., 1921.*)

1165. Bank A holds Smith's note indorsed by Jones who requests A to send it to bank B where he pays it. Bank B becomes insolvent and fails to remit to A, and the question is as to Jones' liability. *Opinion:* The mere fact that a note is made payable at a bank does not of itself confer any agency upon the bank on the part of the payee to receive the amount. In order to make the bank the payee's agent to receive the money, the note must be indorsed to, or lodged with it for collection, or it must have received authority from the payee to collect the amount due. Under the circumstances of this case a court would probably hold that bank B was the agent of A, the owner to receive payment and not of the indorser to make payment; that the note was paid, and that Jones was no longer liable. (*Inquiry from Ark., May, 1920.*)

Drawee discharged by payment to insolvent collecting bank

1166. Where A deposits money in H bank to pay a draft which is forwarded to B to H bank for collection and H bank applies money and sends its own draft in remittance, which is dishonored because of its failure. On whom does the loss fall? *Opinion:* B rather than A must stand the loss. *Smith v. Essex Co. Bk.*, 22 Barb. (N. Y.) 627. *Ward v. Smith*, 7 Wall, 447. *Sutherland v. First Nat. Bk. of Ypsilanti*, 31 Mich. 230. (*Inquiry from Mont., Dec., 1912, Jl.*)

Payment and collection by insolvent drawee bank

Discharge of drawer and indorser on check paid by check of drawee which is dishonored.

1167. The bank on which a check was drawn and to which it was presented by

mail sent its draft in payment thereof, and charged the amount to the drawer of the check.

The draft was returned "not sufficient funds," and before it could be returned for payment in some other manner the bank drawing the draft failed. Were the drawer and the indorsers on the original check discharged from liability? *Opinion*: (1) It is established by the weight of authority that where a check is remitted to the drawee for collection, the drawee is made the collection agent of the holder. The duty to collect is in addition to the duty as drawee to pay. *First Nat. Bank of Murfreesboro v. First National Bank of Nashville*, 154 S. W. (Tenn.) 965; *Baldwin's bank of Penn Yan v. Smith*, 109 N. E. (N. Y.) 138. (2) It is also established that where the check, so remitted, is charged to the account of the drawer or the intention to pay is evidenced by some other act sufficient to constitute payment, the drawer is discharged from further liability and the fund thereafter is held by the drawee as agent of the holder and at his risk and if the drawee fails to remit or his remittance draft is dishonored, the loss falls on the holder. The charging of check to drawer's account constitutes payment. *Smith Roofing & Contracting Co. v. Mitchell*, 45 S. E. (Ga.) 47 (where check was also marked "paid"); *Planters Mercantile Co. v. Armour Packing Co.*, 69 So. (Miss.) 293. Where by custom or agreement drawee bank is authorized to credit collecting bank and remit or settle at stated periods, debiting of check to drawer and crediting to collecting bank, constitutes payment. *Pinkney v. Kanawha Valley Bank*, 69 S. E. (W. Va.) 1012. *Briggs v. Central National Bank*, 89 N. Y. 182. Charging-check to depositor, marking it "paid" and surrendering it to him constitutes payment. *Winchester Milling Co. v. Bank of Winchester*, 111 S.W. (Tenn.) 248. *Harmon v. Barber*, 89 S. E. (S. C.) 636. Where the maker of a note payable at a bank instructs bank on day of maturity to pay it and bank through its president says that it will do so, this constitutes payment; in other words, the mere intention to charge the depositor is payment. However, the marking of a check "paid" provisionally as a matter of convenience with no intention to pay if remittance from drawer was not received so as to provide sufficient funds for payment, does not constitute payment where no subsequent deposit is made and the mark "paid" is erased and the check protested. *First Nat. Bank of Murfrees-*

boro v. First Nat. Bank of Nashville, 154 S. W. (Tenn.) 763. (3) But according to some authorities, where the drawee is not agent of the holder and gives its own draft in payment, such check is only conditional payment and if it is dishonored, and due diligence has been used, the drawer of the original check remains responsible. *Burkhalter v. Second Nat. Bank*, 42 N. Y. 538. *Thomas v. Supervisors*, 115 N. Y. 47. *Turner v. Fox Lake Bank*, 4 Abb. Dec. (N. Y.) 434, 3 Keyes 425. The court in *Anderson v. Gill* 79 Md. 312 said that the drawee's draft was either payment of the original check or it was not. If it was (which was the Massachusetts doctrine), the drawer was discharged. If it was not, then the holder's collection agent was responsible to him for having given up the check without payment, and if injury resulted to the drawer by reason of the agent's failure to use due diligence in converting the check into money, then also the drawer was discharged. The drawer was held discharged in the particular case. In *Hilsinger v. Trickett*, 99 N. E. (Ohio) 305, a certificate of deposit was mailed directly to the issuing bank and it was held that its draft was only conditional payment and did not pay the debt where the draft was dishonored; but this case did not go on the theory that the issuing bank was agent of the sending bank to collect the debt from itself. In the case submitted as the check was mailed directly to the drawee bank and was charged to the account of the customer it was paid and according to the weight of authority he was discharged from further liability. Payment would also discharge indorsers prior to the owner. (*Inquiry from Ohio, Mar., 1921, Jl.*)

Note: But in *Waggoner Bank & Trust Co. v. Garner*, 213 S. W. (Tex.) 927 where a check, given for a bill of merchandise, was forwarded direct to the drawee, marked paid, surrendered to the drawer and the sending bank credited with the amount, instead of remittance being made as instructed, the drawee being insolvent at the time and later going into bankruptcy, although had the check been presented at the counter, the bank would have had the money with which to pay it, the supreme court of Texas held that the drawer remained liable, and said: "In the absence of such an understanding (that the payee accepted the check in payment of the debt of the drawer) the giving of the check did not operate as a payment of the debt. For a check to have the effect of payment, the drawer must have the funds to his credit in the bank upon

which it is drawn and the bank must be in a position to pay the check on demand. The receipt of a check is not payment for the debt for which it is delivered, if there is no laches on the part of the holder. Here there was no laches. The bank on which the check was drawn did not pay it and evidently had no intention of paying it. It reported to the City National Bank (forwarding bank) that it could not remit for it. This was equivalent to saying that it could not pay it. A bank which confesses its inability to pay in a customary method, cannot be said to be in a position to pay. A check given for a debt upon such a bank and whose payment by the bank is so refused, is not a satisfaction of the debt. The bank appropriated the check, instead of paying it. With this true, the Hardware Company (drawer) could not claim that by means of the check it had paid its debt to the Garner Company (payee)."

Conflict of authority on discharge of drawer

1168. Where the draft of a drawee bank in payment of a check is dishonored because of its failure is the check considered paid as to the drawer where the drawee bank marked it paid and cancelled it? *Opinion:* According to the weight of authority, the drawer of a check is discharged where the drawee receives and cancels the check and mails its own draft in payment. But if it could be proved that the drawee was insolvent when the check was received and would not have paid cash therefor if presented over the counter, the drawer according to some cases would still remain liable on the check the act of the collecting bank in sending direct not having resulted in damage. And if the drawer had insufficient funds in bank, he would not be discharged. See *Winchester Milling Co. v. Bank of Winchester*, 120 Tenn., 225, 111 S. W. 248. *Lowenstein v. Bresler*, 109 Ala. 326, 19 So. 860. *Jefferson County Bank v. Hendrix*, 147 Ala. 670, 39 So. 295, 1 L. N. S. 246. *Farley Nat. Bank v. Pollock*, 145 Ala. 321, 39 So. 612, 2 L. N. S. 194, 117 Am. St. Rep. 44. *Bank of Rocky v. Floyd*, 142 N. C. 187, 55 S. E. 95. (*Inquiry from Fla., July, 1915.*)

1169. The customer of a bank gave it his check for his balance in another bank in the same city, which check was placed to his credit and handled in the clearings of that day. In settlement of such clearings the payee bank was given a draft on a bank in another city. This draft was returned

unpaid—owing to the closing of the drawer bank. The customer has the cancelled check in his possession. Has the payee bank recourse against the customer? *Opinion:* According to the weight of authority the drawer is discharged by the surrender of his check and the acceptance of the drawee's check. But where a check is presented to a drawee bank by a bank owning the paper, and the drawee's draft is delivered in payment and dishonored, some courts hold that if due diligence has been used and the original check is protested, the drawer of the original check remains liable. See *Burkhalter v. Second National Bank*, 42 N. Y. 538. Even assuming the drawer was not discharged by such transaction, it was incumbent on the payee bank to use due diligence in the collection of the drawee's draft, *Anderson v. Gill*, 79 Md. 312. (*Inquiry from N. M., Jan., 1921.*)

Discharge of drawer although drawee's remittance draft dishonored

1170. A collecting bank received a number of checks on an out-of-town bank, which were forwarded through the usual channels, and were honored by the drawee bank and charged to its customers' accounts, but its remittance draft to cover these items has been dishonored. Can the payees of these checks compel the drawers to reimburse them for same? *Opinion:* Under the facts recited, the drawers of the original checks, according to most of the authorities, are discharged by payment, and the payees of such checks are limited to recourse upon the failed bank, assuming there is no negligence which would make the collecting banks responsible. *Daniel v. St. Louis Nat. Bank*, [Ark.] 54 S. W. 214. *Nineteenth Ward Bank v. First Nat. Bank*, [Mass.] 67 N. E. 670. *Briggs v. Central Nat. Bank*, 89 N. Y. 182. *Winchester Milling Co. v. Bank of Winchester*, [Tenn.] 111 S. W. 248. *Pinkney v. Kanawha Valley Bank*, [W. Va.] 69 S. E. 1012. *Neg. Inst. Law*, Sec. 188. See, however, *Ripley Nat. Bank v. Conn. Mut. Life Ins. Co.*, [Mo.] 47 S. W. 1, and *Kirkham v. Bank of America*, [N. Y.] 58 N. E. 753, to the contrary. (*Inquiry from Kan., Jan., 1921, Jl.*)

1171. A bank with which a check was deposited sent it directly to the drawee bank, which charged it to the account of the depositor but delayed remitting, although a cashier's draft was drawn. At the end of ten days, bank examiners took charge of the drawee bank and remitted the cashier's

draft to the collecting bank. The drawee of the draft refused payment with the words "Bank in the hands of State Bank Examiner." Is the drawer of the check liable? *Opinion:* As the check was mailed directly to the drawee bank for collection, that bank occupied the dual relation of agent of the drawer to pay and agent of the holder to collect. When it charged the check to the account of the drawer, this constituted payment, and it thereafter held the fund as the agent of the holder. The drawer is discharged from liability on the check; he has paid the indebtedness for which the check was given and the owner of the item will have to look to the liquidators of the failed bank for reimbursement, as under the law of Louisiana [Laws (1916) Act 85] the bank in which the check was first deposited was authorized to mail it direct to the drawee and is not guilty of negligence in so doing. (*Inquiry from La., Feb., 1921, Jl.*)

Priority in assets of insolvent collecting bank

Proceeds in hands of failed Alabama bank a trust fund

1172. A check was forwarded "for collection and returns" and the collecting bank failed after making the collection. *Opinion:* The proceeds in the hands of the failed bank are recoverable as a trust fund provided their identity can be traced. Where a failed state bank in Alabama is not a trustee but a debtor for collection proceeds, a creditor, who is not a depositor, is subordinated to claims upon non-interest bearing deposits. *Hutchinson v. Nat. Bk. of Commerce*, 41 So. (Ala.) 143. *First Nat. Bk. v. Dennis*, 146 Pac. (N. Mex.) 948. Ala. Const., 1901, Sec. 250. *Nixon St. Bk. v. First St. Bk.*, 60 So. (Ala.) 868. (*Inquiry from Ala., July, 1915, Jl.*)

Tennessee rule uncertain

1173. Where a Tennessee bank, the last in a chain of collecting banks, makes the collection but fails before its draft is paid, is the owner of the paper entitled to a preference on the theory that the proceeds are a trust fund? *Opinion:* The Courts are divided on this proposition, and those in Tennessee do not seem to have passed upon the question. (*Inquiry from Conn., April, 1914, Jl.*)

Proceeds in South Dakota failed bank a trust fund

1174. Where the draft of a South Dakota collecting bank is not paid because of its

insolvency has the owner of the paper remitted for collection the right to recover the proceeds of the collection as a trust fund? *Opinion:* In South Dakota such proceeds constitute a trust fund. *Piano Mfg. Co. v. Auld*, 14 S. D. 512. (*Inquiry from Ind., March, 1912, Jl.*)

Proceeds in Washington failed bank not a trust fund

1175. A bank in the state of Washington collected paper but its draft for the proceeds was dishonored because of its insolvency. Are such proceeds a trust fund? *Opinion:* In Washington the proceeds are not a trust fund but the relationship between the bank and the owner of the paper is that of debtor and creditor. *Bowman v. First Nat. Bank*, 9 Wash. 614, 38 Pac. 211. The owner would share pro rata with other general creditors. (*Inquiry from Iowa, March, 1921, Jl.*)

1176. Bank A sold bank B a note payable at its bank. The maker remitted interest to A which sent cashier's check for same to B, but before payment A failed. B carried no account with A, and asks if latter is not in the position of trustee and B entitled to preference. *Opinion:* The authorities are in conflict upon the proposition, but the cases in Washington are against B's contention. In *Hallam v. Tillinghast*, 19 Wash. 20, 52 Pac. 329, it is held that only the ordinary relation of debtor and creditor, and not that of trustee and cestui que trust, exists between a bank which has collected a draft and the person who left the draft for collection, though there was no agreement for deposit of the proceeds, so that, the bank becoming insolvent, such person is not entitled to preference. See also *Bowman v. First Nat. Bank*, 9 Wash. 614, 38 Pac. 211, 43 Am. St. Rep. 870. (*Inquiry from Wash., Nov., 1917.*)

Federal courts favor trust fund theory

1177. Where a collecting bank fails after making a collection and before remittance, is the owner of the paper entitled to a preference in the assets of the insolvent bank? *Opinion:* There is a conflict of authority among the courts of the different states, where a bank receives an item for collection, and after collecting same from debtor fails to make remittance because a receiver has taken possession, whether the fund held by it is a trust fund which the creditor can recover in full from the assets or whether insolvent bank is debtor only. The state

courts of Washington hold that only the ordinary relation of debtor and creditor exists so that the collecting bank becoming insolvent, the creditor is not entitled to preference; the courts of Georgia and North Carolina have also held insolvent collecting banks debtors. On the other hand the courts of New Mexico, Alabama, Kansas and Nebraska have held the collecting bank a trustee, and this seems to be the rule in the Federal Courts. See *Western German Bank v. Nowell*, 134 Fed. 724. *Holder v. Western German Bank*, 136 Fed. 90. See also *Hallam v. Tillinghast*, 19 Wash. 20, 52 Pac. 329. But see *Empire State Surety Co. v. Carroll County*, 194 Fed. 593. (*Inquiry from Wash., May, 1920.*)

1178. A warrant on a city was sent to a national bank in the state of Washington for collection. After collecting, the Washington bank became insolvent. The national bank examiner found a cashier's check payable to the forwarding bank. Is the forwarding bank a preferred creditor? *Opinion:* Presumably the Washington bank received the money from a source outside a deposit of the city with it, so that the funds of the bank would be augmented by the collection. While the Washington courts hold that the proceeds of the collection are not a trust fund, but that the bank becomes merely a debtor for the amount of the collection, the federal courts hold generally that the proceeds are a trust fund which may be recovered in full, when they can be traced into the hands of the receiver of the bank. *Western German Bank v. Norvell*, 134 Fed. 724. It is not necessary to trace the identical money into the hands of the receiver; it is sufficient to show that the sum which went into the receiver's hands was increased by the amount collected. The law governing distribution would seem to be that of the federal courts, since the insolvent bank is a national bank. (*Inquiry from Mich., Oct., 1915.*)

Proceeds in failed Michigan bank recoverable in full

1179. An item drawn on B bank sent for collection to C National Bank in Michigan was collected and remitted for by that bank's draft, which was dishonored because of the bank's failure. *Opinion:* Under the law of Michigan (the authorities elsewhere being in conflict) the bank owning an item collected is entitled to payment of proceeds in full by receiver. *Lunderlin v. Sav. Bk.*, 116 Mich. 281. *Sherwood v. Milford Bk.*,

94 Mich. 78. *Sherwood v. Central Mich. Sav. Bk.*, 103 Mich. 109. *Wallace v. Stone*, 107 Mich. 190. *Western German Bk. v. Norvell*, 134 Fed. 724. *Holder v. Western German Bk.*, 136 Fed. 90. *Hutchinson v. Nat. Bk. of Commerce*, 145 Ala. 196. *Kan. Bk. v. First St. Bk.*, 62 Kans. 788. *State v. Bk. of Commerce*, 61 Neb. 181. The following cases are contra: *Ober v. Cockran*, 118 Ga. 396. *N. C. Corp. Commission v. Merchants & Farmers Bk.*, 137 N. C. 637. *Hallam v. Tillinghast*, 19 Wash. 20. (*Inquiry from Mich., April, 1910, Jl.*)

Proceeds in failed Texas bank a trust fund

1180. Is the claim of the owner of paper preferred when a Texas collecting bank receives payment but fails before remitting the proceeds? *Opinion:* The claim would be a preferred rather than a general claim, since the insolvent bank stands in the relationship of trustee. *Hunt v. Townsend*, 26 S. W. (Tex. Civ. App.) 310. (*Inquiry from N. M., Feb., 1921.*)

Proceeds in assets of failed North Carolina bank not a trust fund

1181. A draft with bill of lading attached was forwarded for collection, and was collected and a draft was sent in payment, which draft was protested for insufficient funds. Does the collecting bank sustain a trust relationship to the bank forwarding the original draft, which now holds the protested draft of the collecting bank? *Opinion:* *North Carolina Corp. Commission v. Merchants & Farmers Bank*, 50 S. E. (N. C.) 308 holds that where a draft is sent to a bank for collection and it is so restricted by indorsement, the bank is entitled to carry the proceeds of the draft into its general assets, and that when it does so the relationship between the owner or forwarder of the draft and the bank becomes that of creditor and debtor, so that on failure of the bank such owner or forwarder can share in the assets only pro rata with the other general creditors. Assuming in the case submitted that the proceeds of the draft were carried into the general assets, the customer can prove only as a general creditor. (*Inquiry from N. C., Jan., 1921.*)

Proceeds in assets of failed South Carolina bank a trust fund

1182. What is the rule in South Carolina with respect to a preferred claim against an insolvent collecting bank for the proceeds of the collection, when the draft of such col-

lecting bank is dishonored? *Opinion:* White v. Commercial & Farmers Bank, 60 S. C. 122, 38 S. E. 453, holds that to entitle a claimant to a priority over other creditors of an insolvent bank on the ground that he is a cestui que trust, and not a creditor, as to the proceeds of drafts sent by him to the bank for collection, and collected by the bank, but not remitted, he must show that such proceeds in some form have gone into the assets of the bank, and if he fails to do so, he must share ratably with other creditors in the distribution of the assets. (*Inquiry from S. C., Jan., 1921.*)

No preference in assets where check is on failed bank

1183. Is there a preferred claim against the assets of a drawee bank, which receives a check by mail and remits by draft, which is dishonored because of its insolvency? *Opinion:* The check in question given by the insolvent Florida bank is not a preferred claim. It has been held in numerous cases where the check is drawn directly on a bank which fails, its own check in payment is not a preferred claim because the bank has received nothing from an outside source by which its assets are swelled. It has simply transferred the amount from the account of the drawer of the check to another account and this does not entitle the holder of its own check to be preferred in its assets in the hands of the receiver. (*Inquiry from Mass., April, 1916.*) (Similar inquiry from Ill., March 1914, Jl.)

1184. Bank A forwarded several checks sent to it for collection to drawee bank B at a time when state examiners were checking up the latter and received B's draft on bank C for balance owed which draft was protested for insufficient funds and before any action could be taken bank B was closed by order of the state commissioner. Is A a preferred creditor? Would it have any recourse on the state examiners for allowing the draft to be issued while they were in charge? *Opinion:* Had bank B been an independent collecting agent which had failed after sending a remittance draft it would seem that there would be a preference. Midland Nat. Bank v. Brightwell, 148 Mo. 358, 49 S. W. 994, 71 Am. St. Rep. 608. But this case also holds that where the collection is made by the bank, not from an outside source, but by charging the accounts of depositors, there is no preference in the assets of the failed bank. According to this ruling, it is doubt-

ful if bank A can claim as a preferred creditor because the draft was given, not from money collected from an outside source, but for the balance of checks or drafts upon it which were charged to the accounts of the drawers thereof and its assets were not swelled by reason of any collection from an outside source. A would have no recourse on the state examiners for allowing the draft to be issued while they were in charge as they were simply making an examination and the bank was a going concern at the time it issued the draft. The bank was not closed until later. (*Inquiry from Mo., Jan., 1921.*)

1185. Where a note is sent to a bank where payable for collection, and the bank charges the note to the account of the maker, but fails to remit the amount of the note to the payee, on account of insolvency, is the payee of the note a general creditor of the failed bank, or does such bank thereby become a trustee for the payee, and the latter a preferred creditor of the bank? *Opinion:* Where an insolvent bank does not collect the item from an outside source, but collects it from itself simply transferring the credit on its books from its depositor, the courts are quite unanimous in holding that there is no preference and that the owner of the item can share only as a general creditor. See People v. Merchants and Mechanics Bank, 78 N. Y., 269, 34 Am. Rep. 532. (*Inquiry from N. Y., Oct., 1918.*)

1186. If a bank sends a check to another bank in a distant city, and the latter bank fails before remitting, to whom do the proceeds belong? *Opinion:* The majority of decisions are to the effect that the proceeds are regarded as a trust fund belonging to the owner of the item and may be recovered in full if they can be traced. There are a few decisions, however, the other way, which have held that the collecting bank is to be regarded as debtor for the proceeds; and in any case where the item is upon the failed bank itself and its remittance draft is dishonored, there is held to be no preference. (*Inquiry from Va., March, 1916.*)

1187. A note was sent to the First National Bank of X for collection, and the amount was paid to said bank at maturity, by a check against the account of one M in said bank. Two days later the bank failed. The receiver forwarded to the owner the draft of the First National Bank of X which had been drawn for the purpose of remitting for the collection. *Opinion:* The owner of the draft has no preferred claim

against the insolvent bank, there being no increase of the bank's assets by the transaction. (*Inquiry from Wis., May, 1910, Jl.*)

Check or proceeds received after insolvency can be reclaimed

1188. A bank took a check for collection and credit, but credit was not given at the time of deposit and the returns from the collection were not received until after the bank had failed. *Opinion:* The depositor is entitled to the entire proceeds. The check was deposited at a time when the bank was insolvent and remains the property of the depositor. *Richardson v. Denegre*, 93 Fed. 572. *Jones v. Killveth*, 49 Ohio St. 401. *Hallam v. Tillinghast*, 19 Wash. 20. (*Inquiry from Wash., Dec., 1914, Jl.*)

1189. A private banking firm receives paper for collection, knowing at the time that it is insolvent and will not be able to make a return. *Opinion:* This is such fraud as will entitle the depositor of the items to reclaim the same or their full proceeds from the receiver or assignee. *Cragie v. Hadley*, Rec'r., 99 N. Y. 131. *St. Louis & San Francisco R. R. v. Johnston*, Rec'r., 133 U. S. 566. *Williams v. Van Norden Tr. Co.*, Assignee, 104 App. Div. (N. Y.) 251. *Grant v. Walsh*, 145 N. Y. 502. *Met. Nat. Bk. v.*

Loyd, 90 N. Y. 530, 537. *Spring Brook Chemical Co. v. Dunn*, Rec'r., 39 App. Div. (N. Y.) 130. (*Inquiry from Va., March, 1911, Jl.*)

Uniform code of collections

1190. A most important task is the straightening out of the knots and tangles in the law governing the collection of commercial paper, which is now in a most confused state and is not adequately regulated by the Negotiable Instruments Law. The judicial decisions upon nearly all phases of the law of bank collections are in hopeless conflict—they do not square with modern banking customs—and it would seem of the utmost importance to all banks handling collection items that there be prepared for statutory enactment a uniform code of rules simplifying and making uniform the law governing collections, and covering (1) liability of initial bank for default of correspondent, (2) methods of presentment, direct and circuitous, (3) definite meaning and construction of collection endorsements and guarantees, (4) responsibility for lost items, (5) questions of title and right to proceeds in event of insolvency, and (6) such other topics as are germane to the subject. (*General Counsel's report Nov., 1911.*)

CONTRACTS AND AGREEMENTS

Bank's contract with publisher of bank directory

1191. A bank signed a contract with a publishing company calling for payment of \$15 per year for 5 years for delivery of a bank directory. The bank was induced to make the contract on the strength of a statement by the company's agent that "10,000 more or less business houses would use the directory for making collections through banks." The bank was led to believe that the number of collections coming to it would be largely increased by use of their book. The book did not prove satisfactory, and, upon learning that the statement was probably much exaggerated and visionary, the bank desires to abrogate the contract and be relieved of responsibility for making further payment. *Opinion:* The contract probably cannot be abrogated. The court will doubtless hold that the written contract itself embodied everything binding between the parties and that any oral statements not embodied therein as to the number of houses which would use the book would not be admissible. In this case the statement by the agent was in the nature

of an opinion and could not be regarded as a misrepresentation of a fact which could be relied upon by a prudent man. (*Inquiry from Pa., May, 1919.*)

Subscription contract for one year— Liability for publication beyond year

1192. The Oregon law provides that a publication sent without an order is a gift, and no claim accrues for same. If a publication was ordered by a bank for one year from a publisher located outside the state, and the publisher continued to send the paper for a longer period without any instructions from the bank, could he force the bank to pay for the publication for the period sent, though not ordered by the bank? *Opinion:* Apart from the Oregon statute, where a publication is ordered for one year only, there is no contract liability to pay for the publication beyond the year, unless a new order or a renewal is given or unless by thereafter receiving the paper, the bank becomes liable on an implied contract to pay for same. If the publisher continues to send the paper for a longer period without instructions so to do, he does so at his own

risk, and where the bank refuses to receive it, it cannot be compelled to pay for the publication beyond the first year. If, however, the bank should continue to take the publication from the post office during the second year without protest, it would probably be held liable. In *Austin v. Burge*, 137 S. W. (Mo.) 618 after payment of a subscription bill, the defendant directed the paper stopped. Notwithstanding the publisher continued to send the paper and defendant received it. It was held he was liable for the subscription price upon an implied contract to pay for same. In *Fogg v. Atheneum*, 44 N. H. 115, after direction to discontinue, the publisher continued to send and defendant continued to receive it through the post office. Having accepted the paper, he was held liable for the subscription price by implication of law. So in *Ward v. Powell*, 3 Har. (Del.) 379 it was held an implied agreement to pay for a newspaper or periodical arose by continued taking and accepting the paper from the post office but that "if a party, without subscribing to a paper, declines taking it out of the post office, he cannot become liable to pay for it; and a subscriber may cease to be such at the end of the year, by refusing to take the papers from the post office, and returning them to the editor as notice of such determination."

The Oregon statute provides (Ore. Laws §77 10334) that when a publisher mails or sends a newspaper or periodical to a person in the state without first receiving an order therefor, it "shall be deemed to be a gift and no debt or obligation shall accrue against such person or persons, whether said newspaper or periodical is received by the person or persons to whom it is sent or not." In Oregon, therefore, the taking of an unordered periodical from the post office raises no implied contract to pay for same, but the person so receiving may regard it as a gift. Presumably this would apply where the subscription was for one year only and not renewed; as the publisher would have received no order for the second year. But where there is no statute, as in Oregon, a bank which has ordered a paper for a year only, must refuse to take it thereafter from the post office, for otherwise the law will raise an implied promise to pay for same. (*Inquiry from Ore., Dec., 1916.*)

Offer and acceptance as completing contract for purchase and sale of real estate

1193. A prospective purchaser offers

\$2200 for a piece of land and asks that a deed be sent if the offer is accepted. The owner answers that an option has been given on the property and when this expires he will take up the subject. The offer is renewed to take effect if the option is not fulfilled, and there is a request that a deed be forwarded in case of acceptance. At expiration of option the owner wires to the person making the offer: "Do you want property, \$2200? Answer," and the answer was: "Will take property \$2200; send deed." *Opinion:* A court would be likely to hold that there was a completed contract for the sale of the property. The real controversy is whether the telegram of the owner was an offer, which upon acceptance would form a binding contract, or whether it was merely an inquiry, so that the answering telegram would constitute merely an offer. In view of the original and repeated offer to purchase, the telegram of the owner may well be considered an offer. It will require a judicial decision to settle the question positively. (*Inquiry from Minn., Aug., 1916.*)

Consignment contract of wool—Advances by commission merchant

1194. A contract between a shipper of wool and a commission merchant is in the following form: "In consideration of the payment of \$5586.25, as an advance on my wool the receipt of which is hereby acknowledged, I agree to consign my entire 1920 clip of wool, about.....fleeces, ...pounds to of Boston Mass. Total advance to be cents per pound and balance to be paid when wool is shipped," after which there are provisions for interest on advances, etc., rate of commission, and for defense of title by shipper.

If the wool sells for less than the amount of advances and other charges, has the commission merchant the right to recover the excess of the advances from the shipper? *Opinion:* The relation is that of principal and factor and the commission merchant may hold the shipper for the excess of the advances. (*Inquiry from Mont., Jan., 1921.*)

Contract with bank to collect its delinquent claims

1195. A commercial liquidation company calling themselves specialists in the liquidation of delinquent debts, made a contract with a bank on January 15, 1916,

whereunder the bank paid \$250.00 retainer fee, the company agreeing to use due diligence in collecting all delinquent claims during two years from date. The company also gave the bank a surety bond to protect the latter against any dishonest misappropriation of collections made. Under this contract the bank forwarded to the company \$4,000 in old notes. One year and eight months has elapsed and there have been no results. The bank asks what its recourse is and what is the best method of procedure. *Opinion:* There appears to be no basis for any criminal action against this concern. They have simply agreed to use due diligence in collecting the claims and have received \$250.00 from the bank as a retainer or advance payment for services to be rendered. It would be difficult to prove that they had obtained this money under false pretenses for they could doubtless show that they had rendered some services in the matter, though ineffectual, nor could the bank recover the money unless it proved that they had rendered no services. (*Inquiry from Ind., Oct., 1917.*)

Express company. Liability as carrier for shortage of currency shipped

1196. A bank claims that an express company is short in the delivery of currency shipped, and the company contends that the container was in perfect condition when delivered. Can the bank recover for the shortage? *Opinion:* Where money is delivered to a carrier, such as an express company, and the carrier fails to deliver, it is prima facie liable and the burden of proof is on it to show facts relieving it from liability. If the bank's proof tends to show the delivery of the full amount claimed to the carrier, and that of the express company tends to show that the package received by it was delivered intact, a question of fact is raised which it is for the jury to decide. If the bank feels confident that it can establish that the full amount of currency was delivered by it, it is justified in suing for the shortage. (*Inquiry from Pa., Nov., 1916.*)

Contract to pay commission on sale

1197. A entered into a written contract with a real estate agency, wherein the agency was given power of attorney to sell A's house for \$1,000 within thirty days, and upon cancellation of the contract by A before its expiration A was obliged to pay the agency the five per cent. commission. A cancelled the contract and the agency demanded the

commission. *Opinion:* The agency may recover the commission, because the contract was founded upon sufficient consideration. A employed the agency as brokers to sell, and such employment was sufficient consideration to support A's promise. *Kim-mell v. Skelly*, 130 Cal. 555. *Hoskins v. Fogg*, 60 N. H. 402. *Gibson v. Gray*, 17 Tex. Civ. App. 646. (*Inquiry from Ga., May, 1913, Jl.*)

Statute of limitations in Montana

1198. An Iowa bank desires information relative to the Statute of Limitations in Montana. *Opinion:* The statute provides that "an action upon any contract, obligation, or liability, founded upon an instrument, other than for the recovery of real property, must be commenced within eight years after the accrual of the cause of action." (*Inquiry from Iowa, Sept., 1913.*)

Rights of bank under trust receipt on bankruptcy of borrower

1199. A bank submits a form of trust receipt under which the borrower agrees to hold the merchandise as the property of the bank, with liberty to sell same for its account and further agrees to hold the merchandise and the proceeds thereof in trust for the payment of the bank's acceptance under a letter of credit and of any other indebtedness of the undersigned to said bank; and further, that "in the event of any suspension or failure, or assignment for the benefit of creditors, or of the non-payment at maturity of any acceptance made upon said credit, or any other credit * * * all obligations * * * whatsoever shall thereupon without notice mature and become due and payable." The bank asks whether it would become a preferred creditor in the event of bankruptcy of the borrower and whether the bank would have the right to attach the goods in case of suit or otherwise. *Opinion:* In the event of bankruptcy of the borrower, the bank would have superior right to the goods. As the bank holds the equitable title to the goods, it would be entitled to attach same at any time, unless they have been sold by the borrower in pursuance of the authority given in the trust receipt. In that event, the bank would have a right to follow the proceeds and reclaim same as long as susceptible of identification. *Southern Cotton Oil Co. v. Elliotte*, 218 Fed. 567. *Carroll v. Stern*, 223 Fed. 723. *Clark v. Snelling*, 205 Fed. 240. *Welch v. Polley*, 177 N. Y. 117. (*Inquiry from N. J., Aug., 1920.*)

CORPORATIONS AND CORPORATE STOCK

By-laws

Variation between by-laws and resolution of directors

1200. Where the by-laws of a corporation are filed with a bank, showing the limitations of the powers of its directors, and subsequently a resolution is passed by the board at variance with such by-laws, is the bank to be governed by the resolution or the by-laws? *Opinion:* When by-laws are filed with a bank in which the powers of directors are limited in any particular, or where there is a certain mode of execution or of indorsement of notes or checks provided, in every such case the bank is chargeable with notice of the by-laws, and if such instruments are signed or indorsed contrary to the by-laws, even if by resolution of the board of directors, the bank must be governed by the by-laws and not by resolution of the board of directors. (*Inquiry from N. Y., Nov., 1920.*)

Failure to adopt by-laws

1201. A corporation transacts business without adopting any by-laws. The corporation, becoming involved in damage suits and approaching insolvency questions the validity of its corporate acts by reason of the omission. *Opinion:* When the governing statute in express terms confers upon a corporation the power to adopt by-laws, the failure to exercise the power will be ascribed to mere non-action, which will not render void any acts of the corporation which would otherwise be valid. *Steger v. Davis*, 8 Tex. Civ. App. 23, 27 S. W. 1068. Tex. Rev. Stat., Sec. 581. (*Inquiry from Miss., April, 1913, Jl.*)

Adoption of by-laws by corporation—Meaning of "majority"

1202. Where it is said that by-laws enacted by a majority vote of all stockholders will be valid, what constitutes a "majority?" *Opinion:* The share of stock is the voting unit, and a majority vote of all stockholders would call for a majority of the shares. (*Piano etc. Co. v. Finley*, 98 Ky. 405. See also *Tract & C Co. v. Smith*, 205 Fed. 643. *Com. v. Smith*, 19 Pa. Dist. Ct. 638). And it may safely be said that where the phrase "a majority vote of all stockholders" is used in connection with a joint stock corporation, it means "a majority

vote in interest of all stockholders," or "a majority vote of all the stock," unless the contrary is specifically, or by necessary implication, indicated. (*See Weinburgh v. Union St. Ry. Advertising Co.*, 55 N. J. Eq. 640. *State v. Horan*, 22 Wash. 197). (*Inquiry from La., Jan., 1917.*)

Foreign corporations

Right to sue in New York state

1203. Inquiry is made as to whether a New Jersey Corporation, not authorized to do business in New York State, has a right to bring a suit in that state's courts on a contract made in New York. *Opinion:* Applying many New York decisions, it is the consensus of opinion that a foreign corporation not authorized to do business in New York State has a perfect right to sue in the courts of the state on a contract made with a citizen of New York either within or without the state, provided it has not located in the State of New York for the purpose of doing business within its boundaries; that is by exercising its corporate franchise within the state and becoming in practical effect a domestic corporation for all purposes. (*See N. Y. Code of Civ. Proc., Sec. 1779—Consol. Laws, Ch. 23, Sec. 15.*) *Barney & Smith Car Co. v. E. W. Bliss Co.*, 164 N. Y. S. 800. *Sterling Mfg. Co. v. National Surety Co.*, 159 N. Y. Suppl. 979. *Frick v. Pultz*, 149 N. Y. Suppl. 732. *Eclipse Silk Mfg. Co. v. Miller*, 129 N. Y. Suppl. 879. (*Inquiry from N. J., Feb., 1918.*)

Suit on note by non-resident corporation

1204. Inquiry is made as to how a corporation may proceed to bring suit on a note in a state where it is not qualified to do business. *Opinion:* If the corporation holder does not care to qualify with a resident agent in the state where it desires to bring suit, it could indorse the note to an individual in the state for the purpose of suit. The Negotiable Instruments Act provides that "An indorsement is restrictive which * * * constitutes the indorsee the agent of the indorser," and that "A restrictive indorsement confers upon the indorsee the right (1) to receive payment of the instrument (2) to bring any action thereon that the indorser could bring." (*Inquiry from Ind., Aug., 1916.*)

Increase and reduction of capital*Failure of Nebraska corporation to publish notice of increase of capital*

1205. A bank states that a corporation increasing its capital stock, carried out the legal requirements in so doing, except it failed to publish notice of the amendment increasing the same. The bank asks the effect of such failure. *Opinion:* Under the provisions of the Revised Statutes of Nebraska, 1913 (Secs. 571, 574 and 580), it would seem, that failure to publish notice of an amendment to the articles increasing the amount of capital stock would make all the stockholders liable for the debts, to the extent of the unpaid subscription of any stockholder to the capital stock of the corporation, and in addition thereto to the amount of capital stock owned by such individual, the same as failure to publish notice of the original articles of incorporation. (*Inquiry from Neb., March, 1920.*)

Distribution of existing surplus

1206. A bank inquires as to the proper manner of handling a proposition to increase the capital stock of a corporation where new stock is desired to be sold at a figure where surplus might be thus created and where earnings have accumulated to the benefit of present stockholders, but where limited or no dividends have been paid in order that subscribers to new stock would not participate on a par with old stockholders for past earnings. *Opinion:* It would seem that a good way of handling would be, in addition to the issue of new stock desired to be sold, to further increase the stock to the amount of the accumulated earnings and distribute such increase as a dividend to present stockholders. To illustrate: A corporation under the law of New Jersey now has a capital of \$100,000 divided in 1,000 shares. It has accumulated earnings which belong to the existing stockholders of \$25,000. It desires to make an increase in capital of \$100,000 by the issue of 1,000 new shares to be sold at \$125 each so as to create a surplus of \$25,000. The suggestion is that, in addition to the issue of 1,000 new shares to be sold at \$125 each, the corporation also issue 200 new shares, par value \$20,000 and distribute such new shares as a dividend to its present stockholders. As these \$20,000 of new shares would represent \$25,000 of assets, they would be on an equal basis with the \$100,000 of new shares sold at \$125,000

and representing \$125,000 of assets. See Compiled Stat. N. J. 1910, p. p. 1612, 1613. Wall v. Utah Copper Co., 70 N. J. Eq. 17. (*Inquiry from N. J., Dec., 1919.*)

Reduction of preferred capital out of earnings

1207. A bank raises these questions: 1. Has an Ohio corporation (presumable by act of its board of directors) the power or authority to reduce its preferred capital out of earnings, i. e., use earnings to purchase and retire preferred capital without authority of a stockholder's vote, or by virtue of some provision of law or charter? 2. Assuming no such authority—and purchase of stock ultra vires—would the registrar, cancelling the preferred stock on presentation, be liable to other preferred stockholders, if the corporation should become insolvent and not be able to pay preferred stock in full? What is function of registrar? Is he a "watchdog" to see that nothing illegal or unauthorized is done in transfer or cancellation of stock—a trustee of stockholders—or are his functions merely ministerial? *Opinion:* 1. The reduction of the capital stock of a corporation can take place only when prescribed by law and in the manner so prescribed. A purchase by a corporation of its own stock, in effect, amounts to a withdrawal of the shareholder whose shares are purchased, from membership in the company, and a repayment of his proportionate share of the company's assets. There is no substitution of membership under these circumstances as in case of purchase and transfer of shares to a third person, but the members of the company and the amount of its capital are actually diminished. What ever a transaction of this kind may be called in legal phraseology, it is clear that it really involves an alteration of the company's charter and the purchase of preferred stock out of earnings without authority of law would be ultra vires. 2. There seems to be lacking in Ohio any statutory authority for investing a registrar with authority or functions such as those referred to by the inquiring bank and, therefor, the necessary conclusion is that the duties of such an officer are purely ministerial and he would not be liable for cancelling the preferred stock so purchased. (*Inquiry from Ohio, April, 1917.*)

Corporation as guarantor

Corporation as guarantor of railroad bonds substituted for railroad notes on which corporation liable as indorser

1208. A director of a corporation sub-

scribed to "bearer" railroad notes in his own name but turned them over to it for value received. The corporation delivered the notes in payment of a debt to another corporation. The latter negotiated the notes to a bank which required the indorsement of both corporations, and after the notes were protested for non-payment, it accepted renewals with the same indorsements. Is the bank safe in exchanging the outstanding renewal notes for bonds of the railroad, guaranteed by the two corporations? Were the indorsements on the renewal notes accommodation indorsements? *Opinion:* Generally speaking, where A gives a note to B who indorses for value to C corporation, which indorses for value to D corporation, which indorses for value to a bank and the note is renewed with the same indorsements, the corporation indorsements are not for accommodation but for value and the corporation can be held thereon, having received value for the paper in their business. But when as in this case the maker of railroad notes proposes to substitute a different form of security, i. e., railroad bonds, and in place of the liability of the corporations as indorsers on the notes, proposes to have these corporations guarantee the bonds, the question of ultra vires is raised.

The corporations might be held liable on the guaranty as it would be for value and not for accommodation—a mere renewing of an obligation in a different form—but the bank before making the exchange should call upon the railroad company to produce some unquestionable legal authority that the guarantor corporations would be bound by their guaranty. (*Inquiry from Wis., April, 1919.*)

Loans to corporation

Bank's recourse on real estate security of corporation where proceeds of loan delivered to unauthorized person

1209. A, the organizer of a corporation, who had no stock in his name nor any official connection with it, falsely representing that it had considerable property, caused B to deed a tract of land to it for \$85,000 par value of stock in the corporation and had the directors accept the deed and issue the stock. A by virtue of oral authority negotiated a bank loan on the parcel of land and took the note and mortgage properly executed by the corporate officers to the president of the bank, who was also his attorney, and who at A's request deposited the money to A's credit, notwithstanding

that the corporate by-laws provided that all money must be handled by the treasurer of the corporation, and that A was without authority to receive or disburse the money. A squandered the amount of the loan and the bank sues to foreclose the mortgage. What rights has the bank? *Opinion:* The corporation apparently has a good defense to the bank's foreclosure suit on the ground of failure of consideration. While the note and mortgage were executed by officers of the corporation, the consideration was not paid to it but to A. A, not being an officer of the corporation, and otherwise without authority, had no authority to receive the proceeds of the loan on its behalf. It would seem that the only recourse of the bank would be upon A. If A had stock in the corporation which is the owner of the land, the bank might seize this stock for A's debt, but A has no stock in his name. Furthermore, were the fact otherwise, as the land, which it would appear was the sole asset of the corporation, was deeded to it under false representations, it would seem that B would have a prior claim on this asset. (*Inquiry from Ind., Aug., 1918.*)

Building and loan associations

Power to advertise business

1210. Inquiry is made whether a building and loan association has a legal right to use its capital to advertise or promote its business. *Opinion:* Assuming that contracts for advertising would be proper for such associations to enter into in order to successfully accomplish the purposes for which the association is created, there is nothing in the Pennsylvania statute creating or authorizing the creation of building and loan associations which expressly or by implication exempts the capital of such associations from liability for its legitimate contracts, and it seems where a contract for advertising was made by a duly authorized officer of the association it would be binding on it and its liability could be enforced. (*Inquiry from Pa., April, 1915.*)

Promoters of corporations

Compensation of promoters of corporations

1211. Can an alleged promoter of a corporation enforce claim against corporation for compensation, in the absence of contract? *Opinion:* It has been held that a promoter who renders valuable services to a corporation is not entitled to compensation therefor, in the absence of an understanding or contract to that effect. Mc-

Mullen v. Ritchie, 64 Fed. 253, 79 Fed. 522. Hinkley v. Sac Oil, etc., Co., 132 Iowa 396, 107 N. W. 629 [holding that where services are rendered by promoters in the organization of a corporation, but not with a view to compensation therefor from the corporation when organized, compensation from the corporation cannot be enforced]. See also Powell v. Georgia, etc., Co., [Ga.] 49 S. E. 759. (*Inquiry from Miss., Dec., 1917.*)

Dividends

Nature of unpaid dividends

1213. Where a dividend has been declared, but remains unpaid, conflicting authorities reviewed showing view more generally prevailing to be (a) if dividend specially set apart or segregated it is a trust fund, not liable for debts of corporation, and in event of insolvency unpaid stockholder is preferred to common creditor, but (b) if not specially set apart it remains property of corporation, liable for its debts and unpaid stockholders not preferred in case of insolvency. Some courts, however, hold that mere declaration constitutes a trust fund without special segregation. Le Roy v. Globe Ins. Co., 2 Edw. Ch. 657. Lowne v. Amer, Fire Ins. Co., 6 Paige, 482. Searles v. Gebbie, 115 N. Y. App. Div. 778. In re Le Blanc, 14 Hun (N. Y.) 8 aff'd in 75 N. Y. 598. McGill v. Holmes, 23 Misc. (N. Y.) 524. Van Dyck v. McQuade, 86 N. Y. 38. Germain v. Lake Shore etc., R. Co., 91 N. Y. 483. Hill v. Newichawanick Co., 71 N. Y. 593. Brundage v. Brundage, 60 N. Y. 544. Peckham v. Van Wagener, 83 N. Y. 40. Ford v. Easthampton, etc., Co., 158 Mass. 84. King v. Paterson etc., R. Co., 29 N. J. L. 82, 504. Stevens v. U. S. Steel, Corp., 68 N. J. Eq. 373. 2 Cook on Corp., Sec. 534. Jackson v. Newark Plank Road Co., 31 N. J. L. 277. Larwill v. Burke, 19 Ohio Cir. Ct., 605, 10 Ohio Cir. Dec. 513. Beers v. Bridgeport Spring Co., 42 Conn. 17. Gordon v. Richmond, etc., R. Co., 81 Va. 621. Cook County Brick Co. v. Kaehler, 83 Ill. App. 448. Case v. Chicago Crayon Co., 170 Ill. App. 234. Northwestern Marble etc., Co. v. Carlson, 133 N. W. (Minn.) 1014. Pollard v. First Nat. Bk., 47 Kans. 406. (*Inquiry from N. J., Nov., 1913, Jl.*)

Right of purchaser of stock to dividend

1214. A man purchased stock through a brokerage firm. After the stock had been sold, and before it had been transferred on the company's books, a dividend was declared and the check mailed to the previous

owner. The brokerage office claims the check should be given to the new owner. *Opinion:* Where a dividend is declared after stock is sold, it belongs to the purchaser, although the transfer has not been recorded on the books and the company has paid the dividend to the person appearing on its books as the owner. Hyatt v. Allen, 56 N. Y. 553. Jones v. Terre Haute & R. R. Co., 57 N. Y. 196. Brundage v. Brundage, 65 Barb. (N. Y.) 397. Gemmel v. Davis, 75 Md. 546. Utica Bk. v. Smalley, 2 Cow. (N. Y.) 770, 780. (*Inquiry from N. Y., March, 1918, Jl.*)

Negotiability of stock certificates

Stolen certificate with blank indorsement

1215. The holder of a stock certificate of a corporation properly indorsed in blank transferred it to a bank as security for a loan. The loan was unpaid and the certificate was presented by the bank to the corporation, which refused to transfer or return it, claiming that the same had been stolen. *Opinion:* Except in states which have passed the Uniform Transfer of Stock Act a certificate of stock, though properly indorsed in blank, is not completely negotiable, and a purchaser from a finder or thief takes no title as against the true owner. (*Inquiry from N. J., Oct., 1912, Jl.*)

Note: The above act has been passed in Connecticut, Illinois, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Tennessee and Wisconsin.

Corporation lien on stock

Lien of Wisconsin corporations

1216. A bank asks whether a Wisconsin corporation will have a prior lien for any indebtedness of the person to whom the stock is issued. *Opinion:* Under Sections 1751, 1756 Revised Statutes of Wisconsin, a corporation was given a lien upon its stock for all debts due it from the owner thereof, and this lien continued until the stock was transferred on the books of the corporation. But Section 1751 was amended in 1891, the vital part of which was the striking out of the clause at the end of Section 1751 that every such corporation shall have a lien upon all shares of stock for all debts due from the owner thereof to such corporation. Wis. Laws 1891, Chap. 414. Said Section, 1751, was further amended in 1913 so as to provide "That there shall be no lien in favor of a corporation upon the shares represented

by a certificate issued by such corporation and there shall be no restriction upon the transfer of shares or otherwise, unless the right of the corporation to such lien or restriction is stated upon the certificate." (Wis. Stat. 1913, Chap. 85, Sec. 1751 n-15). (*Inquiry from Minn., Dec., 1914.*)

Transfer of stock

Assignment and power of attorney in separate instrument

1217. A bank submits a power of attorney, the object of which is to obviate the necessity of the stockholder signing the certificate in blank with power of attorney to transfer and making such assignment on a separate instrument attached to the certificate. *Opinion:* According to the decisions the courts would uphold such a form of assignment with power of attorney and it would entitle the bank, equally as if the assignment was on back of the stock certificate, to demand a transfer of the stock in any case where it was necessary to realize on the collateral. The only thought in this connection is that the South Carolina Civil Code provides "the manner, terms and conditions of assigning and transferring the shares shall be prescribed by the by-laws of each corporation." If in any particular case a corporation should prescribe by its by-laws that its stock certificates should be assigned only by transfer on the back thereof, there might be some trouble in obtaining a new certificate. At the same time, even in such contingency it seems a transfer on a separate paper would be upheld as valid, so the conclusion is that the bank is safe in using the power of attorney submitted. (*Inquiry from S. C., Oct., 1917.*)

Transfer of stock as collateral by written transfer apart from certificate

1218. A bank inquires whether it is necessary to have signed the transfer on the back of stock certificate. *Opinion:* The Civil Code of South Carolina provides that shares of stock of corporations shall be deemed personal estate except in the case of manufacturing companies "and the mode of issuing the evidence of stock and the manner, terms and conditions of assigning and transferring shares shall be prescribed by the by-laws of each corporation." Sec. 2784 d. The bank's form of collateral note which recites the deposit and pledge of shares to it with power of sale would, it seems, be sufficient to transfer the certificates by way of pledge, and the delivery of the unindorsed

certificates with such a collateral note would operate as a transfer which, upon non-payment of the note, would entitle the bank to sell the stock and entitle the purchaser to whom the bank gives a written transfer and delivers the certificate, to ask for a transfer upon the books of the corporation. (*Inquiry from S. C., July, 1917.*)

Transfer on book not necessary in North Carolina

1219. It is not necessary, under the law of North Carolina, for a bank holding shares of a North Carolina corporation as collateral security to have the same transferred on the books of the corporation. Transfer on the books is not necessary to protect the stock against the attaching creditors of the pledgor. *Morehead v. Western N. C. R. Co.*, 96 N. C. 362. *Havens v. Bk.*, 132 N. C. 214. *Cox v. Dowd* 133 N. C. 537. (*Inquiry from N. C., Jan., 1909, Jl.*)

Estoppel of bank to refuse book transfers

1220. A bank in North Dakota loaned money upon a pledge of stock of a corporation in Montana. Being unable to collect the loan, the bank requested that the stock be transferred on the books of the corporation and a new certificate issued to it in exchange for the original one. The corporation refused the request, stating that at a directors' meeting it was decided to cancel the certificate of stock, as the stockholder had not lived up to his agreement with the corporation. *Opinion:* The bank has the right, upon the default of the pledgor, to have the stock transferred upon the books of the corporation and a new certificate is issued to it, upon compliance with the statutory requirements, and the corporation is estopped from alleging the invalidity of the stock because the holder did not live up to his agreement with the corporation. *Rev. Codes Mont.*, 1907, Secs. 3855, 3857, 3859. *Van Slochem v. Willard*, 207 N. Y. 587. *French v. Harding*, 46 Pa. Super. Ct. 363. *Davies v. Ball*, 64 Wash. 292. *Westminster N. B. v. New England Elec. Works*, (N. H.) 62 Atl. 971. (*Inquiry from N. D., Nov., 1918, Jl.*)

Transfer of stock of decedent

1221. A bank holds stock as collateral security for a loan made to a person since deceased, with power to transfer on the back of the certificate, duly executed by the decedent. The bank is about to transfer but is advised that new powers must be executed

by the administrator of the estate, since the death of the principal terminated the bank's authority. *Opinion:* Bank holding stock as security for loan with power to transfer on back of certificate, has right to transfer of stock notwithstanding death of borrower, since power to transfer being coupled with an interest is not revoked by death of the giver of the power. *Saltmarsh v. Smith*, 32 Ala. 404. *Anderson v. Goodwin*, 125 Ga. 663. *Durbrow v. Eppens*, 65 N. J. L. 10. In re *Droste's Estate* 9 Weekly Notes Cases (Pa.) 224. *Dickinson v. Central Bk.*, 129 Mass. 279. *Hess v. Rau*, 95 N. Y. 359. *Chapman v. Bates*, 61 N. J. Eq. 658. *Bell v. Mills*, 123 Fed. 24. Uniform Stock Transfer A., Sec. 6. (*Inquiry from N. J., Dec., 1917, Jl.*)

1222. A signed a transfer and power of attorney on a stock certificate and delivered it to B for value. Before B had the stock transferred on the books of the corporation, A died. *Opinion:* A's subsequent death did not affect B's rights to a transfer on the books. In a case where A's death occurred before the delivery of the certificate to B, it is doubtful if the subsequent delivery would be effectual. *Randolph Com. Paper*, Sec. 221. (*Inquiry from N. J., Nov., 1912, Jl.*)

1223. The administratrix of an estate is entitled to the transfer of the decedent's stock upon delivering to the bank an authenticated copy of the letters of administration, but where there is no will and no administrator appointed the next of kin is not entitled to the transfer in the absence of a court order. (*Inquiry from Okla., Nov., 1916, Jl.*)

Transfer of bank stock of decedent

1224. An owner of ten shares of bank stock dies intestate, and no administrator of the estate is appointed. The heirs are the widow and a number of children, one of whom is a minor. All the heirs, other than the minor and J. S., unite in an assignment of the shares to J. S. The bank transferred the shares to J. S., who, over the objection of certain stockholders, was allowed to vote the stock and was elected a director. Was the bank justified in making such transfer? Would injunction lie at instance of stockholders, who in the absence of these ten shares would constitute a majority, to prohibit the bank directors and officers from permitting such shares to be voted? *Opinion:* Where the owner of bank stock dies intestate, the property in such stock vests

in his estate and until letters of administration have been issued, and the administrator duly qualified, there is no person vested with power to demand a transfer. A bank which transfers stock of a decedent without requiring letters of administration will be liable to the rightful heirs for damages, if the transfer is wrongful. (*St. Romes v. Levee Steam Cotton Press Co.*, 127 U. S. 614. *Taft v. Presidio etc. R. Co.*, 84 Cal. 131. *Miller v. Doran*, 245 Ill. 200. *Citizens Nat. Bank v. State*, 179 Ind. 621. *Crocker v. Old Colony R. Co.*, 137 Mass. 417. *Hughes v. Drovers' etc. Nat. Bank*, 86 Md. 418. *Baker v. Atlantic Coast Line R. Co.*, [N. C.] 92 S. E. 170. *Bayard v. Farmers' etc. Bank*, 52 Pa. St. 232. *Peck v. Providence Gas Co.*, 17 R. I. 275. *Read v. Cumberland Tel. Co.*, 93 Tenn. 482. *Baker v. Wasson*, 53 Tex. 150, 59 Tex. 140. *Mundt v. Com. Nat. Bank*, 35 Utah 90, 99 Pac. 454. *Nagle v. Ham*, 88 Wash. 99). Where stock is transferred to a person without title, a court of equity will enjoin such person from voting. (*Clarke v. C. R. Co.*, 50 Fed. 338. *Georgia v. C. R. Co.*, 101 Ala. 607. *Webb v. Ridgley*, 38 Md. 364. *Way v. Amer. Grease Co.*, 60 N. J. Eq. 263. *Butler v. Standard Flour Mills Co.*, 131 N. Y. S. 451. *Parsons v. Tacoma etc. Co.*, 25 Wash. 492. *Wood v. Union etc. Assoc.*, 69 Wis. 9). (*Inquiry from Tex., April, 1920, Jl.*)

Voting power of stock

Voting control by fraction of share

1225. A corporation organized with a capital stock of 1,000 shares at \$100 a share has three shareholders, A, B and C. A owns two certificates for 499.80 shares and 40 shares, totaling 500.20 shares, as against B and C, the owners of two certificates of 249.90 each, totaling 499.80 shares. The question is raised as to whether A could control the corporation by a fraction of a share. *Opinion:* The control of the corporation would be held to rest in A because he is the majority stockholder. A single share is the voting unit and a fraction of a share cannot be voted in the absence of an express provision therefor in a statute or by-laws of the corporation. But if A was unable to exercise control by inability to vote the fraction, a court of equity would doubtless enforce his rights. (*Inquiry from Wash., June, 1915, Jl.*)

Voting power of stockholder

1226. At common law each stockholder in a corporation has one vote, irrespective of the number of shares held by him. This

has been changed by statute in most states, which hold that the stockholder has one vote for each share of stock owned by him, and in some states cumulative voting is provided for. *Vaudry v. New Orleans*

Cotton Exch., 2 McGloin (La.) 154. 10 Cyc., 331. *Matter of Pioneer Paper Co.*, 36 How. Pr. (N. Y.) 111. *Times v. Hestenville*, etc., Pass. R. Co., 149 Pa. 70. (*Inquiry from Wash.*, June, 1915, *Jl.*)

DEATH AND THE DECEDENT'S ESTATE

Payment of c/d after death

Payment to indorsee after death of payee

1227. Can a bank pay upon presentation a certificate of deposit standing in the name of a deceased person but bearing his genuine indorsement "Pay to the order of A?" *Opinion:* The death of the payee after he has indorsed and delivered a certificate of deposit to a third person, does not affect the right of the indorsee to receive payment. The case is different where a depositor gives his check and dies before the check is presented. In such case the death of the drawer revokes the bank's authority to pay. But a certificate of deposit is virtually a promissory note to the payee and when he assigns this to another person, indorsing it over, the bank's obligation runs to the holder and the death of the payee does not affect it. If the indorsement of the payee is genuine the certificate is properly payable on presentation. (*Inquiry from N. Y.*, June, 1916.)

1228. Where a negotiable certificate of deposit properly indorsed was presented for payment at a bank by a bona fide holder after the payee's death. *Opinion:* The bank should pay such certificate. The case differs from that of a check, in which the death of the drawer revokes the authority of the bank to pay, in the absence of statute expressly authorizing *post mortem* payment. (*Inquiry from Mich.*, May, 1912, *Jl.*)

1229. A bank should pay a negotiable certificate of deposit to a bona fide indorsee of the payee, although not presented until after the payee's death. (*Inquiry from Miss.*, Oct., 1913, *Jl.*)

Payment not subject to inheritance tax law

1230. A obtained from bank B a certificate of deposit on January 3, 1917. He died on March 5th following, and on March 17th the certificate was presented for payment, bearing the indorsement "January 10th, 1917, pay to C or order, A." Is it safe for the bank to pay other than the executor or administrator, and would the indorsement relieve the bank from complying with Section 9 of the Illinois Inheritance Tax Law

of 1909? *Opinion:* If the certificate is in negotiable form, it having been indorsed before due, C would take a full enforceable title unaffected by the death of A, the payee. At the time of the death of A the certificate is no longer his property, but has been transferred to C, and the bank would be safe in paying C where A indorsed and transferred to C before his death and the indorsement is not a forgery. The indorsement not being questioned, bank B would have no assets in its hands belonging to A at the time of his death, and would be relieved from complying with the Inheritance Tax Law of 1909. (*Inquiry from Ill.*, April, 1917.)

Where c/d indorsed to wife to receive money in case of husband's death

1231. A obtained from bank B a number of time certificates which he indorsed to his wife so that she could obtain the money on them in case of his death. Would the bank be obliged to pay her in case of his death? *Opinion:* If the certificate of deposit were not only indorsed to the wife, but delivered to her by the husband before his death, the delivery would complete the gift and the wife would have a legal title to the money represented by the certificate. If, however, at the time of A's death he still retained the certificates in his possession, although indorsed to his wife, and nothing took place which could be construed as constituting a symbolical delivery, the wife would not have title, and the certificates and the right to proceeds would belong to the husband's estate. After A's death if his widow should present the certificates bearing indorsement to her, the bank would be justified in paying them to her. Her possession of the certificates would give it the right to presume that they had been delivered before the payee's death and the mere fact of his death, known to the bank would not revoke the bank's duty to pay as in case of his check, for the obligation is different, like that of a maker of a note to pay at maturity the payee or any bona fide indorsee or the payee. (*Inquiry from Iowa*, Aug., 1914.)

Certificate of deposit payable in event of death*Assignment to be paid in event of death invalid as contrary to statute of wills*

1232. A customer of bank A who desired to keep control of her money while she lived and in case of her death have it go to her son without the necessity of making a will, asked that a certificate of deposit be issued to her and that it be assigned on the back to her son to be paid to him in case of her death. If the customer should die, leaving debts unpaid and no property upon which money could be realized, could the bank without being liable pay the certificate to the son? *Opinion:* Should the customer die, the certificate would belong to her estate and would not belong to the son and should not be paid to him, because the assignment would be invalid as an attempted testamentary disposition contrary to the Statute of Wills. See *Sullivan v. Sullivan*, 161 N. Y. 554, 56 N. E. 116, Bank A's customer could accomplish the object desired by opening a joint account payable to herself or son or the survivor and keep the book and thus control the account, or take a certificate of deposit payable to herself or son or the survivor. In the event of her death the bank could pay the money to the son without liability as there is a statute in Missouri which provides that, when a deposit is made in the names of two persons payable to either or payable to either or the survivor, it may be paid to either whether the other be living or not. The bank being authorized to pay the son, the question as to whether he is entitled to the money as against the heirs of his mother's estate, or the creditors, would have to be fought out between themselves. (*Inquiry from Mo., Oct., 1919.*)

Certificate payable to person named in event of purchaser's death

1233. A deposited in bank a sum of money and received a certificate of deposit payable to B in case of A's death. The certificate provided that it was "Not to be cashed unless" it had the indorsement of A and B while both are living. Would the bank be released in paying over this money to B on A's death? *Opinion:* The bank cannot safely pay B. Where a certificate provides that A has deposited so many dollars payable to B in case of A's death, this is not sufficient to give B any right to the money upon death of A. See *Sullivan v. Sullivan*, 39 App. Div. (N. Y.) 99. Aff'd 161 N. Y.

554, 56 N. E. 116. In *Re King* 51 Misc. 375, 101 N. Y. Supp. 279. The certificate furthermore provides that, while both are living it is not to be cashed unless both indorse. This would indicate that B may have some present interest in the deposit as a joint party which would survive in case of A's death. Whatever the interpretation of this provision, the bank cannot safely pay B and if he has any rights in the deposit as against the estate of A, they would have to be determined in an appropriate action. It might be best for the bank to interplead the parties rather than pay either B or the representative of A's estate. (*Inquiry from N. Y., Nov., 1913.*)

C/d payable to A in event of death to B

1234. A certificate of deposit to the credit of A, payable in case of death to B, was issued by bank C. Would the bank be liable to the heirs of A if it paid the money to B after A's death? *Opinion:* It was held in *Sullivan v. Sullivan*, 39 App. Div. (N. Y.) 99. Aff'd 161 N. Y. 554, 56 N. E. 116, where a certificate of deposit was drawn payable to A or in event of his death to B, and was retained by A until his death, that the certificate did not divest A's title to the deposit which upon his death belonged to his estate and not to B. The provision that in the event of A's death it should be payable to B, was held to be in the nature of a testamentary disposition, not in compliance with the statute of wills. See also *In Re King* 51 Misc. (N. Y.) 375, 101 N. Y. Supp. 279. In the present case, therefore, it is likely it would be held the money belonged to the heirs of A and not to B, and it would not be safe for bank C to pay B. (*Inquiry from Tenn., Nov., 1914.*)

Savings deposit payable to another in event of death*Deposit of A, in case of death B may draw*

1235. An old gentleman upon opening a savings account in a bank instructed its receiving teller to write on the ledger that depositor alone could draw, but in event of his death his daughter should draw. The depositor died leaving a balance on deposit. The daughter has paid the bill for funeral expenses and now wishes to withdraw the money from the bank. The bank asks if it would be proper to permit her to do so. *Opinion:* It has been held in several cases where A makes a deposit in his own name and subject only to his signature but coupled

with a provision that, in event of his death B to have authority to draw, there was no gift of an interest in the deposit to B during the life of A and upon A's death the title vested in his estate and not in B; the authority to B was invalid as being an attempted testamentary disposition contrary to the statute of wills. It would follow, therefore, that, in this case the bank would pay the money to the daughter at its own risk, as the mere intention that the daughter should have it when he died would not be sufficient to vest any legal right to the depositor in her. At the same time the case may be one where the daughter is the only child and the money would go to her in due course of administration after the debts were paid. Should such be the case and there were no debts, it might be fairly safe to pay over the money to her. (*Inquiry from Ind., Aug., 1915.*)

Certificate of deposit payable to either or survivor

Payment to survivor subject to transfer tax law

1236. A bank received a request for a certificate of deposit to be issued in two names payable to either or the survivor. Would such certificate be legal, and, if so, could the funds be paid to either in case of the death of the other? *Opinion:* It is legal for a bank to issue a certificate of deposit payable to either or the survivor and upon the death of one, the deposit would be payable to the survivor. The payment, however, would probably be subject to the transfer tax law. In re Van Vranken's Estate, 179 N. Y. Supp. 752. (*Inquiry from N. Y., Oct., 1920.*)

Payment of check after drawer's death

Note: The legislatures of the following states have passed laws permitting the designated depository to pay a check, demand draft or order after death of the drawer: New Jersey, Chap. 123 Laws 1916 provides that any bank may pay within 10 days after date of check or demand draft; Connecticut Gen Stat. 1918, Chap. 204, Sec. 4001-2, Maine, Rev. Stat. 1916, Chap. 52, Sec. 23, West Virginia Anno. Code 1913, Chap. 54, Sec. 3105, provide that savings banks may pay within 30 days after the date of such check, demand draft or order or at any subsequent period "provided the depository has received no actual notice of the death of the drawer;" Vermont, Gen.

Laws 1917, Chap. 139, Sec. 2854, provides that any bank may pay within 30 days after the death of the drawer. Massachusetts, Chap. 73, Sec. 17, Revised Laws, provides that a bank may pay within 10 days after date of check, and Chap. 590, Sec. 65, Act 1908, provides that a savings bank may pay an order within 30 days after date of the order "and at any time if the corporation has not received written notice of the death of the drawer."

Death revokes bank's authority to pay in absence of statute, unless check an assignment

1237. A check drawn on a bank in Oregon was given in payment for goods sold and delivered. The check in due course reached the drawee bank which refused payment on the ground that the drawer was dead. *Opinion:* The death of the drawer operated as a revocation of the authority of the bank to pay his check. (*Inquiry from Idaho, Dec., 1913, Jl.*)

1238. The death of the drawer revokes the bank's authority to pay his check except where the check is an assignment, or the statute expressly authorizes payment during a limited time after the drawer's death; but where the bank pays in ignorance of the death it is protected. In Kansas as well as in all of the states which have passed the Negotiable Instruments Law a check is not an assignment—this law expressly provides the contrary. (*Inquiry from Kan., Aug., 1912, Jl.*)

1239. What is the law in North Carolina relative to a bank paying a check of a depositor after said depositor had died. *Opinion:* Except where a contrary rule is provided by statute and in the few states where check is an assignment, death of drawer of check revokes bank's authority to pay, although if bank pays in ignorance of death it is protected. No such statute has been passed in North Carolina and under the Negotiable Instruments Law of that state, a check is not an assignment; therefore in North Carolina the drawer's death revokes the bank's authority to pay his check although if the bank should pay after the death of the drawer in ignorance thereof, it would be protected. Nat. Com'l Bk. v. Miller, 77 Ala. 168. Second Nat. Bk. v. Williams, 13 Mich. 282. (*Inquiry from N. C., Feb., 1913, Jl.*)

1240. In the absence of a statute, the death of the drawer revokes the bank's authority to pay the drawer's checks, and

payment after knowledge of the death is unauthorized. (*Inquiry from Pa., Nov., 1910, Jl.*)

1241. Under the Negotiable Instruments Act a check is not an assignment and death of the drawer revokes the authority of the bank to pay his outstanding checks, in the absence of a special statute authorizing the bank to pay within a limited period after death. (*Inquiry from S. D., Dec., 1913, Jl.*)

1242. A gave B his check in the afternoon and died that evening. B presented the check the next morning. *Opinion:* The death of the drawer revokes the authority of the bank to pay his check and payment with notice or knowledge of death is at the bank's peril in the absence of a statute providing for payment after death of the drawer. Such a statute exists in West Virginia but is applicable only to savings banks. *Glennan v. Rochester T. & S. D. Co.*, 102 N. E. (N. Y.) 537. W. Va. Code, Sec. 3105. (*Inquiry from W. Va., Nov., 1915, Jl.*)

Statutory authority in Massachusetts

1243. The death of a drawer revokes the authority of a bank to pay his outstanding checks, and payment by the bank after knowledge of the death of the drawer is unauthorized, but the bank is protected where it pays the checks in ignorance of the death. A statute in Massachusetts, however, authorizes a bank to pay a check of a depositor, notwithstanding his death, if presented within ten days after date and this applies to national banks. *Mass. Sav. Bk. Act. 1908. Chap. 590, Sec. 65. Rev. Laws Mass., Chap. 73, Sec. 17.* (*Inquiry from Mass., Nov., 1914, Jl.*)

Massachusetts statute applies to national banks

1244. Can a national bank legally pay a check after the decease of the drawer, his death being known to the officials of the bank. *Opinion:* Chapter 73, Section 17, of the Revised Laws of Massachusetts provides: "A depository of funds subject to withdrawal by check or demand draft may pay a check on demand draft drawn on it by a depositor having funds on deposit to pay the same, notwithstanding his death upon presentation within ten days after its date." It seems the above statute would apply to a national bank for it is generally recognized by the courts that state statutes are so applicable where they do not conflict with the National Bank Act or tend to impair the

utility of national banks as instrumentalities of the Federal Government. (*Inquiry from Mass., Oct., 1914.*)

When Massachusetts statutory ten day limit ends on Sunday

1245. In Massachusetts a bank is authorized to pay a check after the drawer's death within ten days (and a savings bank within thirty days) after its date. A check is dated June 3, and ten days would bring it to the 13th, but that day being Sunday, would the 14th, Monday, be considered the 10th day? *Opinion:* The authority does not extend the time limited, although the last day falls on Sunday. *Rev. Laws Mass., Chap. 73, Sec. 17, Chap. 113. Sec. 36, 38 Cyc. 329. Cunningham v. Mohan*, 112 Mass. 58, 59. *Cooley v. Cook*, 125 Mass., 406, *Stevenson v. Donnelly*, 108 N. E. (Mass.) 926. (*Inquiry from Mass., May, 1917, Jl.*)

Check an assignment rule overturned in South Carolina

1246. In South Carolina, where the rule prevails that a check is an assignment, a check is payable by a bank to a bona fide holder notwithstanding the death of the drawer before its presentation for payment. *Wagstaff v. First Nat. Bk. of Blue Earth*, 134 N. W. (Minn.) 224. *Lewis v. Internat. Bk.*, 13 Mo. App. 202. *Loan & Sav. Bk. v. Farmers & Merchants Bk.*, 74 S. C. 210—overturned by *Neg. Inst., Act.* (*Inquiry from S. C., Dec., 1913, Jl.*)

Note: This rule is overturned by the Negotiable Instruments Act passed in South Carolina in March, 1914.

Check an assignment rule overturned in Minnesota

1247. In Minnesota, by a decision of the Supreme Court, a check operates as an assignment and the death of the drawer does not revoke the authority of the bank to pay. *Wagstaff v. First Nat. Bk. of Blue Earth*, 131 N. W. (Minn.) 224. Drawer cannot stop payment. *Union Nat. Bk. v. Oceana Co. Bk.*, 80 Ill. 212. *Gage Hotel Co. v. Union Nat. Bk.*, 171 Ill. 531. *First Nat. Bk. v. Keith*, 183 Ill. 475—Effect of notice to Bank of check before presentment. *Meyers v. Union Nat. Bk.*, 27 Ill. App. 254. *Bk. of Antigo v. Union Tr. Co.*, 149 Ill. 343. *Jacobson v. Bk. of Commerce*, 66 Ill. App. 370. *Wyman v. Fort Dearborn Nat. Bk.*, 181 Ill. 279. *Harrington v. First Nat. Bk.*, 85 Ill. App. 212. Other questions: *Brown v.*

Leckie, 43 Ill. 497. Fourth Nat. Bk. v. Citizens Nat. Bk., 68 Ill. 398. Hogue v. Edwards, 9 Ill. App. 148. Ridgely Bk. v. Patton & Hamilton, 109 Ill. 479. Nat. Bk. of America v. Ind. Bk. Co., 114 Ill. 483. International Bk. v. Jones, 15 Ill. App. 594. Pabst Brewing Co. v. Reeves, 42 Ill. App. 154. Nat. Bk. of America v. Nat. Bk. of Illinois, 164 Ill. 503. Niblock v. Park Nat. Bk. 169 Ill. 517. Clarke v. Chicago Title & Tr. Co., 186 Ill. 440. (*Inquiry from Minn., April, 1912, Jl.*)

Note: This rule is overturned by the Negotiable Instruments Act passed in Minnesota in April, 1913.

Check "for all my deposit" as an assignment

1248. A husband, critically ill, drew and delivered to his wife a check for "all of my deposit." The husband died and the wife is likely to present the check. *Opinion:* The bank would be safe in paying the wife after the husband's death, on the ground that the check constituted an assignment of the entire deposit, and its delivery completed a gift *causa mortis*, by virtue of which the deposit belonged to the wife and not to the husband's estate. Weber v. Salisbury, 148 S. W. (Ky.) 34. Pullen v. Placer Co. Bk., 138 Cal. 169. Reviere v. Chambliss, 120 Ga. 714. Dunlap v. Commercial Nat. B., 195 Pac. (Cal.) 688. (*Inquiry from Ga., April, 1913, Jl.*)

Payment of check in ignorance of depositor's death

1249. A bank paid a check signed by its depositor. The depositor died two days before the check was presented but the bank had no knowledge of his death. Was the bank protected? *Opinion:* The payment was valid. The New York Court of Appeals in Glennan v. Rochester Trust & Safe Deposit Co., 102 N. E. 537 has held that the rule that an agents' authority is revoked by the death of the principal without notice, does not apply to the payment of a check by a bank without knowledge of the drawer's death; since such an application would be utterly impracticable and contrary to the almost universally accepted rule of law. (*Inquiry from N. Y., April, 1921.*)

Payment of check drawn under power of attorney in ignorance of principal's death

1250. A depositor gave instructions to her bank that checks against her account should be signed either by herself or by her nephew signing her name by him. Her nephew presented checks signed in the

usual manner, but before payment the bank learned of its customer's death. The bank refused payment but questions whether if the checks had been paid in ignorance of the depositor's death it would have been protected. *Opinion:* The general rule at common law is that a power of attorney, unless coupled with an interest, is revoked by the principal's death. The Appellate Division of the New York Supreme Court has held that payment by a bank to an agent under power of attorney after the principal's death does not bind the estate, although the bank was ignorant of the death at the time of payment. Under the existing conditions of law there is considerable danger and risk to banks which pay checks signed under power of attorney in case of unknown death of principal. Doubtless in many states the courts would not hold to the rule of the common law in all its rigor but would apply equitable principles and hold that payment to the attorney after death of the principal and before notice thereof would be valid. Long v. Thayer, 150 U. S. 520. Rigs v. Cage's Adm., 2 Humph, 350. Rogerson v. Ladbroke, 1 Bing. (Eng.) 93. Hoffman v. Union Dime Sav. Inst., 95 App. Div. 329. Reversed in 109 App. Div. 24. Weber v. Bridgman, 113 N. Y. 600. Farmers Loan & Tr. Co., v. Wilson, 139 N. Y. 284. (*Inquiry from Tenn., March, 1912, Jl.*)

Note: Since the decision in 1913 of the New York Court of Appeals in Glennan v. Rochester Trust & Safe Dep. Co., 102 N. E. 537, the rule above announced of the New York Appellate Division in Hoffman v. Union Dime Sav. Bank will probably not apply. The Court of Appeals holds that "the usual rule that a debtor is not protected in payment to an agent after the death of his principal, though without knowledge of that fact, is not applicable to the payment of checks by banks."

Validity of payment to agent in ignorance of depositor's death

1251. What is the rule in Washington as to validity of payment of a check, drawn under power of attorney, after death of the principal, where the bank has no knowledge of such death. *Opinion:* While the common law rule established by the weight of authority in this country is that death of the principal revokes an agent's authority and payment thereafter to the agent, even though in ignorance of such death, does not discharge the obligation, the courts which administer such rule admit its harshness,

and some courts have held it inapplicable to payment of checks by banks in ignorance of the principal's death. The New York Court of Appeals in a recent decision has declared in view of long-established custom that payment of a check by a banker in ignorance of the drawer's death constitutes an exception to the common law rule and is valid, and the reasoning of the court would lead to a like conclusion where payment of the check of an attorney in fact is made in ignorance of the principal's death. It is reasonable to assume that courts in future cases will so hold. *Johnson v. Christian*, 128 U.S. 374. *Long Thayer, v.* 150 U.S. 520. *Clayton v. Merritt*, 52 Miss. 353. *Farmers Loan & Tr. Co. v. Wilson*, 139 N. Y. 284. *Hoffman v. Union Dime Sav. Inst.*, 109 App. Div. (N. Y.) 24. *Weber v. Bridgman*, 113 N. Y. 600. *Cassidy v. McKenzie*, 4 Watts & S. (Pa.) 282. *Travers v. Crane*, 15 Cal. 12. 17. *Glennan v. Rochester Tr. & Safe Dep. Co.*, 209 N. Y. 12, 102 N. E. 537. (*Inquiry from Wash., Sept., 1918, Jl.*)

Payment of check of authorized agent after depositor's death

1252. A gave authority to a bank to pay checks drawn by his wife or other agent and a check is presented after the depositor's death. The bank requests a statement of the law respecting payment of such checks after the death of depositor. *Opinion:* The general rule of law is that the death of the depositor revokes the authority of the bank to pay his outstanding checks, but if the bank pays a check after the depositor's death, in ignorance thereof, it is protected. In a few states there are statutes which permit a bank to pay the check of a deceased depositor a certain number of days after his death, but there is no such statute in Missouri. In the case stated where the depositor gives authority to the bank to pay checks drawn by his wife or other agent and check is presented after the depositor's death, of which the bank has knowledge, the bank has no right to pay, whether the check is dated by the agent after the date of the depositor's death or has been drawn before his death. It is a general rule of law that the death of the principal revokes the authority of the agent. If, however, the check of the agent was paid by the bank in ignorance of the death, the same rule would seem to apply as has been held where a bank has paid the check of the depositor himself, presented after his death, where the bank has no notice or knowledge thereof,

i. e., that such payment is valid and will protect the bank. (*Inquiry from Mo., April, 1918.*)

Payment of check drawn under power of attorney after depositor's death

1253. A bank has on file the following power of attorney: "Below is the signature of, who is hereby authorized to sign and indorse checks, notes and drafts, accept drafts and transact all business with your bank in my name as my attorney." The party given this power died and after his death the attorney drew a check which the bank paid. Is the bank protected by the power of attorney? *Opinion:* It is the rule of law that death of the principal revokes his power of attorney where not coupled with interest. Clearly, the bank would not be protected if it paid a check under power of attorney after knowledge of the death of the principal. But since the decision of the New York Court of appeals in *Glennan v. Rochester Trust & Safe Dep. Co.*, 102 N. E. 537, if it paid in ignorance of the death of the principal, it would probably be protected. (*Inquiry from Mont., Nov., 1914.*)

Husband's death revokes wife's authority to draw checks

1254. A depositor who authorized his wife to draw against his account died, leaving a balance of less than \$500. *Opinion:* The husband's death revoked his wife's authority to draw checks, and also revoked all his outstanding checks; but by a statute in California, not exceeding \$500 of a decedent's deposit may be paid to a surviving wife or husband upon affidavit. *Bank Act Cal., Sec. 16.* *Pullen v. Placer Co. Bk.*, 138 Cal. 169. (*Inquiry from Cal., Feb., 1914, Jl.*)

Check holder cannot recover from bank

1255. Several checks of a decedent were presented for payment at the bank, where the depositor had sufficient funds. The bank, having received notice of the depositor's death, refused payment and was sued by one of the holders. *Opinion:* Under the Negotiable Instruments Law of Illinois the bank was not liable to the holder both on the narrow ground that death of drawer revoked the bank's authority to pay and on the broader ground that the bank owed no duty to the holder. Death of the drawer revokes the authority of a bank to pay his checks wherever the rule prevails that a check is not an assignment, except in a few

states where special statutes authorize payment within a limited period after death. Neg. Inst. A., Sec. 189 (Comsr's. dft.). Sec. 188 Ill. Act. Tate v. Hilbert, 2 Ves. Jr. 118. Weiland's Adm. v. St. Nat. Bk., 112 Ky. 310. Pullen v. Placer Co. Bk., 138 Cal. 169. American T. & B. Co. v. Boone, 102 Ga. 202. Wagstaff v. First Nat. Bk. of Blue Earth, 134 N. W. (Minn.) 224. (*Inquiry from Ill., April, 1913, Jl.*)

Note: The Negotiable Instruments Act which provides the rule that "a check, of itself, does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the check" has now been passed in every state except Georgia.

Renewal of agent's note in ignorance of principal's death

1256. A banker discounts a note indorsed by John Jones per John Smith, Atty. in fact. At the time of discount, the authority of Smith to indorse was duly verified. At any renewal periods is it incumbent upon the banker to actually ascertain whether or not the power of attorney has been revoked? *Opinion:* Generally where an agency is revoked, third persons dealing with the agent are protected until they receive notice of the revocation. But the weight of authority supports the doctrine that the death of the principal operates as an immediate revocation and that acts of agency done after the death of the principal are void, even if death is unknown to the agent. In accordance with this doctrine it has been held that payment to an agent after the death of the principal will not operate as a discharge even though made in actual ignorance of the principal's death. Long v. Thayer, 150 U. S. 520. A few courts recognizing the harshness of this rule, have held that, although as a general principle, death revokes an agency and renders null every act of the agent thereafter performed, yet where payment has been made in ignorance of the death, such payment will be good. The leading case supporting this exception is in the state of Pennsylvania. Cassidy v. McKenzie, 4 Watts & S. 282. Where, therefore, a banker renews a note indorsed by John Jones per John Smith, Attorney in fact, he would not ordinarily have to ascertain whether the power of attorney had been revoked, unless the revocation was caused by the death of John Jones. In such case it would be incumbent

upon him to ascertain the fact that John Jones was still alive for his protection, but in Pennsylvania it would not be so necessary. (*Inquiry from Pa., May, 1918.*)

Protest of decedent's check

1257. What is the customary procedure of a bank in case of drawer's death before presentment of his check. *Opinion:* The death of the drawer of a check revokes the authority of the bank to pay. The check being refused because of drawer's death, the necessary steps upon non-payment are not dispensed with, and where a check is protestable because of refusal of payment, protest should be made, even though the refusal is for the reason that the drawer is dead and the bank's authority to pay has ceased. In Reed v. Spear, 107 App. Div. (N. Y.) 144 it is held that the fact that the holder is excused from making presentment for payment under section 76 N. I. Act because the principal obligor is dead, does not relieve the holder from the duty of giving notice of dishonor to the indorser. (*Inquiry from N. M., Aug., 1915.*)

Set-off of unmatured note against decedent's deposit

1258. A bank's customer died owing it \$1,000 not matured, having a deposit account of about \$500. The estate is solvent. The bank inquires whether it has a right to apply the general deposit to the unmatured indebtedness. *Opinion:* The general rule is that a bank cannot do so. A number of courts have held that the death of the depositor does not change the rule. Thus in Jordan v. Show & L. Bank, 74 N. Y., 467, where an administrator sued the bank to recover a balance of decedent's deposit standing to his credit at the time of his death, it was held that the bank could not as matter of law, set-off a claim against a decedent on a note which did not mature until after his decease. So also in Gardner v. First Nat. Bank, 10 Mont. 149, it was held that a bank has no right to set-off unmatured notes against the deposit of a decedent and must pay the deposit to the administrator. To the contrary, in Pennsylvania, it has been held that a bank may charge a note to the account of the maker though the note does not become due until several days after his decease, provided the estate is solvent. But the right of set-off does not exist if the estate is insolvent. Basler v. Exchange Bank, 4 Barr (Pa.) 32. It seems the question has not been passed upon in Kan-

sas one way or the other. (*Inquiry from Kan., June, 1915.*)

1259. A bank inquires as to its right to set-off an unmatured note where customer dies, or must it pay balance to the administrator and prove note against the estate. *Opinion:* There seem to be no Arkansas cases involving the precise point raised in the bank's question. In some jurisdictions it has been held that a bank may set off against a deposit an indebtedness maturing after the death of the depositor. *Little v. City Nat. Bk.*, 115 Ky. 629, where the debt matured the next day after the depositor's death; *Ford v. Thornton*, 3 Leigh (Va.) 695, while in other jurisdictions the same will only be allowed in the event of insolvency of the decedent's estate. But in *Steelman v. Atchley* (Ark. 1911) 135 S. W. 902, it was held that the fact that a depositor's note to a bank was not due at the time of the bank's insolvency does not prevent the depositor from asserting his right to set off his general deposit against the note; and there would seem to be no reason why the converse of this proposition should not hold good in that jurisdiction. (*Inquiry from Ark., May, 1920.*)

Payment of decedent's deposit

Proof of appointment before payment of check of administrator

1260. A bank refused to pay a check drawn against the account of its deceased depositor until further evidence of the drawer's authority. The drawer, who was the administrator, claimed that the indorsement of the bank through whom the check was presented was sufficient assurance that he had been legally appointed administrator. *Opinion:* A bank has the right to demand the production of letters of administration before paying the deposit of a decedent upon check of one claiming to be administrator. *Scudder v. Trenton Sav. Fund Soc.*, 5 N. J. Eq. 154. *Boone v. Citizens Sav. Bk.*, 84 N. Y. 83. *Schulter v. Bowery Sav. Bk.*, 117 N. Y. 125. (*Inquiry from Kan., June, 1918, Jl.*)

Payment in the absence of letters of administration

1261. Can a bank safely pay out the balance of a deceased depositor, who died intestate, to the widow or mother in the absence of letters of administration. *Opinion:* In the absence of statute, a bank cannot ordinarily pay out any part of the deposit

of decedent and receive acquittance therefor until there has been due administration on the estate. Pennsylvania has no such statute. In exceptional cases, however, where the heirs are all known and consent and there are no creditors, payment may be made without administration with reasonable safety. (*Inquiry from Pa., Jan., 1919.*)

Payment of time certificate without administration to widow, where no debts and other heirs consent

1262. A customer of a bank died intestate, leaving as heirs a widow and grown daughter, he has a time deposit with bank evidenced by a certificate of deposit. There are no debts to knowledge of bank. Would it be safe for the bank to turn over this time deposit to the widow on surrender of the certificate of deposit? *Opinion:* Administration is usually necessary where a person dies leaving debts and property which may be made available to pay them. (*Brennan v. Harris*, 20 Ala. 185. *Congers v. Bruce*, 109 Ga. 190. *Leamon v. Mccubbin*, 82 Ill. 263. *Bowen v. Stewart*, 128 Ind. 507. *Royce v. Burrell*, 12 Mass. 395. *Lee v. Wright*, 1 Rawle [Pa.] 149). But where a person is indebted upon a certificate of deposit issued to a person since deceased, who leaves surviving a widow and one adult daughter, and there are no debts against the estate except the funeral expenses, the bank would be safe in paying the certificate of deposit to the widow, without letters of administration, upon written consent of the undertaker and of the daughter, as these would be the only persons who could question the validity of the payment. (*McCaa v. Woolf*, 42 Ala. 389. *Ellard v. Coleman* [Ga. 1919] 97 S. E. 111. *Story's Succ.*, 3 La. Ann. 502. *Foote v. Foote*, 61 Mich. 181. *Kilerease v. Shelby*, 23 Miss. 161. *Woodman v. Rowe*, 59 N. H. 453. *Glasgow v. Martin*, 1 Strobb. [S. C.] 87. *Reed v. Reed*, 56 Vt. 492. See Mont. Civ. Code, Sec. 1852). (*Inquiry from Mont., Oct., 1920, Jl.*)

Payment of undertaker's bill

1263. Robert E. Lee deposited in a bank the sum of \$200 and received a certificate of deposit containing the following words: "Robert E. Lee has deposited in this bank \$200 payable to the order of himself or Mrs. Mary Lee (wife) in current funds on the return of this certificate properly indorsed with interest at the rate of 3% per annum. Certif. of dep. not sub. to ck. J. J. Cashier." At same time depositor

made oral request that, in event of his death before his wife, his burial expenses be paid out of the deposit. Can the bank legally pay such expenses and charge same to the account in advance of appointment of administrator. *Opinion:* In the case of a deposit subject to check, death, of course, ordinarily revokes the authority of the bank to pay, but either by statute or custom it is the quite general practice for savings banks to pay out a deposit on the undertaker's bill without waiting for the appointment of the administrator, and such receipted bill is regarded as a valid voucher. In the present case the money is owing on certificate of deposit in which the wife of decedent is alternate payee and the bank should obtain her sanction of payment to the undertaker. (*Inquiry from Ala., Feb., 1913.*)

Payment of savings deposit of foreign decedent

1264. A depositor in an Ohio savings bank who was a citizen of France died unmarried and intestate leaving a father and mother. Upon what authority should the bank pay over the deposit? *Opinion:* While some states require the appointment of a resident administrator of a decedent to collect the assets in the particular state, the statutes of Ohio clothe the foreign administrator with full power and authority to make a complete settlement of the estate of a non-resident. *McCreight*, 6 Ohio N. P. 481. Ancillary administration is rendered unnecessary where there is no claim by a resident creditor against the estate. *Swearingen v. Morris*, 14 Ohio St. 424. The bank may then pay the deposit of the decedent to the foreign administrator. It would be reasonably safe in accepting an affidavit from a "Maire" in France (corresponding to the American mayor) to the effect that the father and mother are the only heirs of the deceased and in paying on that affidavit and his order and the pass-book. The "Maire" seems to act in the capacity of a foreign administrator. Hence it would not seem necessary to go to the trouble and expense of having a local administrator appointed. There is no inheritance tax question involved as the Inheritance Tax Law of Ohio exempts the deposit where the beneficiary is the father or mother. Sec. 5331, Suppl. Page and Adams Ohio General Code. (*Inquiry from Ohio, March, 1921.*)

Effect of death of partner

1265. What is the effect of the death of a partner upon the right to draw on the

firm bank account? *Opinion:* Upon death of one partner, survivor has right to draw checks on partnership account. *Backhouse v. Charlton*, 8 Ch. D. 444. *Morse on Banks*, Sec. 439. (*Inquiry from N. J., Dec., 1908, Jl.*)

Receipt of deposits after death of depositor

Credit of deposit by debtor of decedent

1266. A owes a customer of the bank, who is deceased, and wishes to deposit the amount in the bank for him. The question is whether the amount should be credited to the account of the decedent or to the account of his estate. *Opinion:* Strictly the bank has no right to receive the deposit to the credit of the estate unless authorized by the legal representative. But it might be convenient for the bank to credit it to the estate to be held for and paid to the representative. (*Inquiry from N. Y., Sept., 1912, Jl.*)

Certified checks payable to decedent offered for deposit

1267. Several certified checks payable to a decedent were offered for deposit to the credit of the decedent's account by one of the executors, prior to the qualification of the executors under the will of the decedent. *Opinion:* A bank whose customer has deceased may properly, in the interests of his estate and before an executor or administrator has qualified, receive money or checks offered by a debtor of the decedent and place them to the credit of his account, but until the bank has been duly authorized to receive such money or receive and collect such checks, payment of the latter would not be a discharge of liability to the estate and the payors would, in the event of the failure of the bank, remain liable to the estate. 14 Cyc. 109. (*Inquiry from N. J., Oct., 1912, Jl.*)

Rights, powers and duties of executors and administrators

Authority to renew notes of testator

1268. In the absence of statute or of express authority in the will, an executor would have no power to bind the estate of the testator by making, as executor, a new note in renewal of one made by the testator or by renewing indorsements on notes originally indorsed by the testator, and such acts bind only the executor personally. No such statute exists in Pennsylvania. *Lynch*

v. Kirby, 65 Ga. 279. Carroll v. Davidson, 23 La. Ann. 428. Yerger v. Foote, 48 Miss 62. Stirling v. Winter, 80 Mo. 141. Hellier v. Lord, 55 N. J. L. 357. Whitten v. Fin-castle Bk. 100 Va. 546. Montreal Bk. v. Buchanan, 32 Wash. 480. Boggs v. Wann, 58 Fed. 681. Higgins v. Driggs, 21 Fla. 103. Harrison v. McClelland, 57 Ga. 531. Stude-baker v. Montgomery, 74 Mo. 433. White Sulphur Springs v. Collins, 17 Mont. 433. Schmittler v. Simon, 101 N. Y. 554. Darling v. Powell, 20 Misc. (N. Y.) 240. 1 Parsons Bills & Notes, 161. Pumpelly v. Phelps, 40 N. Y. 59. Taft v. Brewster, 9 Johns (N. Y.) 334. Forster v. Fuller, 6 Mass. 58. Hills v. Banister, 8 Cow. (N. Y.) 31. Cornthwaite v. First Nat. Bk., 57 Ind. 268. McCalley v. Wilburn, 77 Ala. 549. Brightwell v. Jordan, 74 Ga. 486. Stewart v. Davis, 18 Ind. 74. Kingman v. Soule, 132 Mass. 285. Shift v. Shift, 20 La. Ann. 269. Johnson v. Union Bk., 37 Miss. 526. Farmers Nat. Bk. v. Griel, 12 Lanc. Law Rev. (Pa.) 28. Williamson's Appeal, 94 Pa. 231. Fehlinger v. Wood 134 Pa. 522. Fluck v. Hager, 51 Pa. 459. Morehead Banking Co. v. More-head, 122 N. C. 318. Brown v. Fairchild, 100 N. E. (Mass.) 556. Harris v. Woodard, 65 S. E. (Ga.) 250. (*Inquiry from Pa., Aug., 1914, Jl.*)

Payment of legacy to wrong person

1269. A will bequeathed a legacy to John Brown of Howard, Ill., the real legatee intended being John Brown of Hall, Ill., who had never lived at Howard. The executrix notified John Brown of Howard, sending him a receipt and instructing a bank to forward him the amount upon receiving the receipt. The instruction was carried out by the bank. *Opinion:* There is no liability on the part of the bank but the executrix is liable to the real legatee, unless the misdescription of his address in the will should be held sufficient to estop him from questioning the validity of the payment. Hemphill v. Moody, 62 Ala. 510. Hindman v. State, 61 Md. 471. Thifes v. Mason, 55 N. J. Eq. 456. Matter of Baker, 57 N. Y. App. Div. 44. Cowdin v. Perry, 11 Pick. (Mass.) 503. Keiningham v. Same, 24 Ky. L. Rep. 1330. In re McDonough's Est., 117 N.Y. S. 258. Wade v. Dick, 36 N.C. 513. Negley v. Gard, 20 Ohio St. 310. Hoffman v. Amer. Exch. Bk., (Neb.) 96 N. W. 112. Jamieson v. Hiem, (Wash.) 86 Pac. 165. (*Inquiry from Neb., April, 1918, Jl.*)

Liability for investment of estate funds

1270. Opinion and comment of General

Counsel desired upon the decision of the New York Court of Appeals in Villard v. Villard, 114 N. E. Rep. 789. *Opinion:* In Villard v. Villard, [N. Y. 1916] 114 N. E. 789, decided under the New York Decedent Estate Law (Colsol. Laws, Ch. 13, Sec. 111) it was held that, if an executor invests funds of the estate contrary to the provisions of the will or of said law as to the securities in which trust funds may be invested, he is liable for any loss that may result, without the right to any profit that he may make by such investment. This case seems but to reiterate the strict rule of accountability to which personal representatives and trustees are held in their fiduciary capacity. Under this line of decisions, a trustee may not accept bonds, securities, or other collateral accruing to or acquired by the estate after the demise of the testator except at his own risk. And even then it is held that all benefit whatsoever must inure to the estate, while the trustee must bear the brunt of any losses accruing from the depreciation of securities, etc. The court even held here that the provision in the will relating to holding investments owned by the testator at the time of his death did not wholly relieve the executors from care and responsibility regarding such investments. In re Dickinson 152 Mass. 184, a trustee was held liable for an investment in Union Pacific Railroad stock. It was there said: "Our cases, however, show that trustees in this commonwealth are permitted to invest portions of trust funds in dividend-paying stocks and interest-bearing bonds of private business corporations, when the corporations have acquired, by reason of the amount of their property, and the prudent management of their affairs, such a reputation that cautious and intelligent persons commonly invest their own money in such stocks and bonds as permanent investments." (*Inquiry from N. Y., June, 1917.*)

Accounting by administrator

1271. An administrator appointed in Kansas wound up the business of the deceased but refused to turn over the proceeds to the widow. Can an administrator be appointed in Tennessee, where the widow lives, to receive the money? *Opinion:* There seems to be no occasion for the appointment of an administrator in Tennessee, unless the deceased left property therein. All that seems to be required is a proper accounting of the Kansas administrator and payment to the widow of her share

of the estate. Presumably there is no will, but it does not appear in the question, whether or not there are next of kin, entitled to share in the estate. It may be that the reason for the refusal of the administrator is that the statutory period for proving claims and settling the estate has not elapsed. (*Inquiry from Tenn., May, 1914.*)

Refunding bond to executor as protection against overpayment to legatee

1272. A Kansas executor made in substance an advance payment to a legatee by returning her note and releasing the mortgage on Colorado realty, given as security. The executor required a refunding bond from the legatee, which was approved by the probate judge, who, however, made no order authorizing the surrender of the note or the releasing of the mortgage, although it would seem that he sanctioned it in an oral conversation. The advance payment so made turned out to be excessive. (1) Could the executor give a valid release? (2) Is the release good under the laws of Colorado? (3) Is it incumbent on the executor to sue on the bond of the legatee? (4) If the executor refuses to sue, is there a liability on his bond? (5) In case of suit brought but failure to realize on judgment, is there liability on executor's bond? (6) Did the taking of the bond from the legatee relieve from liability on the executor's bond. *Opinion:* (1) The release is valid. A release of a mortgage may be executed by the executor or administrator of a deceased mortgagee. *Bank v. Dayton*, 116 Ill. 257. *Reynolds v. Smith*, 57 Mich. 194. *Moss v. Lane*, 50 N. J. Eq. 295. (2) The release is good under the laws of Colorado. (3) It is duty of executor to proceed against the legatee on her bond, unless the obligors are notoriously insolvent. (4) Neglect of duty in not suing renders executor personally liable. (5) In the event of failure to realize on the judgment, there is no liability on executor's bond. (6) The taking of the refunding bond by the executor and the approval of the bond by the court would be a defense to an action on his bond, where the executor has sued on the refunding bond, but there is personal liability where the executor is guilty of laches in suing on the refunding bond. The Kansas statute expressly authorizes the taking of a refunding bond. *Laws* [1911], Chap. 188, Sec. 15. This being so the general rule applies that refunding bonds stand as to creditors in place of assets distributed, and operate to exonerate the per-

sonal representative from all liability for such assets and protect him against the claims of creditors. *Fonte v. Horton*, 36 Miss. 350. *Badger v. Daniel*, 79 N. C. 372. *Schaeffer's Appeal*, 119 Pa. St. 540. *Maxwell v. Smith*, 86 Tenn. 539. (*Inquiry from Kan., July, 1915.*)

Rights and liabilities of heirs

Rights inter se of grandson, surviving brothers and divorced husband

1273. A woman died in Kansas intestate, leaving surviving her a grandson, two brothers and a divorced husband? (1) What are the respective interests of the survivors in the estate of the deceased? (2) Can a bank in Idaho on behalf of its customer, one of the brothers, demand a statement of account of deceased from the Kansas bank with which she did business? *Opinion:* (1) The Kansas statute of descent and distribution provides that upon the death of a wife the estate, in the absence of other arrangements by will, shall descend in equal shares to the surviving children, and the living issue, if any, of prior deceased children; but such issue shall collectively inherit only that share to which their parent would have been entitled had he been living. (*Gen. St. Kan.*, 1909, Ch. 33, Secs. 2952, 2961. *Ibid.*, 1915, Ch. 30. 3851). It will thus be seen that, in the instant case the two brothers of decedent were not entitled to distributive shares of her estate, since she left surviving her a grandson, the issue of a predeceased child, who would be entitled to the whole estate under the Kansas statute. In Kansas a divorced husband is barred from sharing in the estate of his wife on her death. (*Jacobs v. Gaskill*, 69 Kan. 872, 77 Pac. 550. *Durland v. Durland*, 67 Kan. 734, 74 Pac. 274. *Gen. St. Kan.*, 1909, Ch. 95, Sec. 6268). (2) The bank cannot demand a statement of the decedent's account from the bank of her deposit, on behalf of one of the brothers, as only the administrator of the estate who would have such right; furthermore the brothers, in this case, took no rights whatever. (*Inquiry from Idaho, Oct., 1920.*)

Heir's note for decedent's debt

1274. A widow and daughter of the decedent gave their notes to a bank in part payment of a note of the decedent which the bank neglected to prove against the decedent's estate within the time required by law. *Opinion:* The authorities are in con-

flict whether such notes of widow and daughter, receiving assets of the estate, given in part payment of a note of the decedent, outlawed by non-claim, are supported by a sufficient consideration and enforceable. In Illinois, the question is yet to be litigated. *Williams v. Nichols*, 76 Mass. 83. *Linderman v. Farquharson*, 101 N. Y. 434. *Paxson v. Nields*, 20 Atl. (Pa.) 1016. *Alger v. Scott*, 54 N. Y. 14. *Comer v. Allen*, 72 Ga. 14. *Hammond on Contracts*, Sec. 328. *Mull v. Van Trees*, 50 Cal. 547. *Grimball v. Mastin*, 77 Ala. 553. *Bissinger v. Lawson*, 57 Miss. 36. *Didlake v. Robb*, 1 Woods 680. (*Inquiry from Ill., Dec., 1912, Jl.*)

Right to intestate's deposit where sole survivor son and divorced wife

1275. A New Jersey bank asks who has the right to funds which it has on deposit in the name of a depositor who died intestate, his only survivors being a son and a former wife who was divorced and remarried in his lifetime. *Opinion:* The married woman is not the widow of the deceased, and the only surviving son is entitled to the entire deposit under the provisions of the New Jersey statutes. *Comp. Stat, N. J., Sec. 169, p. 3874.* *Bayles v. Latham*, 61 Iowa 174. *Marvin v. Marvin*, 59 Iowa, 699. *Durland v. Durland*, 67 Kans. 734. *Hecht's Estate*, 9 Pa. Co. Ct. Rep. 564. In re *Est., of Runyon*, 137 Wis. 634. *Bishop on Marriage & Divorce*, Sec. 661. In re *Runyon's Est.*, 12 N. J. L. Jl. 15. (*Inquiry from N. J., Feb., 1918, Jl.*)

Promise to make donation to charitable institution not enforceable

1276. A charitable institution received a promise from a New Yorker afterwards deceased, to donate a few thousand dollars. The donor was at the time not in position to pay the cash, and wrote a letter that he would pay 5% interest on the amount during his life and stated that the amount was \$10,000 and that such was specified in his will. After his death it was found that he had written a later will which made no provision for the promised donation. Can the institution recover from his estate? *Opinion:* Such a promise cannot be enforced against the estate of the decedent. It is a mere promise to give and would fail for lack of consideration. To constitute a valid gift, it must be completed by delivery and a mere statement that a person intends to give a certain amount and that he has made a will bequeathing such amount and furthermore

promising to pay interest thereon during his life time will not be binding on his estate where he makes another will revoking the former donation. (*Inquiry from N. Y., Oct., 1914.*)

Right of surviving husband and child

1277. A bank asks whether, in the event of the death of a married woman leaving a husband and child, the property descends to the child unconditionally, or does the husband acquire a right of curtesy therein? *Opinion:* In New Jersey, by act approved March 3, 1915, the husband's right of curtesy was abolished, the act specifically providing that nothing therein shall affect any estate or interest which may have become vested before its enactment. New Jersey Laws, 1915, Chap. 31, p. 65. In the case submitted, the child would take the whole of the mother's real estate, free from any claims or interest of the surviving husband, provided his right of curtesy had not vested prior to the passage of said act. (*Inquiry from N. J., March, 1915.*)

Title of surviving husband under deed to husband and wife

1278. A piece of realty in South Dakota was conveyed to "John Doe & Julia Doe, his wife." After the death of the wife, has John Doe, the widower, title to the premises? *Opinion:* Estates in entirety are not recognized by the South Dakota statutes. *Comp. Laws S. D. Vol. 2, Sec. 1025*, provides that "no estate is allowed the husband as tenant by curtesy." The deed created either a tenancy in common or a joint tenancy. "A joint interest is one owned by several persons in equal shares, by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy." Ibid Sec. 199. "Every interest created in favor of several persons in their own right is an interest in common, unless acquired by them in partnership, for partnership purposes, or unless declared in its creation to be a joint interest, as provided in section 199." Ibid Sec. 202. "A husband or wife may hold real or personal property together, as joint tenants, or tenants in common." Ibid Sec. 101. In the case submitted a joint tenancy is not "expressly declared," and hence it would seem that a tenancy in common was created. This being the case the wife's title to an undivided half of the property passes to her estate. (*Inquiry from S. D., Dec., 1915.*)

Evidence of transactions with decedent*Admissibility of minutes of bank as evidence*

1279. In litigation between a national bank and the estate of its deceased president, where a claim is made against the latter, is the bank's minute book admissible as evidence against the estate? *Opinion:* Were the president living, not only would the minute book of the meetings of the directors of a bank be admissible to prove what action was taken by such directors in regard to the purchase of bonds from the president, but it would be the best evidence thereof. *Protection Life Ins. Co. v. Dill*, 91 Ill. 174. *Chase v. Sycamore etc. R. Co.*, 38 Ill. 215. *Ryder v. Alton etc. R. Co.*, 13 Ill. 516. *Fitch v. Packard*, 5 Ill. 69. *Wesp v. Strasenburg*, 210 N. Y. 527. *In re Mendelbaum*, 141 N. Y. S. 319. *Gold, etc., Co. v. Dennis*, [Colo. 1912] 121 Pac. 677. *Oregon v. C. R. Co.*, 206 Fed. 577. *Carey v. Williams*, 79 Fed. 906. *Cook on Corporations* [7th Ed.], Vol. 3,—Sec. 714. See also *Jefferson v. Stewart*, 4 Harr. [Del.] 82. *Merchant's Bank v. Rawls*, 21 Ga. 334. *White Mountain R. Co. v. Eastman*, 34 N. H. 124. *Rudd v. Robinson*, 126 N. Y. 113. *Plank Road Co. v. Rice*, 7 Barb. [N. Y.] 157. *Bedford R. Co. v. Bowser*, 48 Pa. St. 29. *Bavington v. Pittsburgh etc. R. Co.*, 34 Pa. St. 358. *Fleming v. Wallace*, 2 Yeates [Pa.] 120. It does not seem that Section 2 of the Evidence Act of Illinois which disqualifies from testifying a party to an action, or a party in interest, where the adverse party is representative of a decedent would operate to exclude the minute book, which is simply documentary evidence. (*Inquiry from Ill., May, 1915.*)

Minute book of bank amended after decease inadmissible

1280. In litigation between a national bank and the estate of its deceased president,

are minutes of a meeting of the board of directors admissible against the estate, where the original minutes contained no reference to the matter sought to be proved, but such minutes were amended after his decease by resolution of the board of directors, and upon a certificate of all the surviving members of the board, as to what transpired at such meeting, and such recital incorporated into the minutes as amended?

Opinion: There appear to be no adjudicated cases under either the Illinois or New York statutes in which the precise point here under consideration was raised. The cases of *Handley v. Stutz*, 139 U. S. 417. *Wiley v. Athol*, 150 Mass. 426. *Chott v. Tivoli Amusement Co.*, 114 Ill. App. 178, are to the effect that such proceedings may be proved by parol. See also *Bay View v. Williams*, 50 Cal. 353; *Van Hook v. Sommerville*, 5 N. J. Eq. 37. *State v. Guertin*, 106 Minn. 248. *Grath v. Roofing Tile Co.*, 121 Mo. App. 134. *Seller v. Amer. Lubricating Co.*, 119 Iowa 591. *Watts v. Gordon*, [Tenn. 1913] 153 S. W. 483. *Murray v. Beal*, 23 Utah 548. *Illinois etc. Assoc. v. Plagge*, 177 Ill. 431 [to the effect that minutes of corporate meetings are prima facie evidence only of the proceedings, and where such minutes are incorrect, or incomplete, parol evidence is admissible for the purpose of proving what actually occurred]. If the president were still living it would seem that the minutes of the meeting of the board of directors might be thus amended and be good evidence in a proceeding against him; but where the proceeding is against his estate, a post mortem correction of minutes upon a certificate of surviving members of the board as to what transpired, would be in the nature of personal testimony and would quite likely be excluded as within the statute which prohibits a party or party in interest from testifying in an action against the estate of a deceased party. (*Inquiry from Ill., May, 1915.*)

DEEDS AND CONVEYANCES**Delivery***Delivery essential to completeness of deed of gift*

1281. A farmer made out a deed to his wife for his farm, and put it away in his strong box, with the remark that "so that if I'm taken first, all she will have to do is to put it on record, and then title will be in her

name, and will keep it out of court." Was this a valid gift of the property described in the deed? *Opinion:* It is elementary law that a gift is incomplete without delivery. The mere intention to give is not sufficient. If a man draws a deed intending to give the property to another, but does not deliver the deed, and retains the property until his death, the title does not pass, and the

property becomes a part of his estate. (*Inquiry from Colo., Dec., 1916.*)

Delivery of deed after death

1282. A widow with two children owns land, and does not want to make a will. She proposes to make deeds to each child, which she can hold until her death and then have them delivered to the two children. *Opinion:* Deeds executed by the grantor to her two children and held by her with intention that they shall be delivered after death would be ineffectual, if not delivered during her lifetime, to pass title to the grantees. *Burkey v. Burkey*, 175 S. W. (Mo.) 623. *Latshaw v. Latshaw*, 266 Ill. 44. *Terry v. Glover*, 139 S. W. (Mo.) 337. (*Inquiry from Mo., Nov., 1917, Jl.*)

Names of parties

Right to change name when deeds are executed in original name

1283. A man having the name "Badasci" wanted to change his name to "Badasche." The deeds to his property, his notes, mortgages and insurance policies were executed in his original name. The question was raised by a bank as to whether it was safe in accepting such instruments as collateral from the holder whose name was changed without court order. *Opinion:* The man has a common law right to change his name without Court order but in transferring his property and contract rights there may be difficulty in proving identity and it would be more desirable to obtain a court order, making the change a matter of record and proof, unless the names are to be regarded as *idem sonans*, when such difficulty of proving identity would not arise. It is unsafe for a bank to accept the instrument as collateral because of the difficulty of proof of identity which could be obviated by a court order. Statutes providing for a change of name by judicial proceeding do not affect, but are in aid of the common law right by affording an easier means of proof of identity. *Emery v. Kipp*, 154 Cal. 83. *Wilson v. White*, 84 Cal. 239. *Fallon v. Kehoe*, 38 Cal. 44. *Clark v. Clark*, 19 Kan. 522. *Coplin v. Woodmen of World*, (Miss.) 62 So. 7. *Haywood v. State*, 47 Miss. 1. *Loser v. Sav. Bk.*, 149 Iowa 672. *Cooper v. Burr*, 45 Barb. (N. Y.) 9. *Charleston v. King*, 4 McCord (S. C.) 478. *Linton v. Kittanning First Nat. Bk.*, 10 Fed. 894. *Smith v. U. S. Casualty Co.*, 197 N. Y. 420. *In re Burnstein*, 124 N. Y. S. 989. *Delaney*

v. Gaylord, 131 N. Y. S. 890. *Brayton v. Beall*, 73 S. C. 308. *In re McUltra*, 189 Fed. 250. *Peckham v. Stewart*, 97 Cal. 147. *Galliano v. Kilfoil*, 94 Cal. 86. *McAuliff v. Hughes*, 112 N. Y. S. 486. (*Inquiry from Cal., Feb., 1916, Jl.*)

Description

Discrepancy in description of deed to homestead

1284. A homesteads a piece of land in Oregon. He received his patent which called for 160 acres according to government survey. A traded the land to B for other property. B had the land reported upon before purchasing, and was satisfied, although no report was made as to acreage. B, without seeing the land, traded it to C, and gave a deed calling for 160 acres, more or less, according to government survey. C, without seeing the land sold it to D and gave a deed calling for 160 acres, more or less. D inspected the land and found and reported but 100 acres in the piece. The question is asked, who is the loser, and what recourse is there against the government.

Opinion: It seems that, as between A and the parties claiming title through him, their right to relief would depend largely upon the wording of the respective deeds and the express or implied covenants contained therein. The contract of sale may have called for the conveyance of a certain tract of land described by metes and bounds in the government survey, and as further descriptive thereof recited to contain "160 acres more or less." As to any recourse against the government on its original patent, doubtless if A, the original patentee, paid the government a stipulated sum per acre for 160 acres of land, and the land called for in his patent, according to subsequent developments, only contained 100 acres, he could recover the difference, the price paid for 60 acres, through the Court of Claims—otherwise if the patentee paid a lump sum for a tract of land described by metes and bounds, and incidentally described as containing 100 acres, the maximum number of acres which might be acquired by any one homesteader under the statute. (*Inquiry from Minn., Feb., 1918.*)

Consideration

Deed given in consideration for annuity to continue after grantor's death

1285. A, the owner of a tract of land, proposes to deed it to B upon the condition

that B pay A an annuity of \$1,000 during A's lifetime, and thereafter upon A's death to continue the annuity to C during C's lifetime. A wishes to construct the proper form of deed. *Opinion:* The deed could be drawn with a condition subsequent incorporated therein by the use of the words "upon condition" with a clause providing for the reentry of A or his heirs upon the land on the breach of such condition. Gallagher v. Herbert, 117 Ill. 160. 2 Story's Eq. Jur. Secs. 13, 15 et seq. Willis v. Gay, 48 Tex. 463. (*Inquiry from Okla., Aug., 1912, Jl.*)

Deeds pledged as security for loans

Pledge of unrecorded deed

1286. A bank cashier, as an individual, gave a warranty deed for vacant property. Without recording the deed the grantee proceeded to erect buildings thereon. Thereafter said grantee as collateral for a loan took the unrecorded deed to the cashier of the bank, as such, and the bank made the loan. Before the matter was finally arranged the grantee died and his estate is insolvent. What are the rights of the bank? *Opinion:* Unless the rights of subsequent bona fide purchasers, creditors or mortgagees intervened prior to the recordation of such deed, the grantee could give a perfectly good title or valid lien to the bank upon such property. And, according to the authorities hereinafter cited, the fact that the grantee, and debtor of the bank, was insolvent at the time of his death would not impair the lien of the bank on the property in question, provided the lien represented a contemporaneous advance or loan, in contradistinction to security for a past indebtedness, i.e., a preference, as the term is used in the insolvency and bankruptcy statutes. Brashear v. Alexandria Cooperage Co., 50 La. Ann. 587. Hutchinson Murchie, 74 Me. 187. Hinkleman v. Frey, 79 Md. 112. George v. Grant, 97 N. Y. 262. Gettinger v. Nat. Bk. of Com., 23 Ohio Cir. Ct. 77. In re Eck, 10 Kulp (Pa.) 560. Moore v. American L. & T. Co., 80 Fed. 49. (*Inquiry from Ill., Jan., 1919.*)

Satisfaction of record of deed of trust after death of holder

1287. In 1901 A and his wife gave a note to B, secured by a deed of trust on a tract of land. A few years later A paid the note by check, but the deed of trust was not satisfied of record. B has since died, leaving a widow, and an administrator appointed has duly administered and settled up the estate.

What can A do to effect a release and remove the cloud upon his title to the land?

Opinion: Under the Missouri statute (Rev. St. Mo. 1909, Sec. 2844), providing that the beneficiary under a deed of trust, and not the trustee, shall release the deed on the margin of the record, the indorsee and holder of a note secured by a deed of trust is the proper party to release the same (Ripley Nat. Bank v. Conn. Mut. L. Ins. Co., 145 Mo. 142). In the instant case it would seem to be only necessary to follow the provisions of the Missouri statute, Sec. 2844. That section provides that if any mortgagee, cestui que trust or assignee, or administrator of the mortgagee, cestui que trust or assignee, receive full satisfaction of any mortgage or deed of trust, he shall, at the request and cost of the person making same, acknowledge satisfaction of the mortgage or deed of trust on the margin of the record thereof; and it is not necessary for the trustee to join in such acknowledgment of satisfaction. The statute further provides that, if the notes secured by such deed of trust are not presented for cancellation for the alleged reason that they have been lost or destroyed, the recorder, before allowing any entry of satisfaction to be made of record, shall require the cestui que trust, or his legal representative, to make oath, in writing, stating that the note named in said deed of trust has been paid and delivered to the maker or his representative; and the maker of the note shall likewise make affidavit that the notes in question have been paid, and cannot be produced because lost or destroyed. Sec. 2850 provides that, if any person thus receiving satisfaction does not, within 30 days after request and tender of cost, acknowledge satisfaction on the margin of the record, or deliver a sufficient deed of release, he shall forfeit to the party aggrieved 10% of amount of the deed of trust and any other damages for non-performance. Here, since B, the cestui que trust, is dead, application should be made to, and the release given by, his administrator, or, in case there is no administrator, by his widow. (*Inquiry from Mo., Jan., 1912.*)

Remedy on breach of covenants

Covenants in warranty deed—Statute of limitations

1288. Inquiry is made (1) as to recourse of grantee upon grantor for breach of warranty or covenant of title which he will forever defend, etc. Are damages recoverable by grantee? Can grantee himself ac-

quire good title by purchase of adverse interest and recover from grantor or must grantor come in and defend and pay damages to grantee? (2) What is the Statute of Limitations on grantor's liability? *Opinion:* (1) The general covenant of warranty, under the Code of Iowa, includes and implies all the usual covenants in a deed of conveyance in fee simple, (Van Wagner v. Van Nostrand, 19 Iowa 422 [holding that the existence of a valid lease upon the premises, at the time of the execution of a deed conveying same with general covenant of warranty, is a breach of such covenant, and entitles the grantee to recover at least nominal damages]) which are seizin, right to convey, freedom from encumbrances, for quiet enjoyment, and to warrant and defend the title against all lawful claims. (Funk v. Creswell, 5 Iowa 62.) It has likewise been held in Iowa that, where a party makes conveyance after the form termed by the code "a deed in fee, with warranty," there is implied in covenant therein given, every other covenant necessary to insure a perfect title to the grantee, as well as indemnity for its failure. (2) It has been held in Iowa that covenants of seizin and of good right to convey are synonymous, and if at the time of conveyance the grantor does not own the land, the covenant is broken immediately, and a right of action at once accrues, and is barred by the Statute of Limitations after the lapse of ten years under Section 2629 of the Iowa Code (Mitchell v. Kepler, 75 Iowa 207. Brandt v. Foster, 5 Iowa 287, 295). See, also, McDermott v. Mahoney, 139 Iowa 292, to the effect that the statutory period is ten years from the accrual of the right of action, and other Iowa cases might be cited. (*Inquiry from Iowa, July, 1915.*)

Deposit in escrow

Duty of bank on non-performance of condition

1289. A deed was deposited with a bank on condition that the bank should deliver the deed to the purchaser when he should pay certain notes in full, together with interest, with a proviso that upon non-payment the vendor should have an option to forfeit the purchaser's right to the deed and to all money paid, and that the bank should return the deed to the vendor. After non-performance of the agreement, a proposed agreement was prepared and sent to the purchaser for his signature which, if executed as proposed, would have given him an extension of time for payment, but the proposed agreement was changed by the purchaser

and the change was repudiated by the vendor. What should the bank do with respect to the deed? *Opinion:* There was no meeting of minds as to the new agreement and so this drops out of consideration. Since the condition of the deposit has not been performed, the depositor is entitled to a return of the deed. Hayden v. Meeks, 14 S. W. (Ark.) 864. Equity Gas & Light Co. v. McKeige, 139 N. Y. 237. There seems to be no right of redemption as there would be had the deed actually been delivered to the grantee and placed on record. The escrow does not take effect as a deed until delivery to the grantee or until the condition is performed. 16 Cyc. 588, and cases cited. This rule is modified, where justice requires it, so that delivery will be held by fiction of law to relate back to the deposit. Justice does not require a modification of the law in this case, and the rule applies that the instrument does not take effect as a deed until delivery or at least until performance of the condition. Such being the case the grantee has no title which can be redeemed. (*Inquiry from Kan., Aug., 1915.*)

Leases

Validity of lease of real estate to non-existent but prospective corporation

1290. The promoters of a corporation secure leases on real estate, some of which are executed to "The X. Co." and some to "G, trustee for The X. Co." Can the corporation, when formed subsequently, enforce these leases? Can the corporation make the trustee, G., transfer these leases to it? *Opinion:* Assuming that the lessors have received value for leases made to a non-existent but prospective corporation, they are estopped to deny the validity of such leases because of the non-incorporation of the lessee at the time of giving the leases. The leases would be valid in the hands of the subsequently organized corporation, when turned over by the promoters. The trustee could be compelled to transfer to the corporation when formed, the leases executed to him as trustee, as that was the specific purpose for which the trust was created. (*Inquiry from Tenn., Jan., 1921.*)

Torrens system

1291. What is the Torrens system and what states have adopted this system of land registration? *Opinion:* In 9 Jurid. Rev. 155 it is stated that "The essential point of this system is an official guarantee of title;

it is the registration of *title* as distinct from the registration of *deeds*. The latter ascertains the deeds which must be examined under every transfer, while the former renders such examination unnecessary." Laws enacting the Torrens system (so called from its author Sir Robert Torrens)

have been passed in the following jurisdictions: California, Colorado, Illinois, Massachusetts, Minnesota, Nebraska, New York, North Carolina, Ohio, Oregon, Washington, Virginia, Pennsylvania, Hawaii, Philippines. (*Inquiry from La., Mar., 1916.*)

DEPOSITS

Bank not obliged to receive deposits

Not compelled to open account

1292. Is a bank compelled to accept a deposit from a person with whom it prefers not to do business? *Opinion:* A bank cannot be compelled to receive a deposit. This is not the case of a common carrier. The relation is contractual and cannot be created except by mutual consent. (*Inquiry from Minn., Oct., 1918.*)

Right to close account

1293. A bank is under no obligations to receive deposits from undesirable persons and may close an account at any time it chooses by tendering to the depositor the amount due and declining to receive more. (*Inquiry from N. J., March, 1913, Jl.*)

1293a. A customer opened a small checking account with a bank. The bank later discovered that the customer was a professional forger and questions its legal right to close the account. *Opinion:* A bank, unlike a common carrier, has power to select its customers and may refuse to receive a deposit of a particular customer or can close an account out at any time by tendering the amount due. *Thatcher v. Bk. of St. of New York*, 5 Sand. (N. Y.) 121. *Chicago, etc., Co. v. Stanford*, 28 Ill. 168. *Elliott v. Capital City St. Bk.*, 128 Iowa 275. *People v. Bk. of North America*, 75 N. Y. 547, 563. (*Inquiry from Ala., May, 1912, Jl.*)

Relation and duty of bank and depositor

When is debtor and creditor relation created?

1294. Is the relation of debtor and creditor created when a bank receives a check payable to depositor, indorsed in blank by him, and places the amount to the depositor's credit? *Opinion:* The decisions are not uniform on this question, the earlier ones favoring the rule that the bank does not take title upon a deposit of paper, but becomes agent and the title remains in the

depositor until collection; but this rule is fast being supplanted by the rule that a bank takes title upon deposit; the courts of New York, Illinois and a number of other states holding to the latter rule, the Federal Courts in many cases holding to the contrary. *Nat. Citizens Bank v. Howard*, 3 How. Prac. N. S. 511. *King v. Bowling Green Trust Co.*, 145 App. Div. 398. *Lauterman v. Travous*, 174 Ill. 459. *City of Phila. v. Eckles*, 93 Fed. 485. (*Inquiry from Ill., Aug., 1912.*)

Bank entitled to written order but can pay on oral order

1295. A having an account in bank came to the bank in person and verbally in the presence of the bank officials ordered the bank to pay B \$300 after certain conditions were complied with. The conditions were performed and B was paid the money. A claimed that the oral order was not binding and should have been in writing. *Opinion:* The bank is entitled to require a check or other written order from the customer to pay a deposit, but if it is willing to and does pay on the customer's oral order, the payment is valid and chargeable, assuming the bank can prove such order. *Aurora Nat. Bk. v. Dils*, 18 Ind. App. 319. *Watts v. Christie*, 11 Beav. (Eng.) 546, 551. *McEwen v. Davis*, 39 Ind. 109. *Ellis v. First Nat. Bk.*, 21 R. I. 565, 572. *Ridgley Nat. Bk. v. Patton*, 100 Ill. 479. *Risley v. Phoenix Bk.*, 83 N. Y. 318. (*Inquiry from Colo., June, 1913, Jl.*)

Bank not obliged to make partial payment nor disclose balance to check holder

1296. A customer of a bank draws a check on it for an amount greater than his deposit, and it is asked whether the party presenting the check can require the bank to tell him how near the check is good when it refuses to credit on the check the amount of the customer's balance. *Opinion:* A bank is not obliged to make partial payment of a check and is under no obligation to the

holder of it to disclose the amount of the customer's balance. (*Inquiry from Va., April, 1911.*)

Depositor objecting to account stated after eight years estopped by laches

1297. A bank carried a deposit for the sister of its depositor, he making all the deposits for her and all the withdrawals being upon checks signed by her, the statement of account with returned vouchers being delivered to him as her agent. Eight years later the sister sued the bank claiming there was a considerable balance due her. Has she the right to object to the bank statement? *Opinion:* The general rule is that a bank's passbook or statement written up by the bank and delivered to the depositor with the vouchers, constitute after a reasonable time, an account stated. *Des Moines Nat. Bank v. Sisson*, 121 N. W. (Ia.) 533. *Hardy v. Chesapeake Bank*, 51 Md. 562. *McKeen v. Boatmen's Bank*, 70 Mo. App., 325. In *Leather Mfrs. Bank v. Morgan*, 117 U. S. 96, it was held the depositor may be estopped by negligence from contesting the correctness of the passbook where it has been misled to its prejudice. Eight years would be too late to object to an account stated. See *Standard Oil Co. v. Vanetter* 107 W. S. 325. *Nodine v. Union First Bank* 68 Pac. (Ore) 1109. *Rich v. Eldridge* 42 N. H. 153. *Schneider v. Irving Bank* 1 Daly (N. Y.) 500. Different rule in *McGraw v. Traders National Bank* 63 S. E. (W. Va.) 398. (*Inquiry from Mass., Jan., 1918.*)

Deposit made outside bank

1298. A depositor on his way to the bank delivered to one of the bank clerks a deposit consisting of cash and checks tied up in a package. When the clerk arrived at the bank, it was discovered that there was \$100 less than the amount indicated on the deposit slip. The depositor claims that the full amount was turned over and that the bank should stand the loss. *Opinion:* It is essential that a depositor should deliver his deposit at the bank to one authorized to receive same, and if he delivers the deposit to an officer or agent away from the bank, he makes the latter his own agent and takes the risk of the money reaching the bank to his credit. (*Inquiry from Md., July, 1918, Jl.*)

1299. A customer claimed to have given the cashier of a bank a deposit of money away from the bank, which is denied by the

cashier. The customer had no receipt for the deposit. *Opinion:* The customer cannot hold the bank liable because (1) it is difficult to prove the receipt of the money by the cashier and even if proved (2) the cashier had no authority to receive deposits away from the bank, according to the weight of judicial opinion, and the bank is not liable unless the money was delivered to the bank to the credit of the customer's account. *Demarest v. Holdeman*, 73 N. E. (Ind.) 714. *Morse on Banking* (5th Ed.) Secs. 46, 168b and 179. For contrary case see *Pendleton v. Bk.*, 1 T. B., Monroe, 181. (*Inquiry from Pa., Oct., 1911, Jl.*)

Deposit slips and clauses

Nature of deposit slip

1300. B deposited in a bank \$73.44, and transferred to D a deposit ticket, which read: "deposited and pending settlement with D." B claimed he owed D \$55.44, whereas D claimed B owed him \$73.44. The bank refused to honor the deposit ticket presented by D. *Opinion:* A deposit slip given by a bank to a depositor is simply an acknowledgment of the receipt of money and its delivery by the depositor to a third person does not operate to assign the deposit. *First Nat. Bk. v. Clark*, 134 N. Y. 368, 32 N. E. 38, 17 L. R. A. 589. (*Inquiry from Ala., Mar., 1916, Jl.*)

1301. A deposit ticket or entry of deposit in a pass-book made by one in authority in the bank is evidence that the amount has been received as a deposit by the bank at the time stated, but like any other receipt it is only *prima facie* and not conclusive evidence, and may be explained by other evidence or shown to have been issued by mistake. It is not a binding obligation or promise of the bank to pay the amount. *First Nat. Bk. v. Clark*, 134 N. Y. 368. *Talcott v. First Nat. Bk.*, 53 Kan. 480. *Andrews v. St. Bk.*, 9 N. Dak. 325. (*Inquiry from Okla., May, 1911, Jl.*)

Nature of duplicate deposit slip

1302. In stamping a duplicate deposit ticket "Duplicate" and initialed, what does it guarantee? *Opinion:* A deposit slip marked "Duplicate" with the initials of a bank official, is an assertion or guaranty not only that the total, but that all the items are the same as in the original. *Radford v. Dixon County*, 29 Nebr. 113. *Gilby Bank v. Farnsworth*, 7 N. Dak. 6. *Mo. Pac. R. Co. v. Heidenheimer*, 82 Tex. 195. *State v.*

Graffam, 74 Wis. 643. *Toms v. Cuming*, B. & Arn. 347. (*Inquiry from Pa., June, 1920, Jl.*)

1303. A duplicate deposit slip showing a deposit of \$10 currency was issued to a depositor who checked against the account and obtained cash from A, thereby exhausting the credit. Thereafter the depositor meets B and obtains \$10 cash from him on the original deposit slip. *Opinion:* B cannot hold the bank. The duplicate deposit slip is merely evidence of a receipt of deposit on a stated date. It is not a binding obligation or promise of the bank to pay the amount to the transferee of the deposit slip, like a negotiable certificate of deposit. (*Inquiry from N. D., Sept., 1912, Jl.*)

Deposit slip for check conditionally deposited

1304. The payee of a check leaves it with the teller of the drawee bank for safe keeping and states it is not to be presented for a few days pending the consummation of a contract between the drawer and the payee. The teller issues a deposit slip therefor but does not credit the check to the payee's account and afterwards the contract fails of consummation and the drawer does not provide funds sufficient to cover the check. The bank asks if it is liable on account of having given the deposit ticket, for checks drawn by the payee. *Opinion:* The bank is not liable for the amount to the payee and has the right to refuse payment of the latter's check drawn against such conditional deposit. The deposit slip is in the nature of a mere receipt subject to explanation. *Walnut Hill Bk. v. Nat. Res. Bk.*, 126 N. Y. 5, 430. *Hough v. First Nat. Bk. of Oelwein*, 155 N. W. (Iowa) 163. *Keen v. Beckman*, 66 Iowa 672. *Bk. v. Clark*, 134 N. Y. 368. (*Inquiry from N. M., May, 1918, Jl.*)

Protective clause on deposit slip

1305. A bank asks for a form or clause to be printed on deposit slips to protect it in connection with items presented for credit, or deposit, which are not drawn on it? *Opinion:* A desirable form is the following, passed upon by a committee of the American Bankers Association and published in a book of forms for national and state banks: "The depositor using this ticket hereby agrees that all items payable outside of Richmond shall be forwarded by this bank as agent for the depositor at the depositor's risk; that this bank shall not be responsible for negligence, default or failure of sub-agents, nor for losses in the mails; that this bank shall

have the right to charge back to the depositor's account any item for which actual payment is not received; that items may be sent direct to the banks on which drawn without waiving any of the above conditions, and that items on Richmond are credited subject to actual payment through the Richmond Clearing House." This form protects the bank. (*Inquiry from N. D., May, 1918.*)

Clause on deposit slip of New York bank limiting liability

1306. A New York bank submits a form of clause to be incorporated in deposit slip as a protection to the collecting bank, as follows: "For the collection of all items outside New York City, the Bank will observe due diligence in its endeavor to select responsible collecting agents, but will not be liable for their failure or negligence, nor for losses in the mail," and invites criticism. *Opinion:* The suggested clause quoted would seem to be sufficient to protect the bank from liability for defaults or negligence of correspondents, and because of losses in the mail. It might be improved to correspond with the form of another New York bank which expressly provides that the bank is agent, and contains a disclaimer of all responsibility where it uses due care; and also contains an express reservation of the right to charge back any amounts previously credited. Concerning this latter, under the New York law, it would seem, upon credit of a check on deposit, title would pass to the bank, and it would not be a collecting agent, but owner so that if there was payment of the item to a correspondent the depositor would be discharged as indorser, and if the correspondent failed to remit, the loss would fall upon the bank. It would appear to be quite important, therefore, to establish that items received on deposit are taken as collecting agent only. (*Inquiry from N. Y., Feb., 1921.*)

Deposit slip clause "credited subject to final payment"

1307. At the bottom of printed deposit slips a bank has the statement: "All items credited are subject to final payment." Does this fully protect the bank? Request is made for suggestions as to the specific wording of the protective clause and as to its position? Should it be placed on the deposit ticket, the signature card, or the pass-book? *Opinion:* The form used is a clear notice that the bank does not take title to

the items deposited and has the right to charge the amount back upon non-payment and indicates that the bank acts as a mere collecting agent. It is sufficient for the purpose. A New York bank has this notice printed on its deposit slip: "In receiving items on deposit this Bank obligates itself only as the Depositor's collecting agent, assuming no responsibility beyond carefulness in selecting correspondents and until such time as actual payments shall have come into its possession, reserves the right to charge back to the Depositor's account any amount previously credited." This form expressly declares the bank to be the agent, which is implied from the submitted form; it also provides that the bank assumes no responsibility beyond carefulness in selecting correspondents. Under the New York law this clause is necessary, for otherwise a collecting bank is liable for the defaults of correspondents. In Connecticut, however, the bank is liable only for the lack of due care (*East Haddam Bank v. Scovil*, 12 Conn. 303) and presumably this particular clause is not necessary.

The best place to print the protective clause on the deposit slip is directly under the date line. The location is largely immaterial, except that it can be torn off from top or bottom without destroying the slip. The New York bank, referred to has a similar clause printed on the top of the first right hand page of the pass-book. It might be well to print the clause on the pass-books and also on the signature card, the point being to establish beyond all question that the clause constitutes an agreement between the bank and the depositor. However, it has been held that the clause printed on the deposit slip is sufficient, and probably printing on the signature card or pass-book is unnecessary. (*Inquiry from Conn., Aug., 1918.*)

Assignment of deposit

Assignment of savings deposit as security for loan

1308. There is nothing in the law which will prevent a national bank in New York State from making a loan to a depositor in a savings bank and taking an assignment of his deposit evidenced by his savings bank-book as security. But as a savings bank-book is not a negotiable instrument, notice of the assignment should be given to the savings bank to safeguard it against subsequent withdrawals, which might be effected by the depositor upon the claim of loss

without production of the book. *Smith v. Brooklyn Sav. Bk.*, 101 N. Y. 28. *Mills v. Albany Exch. Sav. Bk.*, 28 Misc. (N. Y.) 251. *Bk. of U. S. v. Public Bk.*, 151 N. Y. S. 26. (*Inquiry from N. Y., July, 1916, Jl.*)

Assignee of savings deposit should notify bank

1309. In the case where a depositor has been paid a savings deposit under false claim of loss, an assignee to whom the depositor had assigned his deposit would have no rights against the bank. A savings pass-book is not a negotiable instrument and an assignee takes no greater rights than the assigner. (*Inquiry from Ore., April, 1917, Jl.*)

Assignment of deposit in national bank

1310. A deposit account in a national bank or a trust company may be assigned by the depositor like any other debt or chose in action, and the assignment is binding upon the bank when notified thereof. *Hove v. Stanhope St. Bk.*, 138 Iowa 39. *Covert v. Rhodes*, 48 Ohio St. 66. *Bk. v. Schuler*, 120 U. S. 515. *Fourth St. Nat. Bk. v. Yardley*, 165 U. S. 634. *First Nat. Bk. v. Clark*, 134 N. Y. 368. *Schollmier v. Schoendelin*, 78 Iowa 426. *First Nat. Bk. v. Wattles*, 8 Kan. App. 136. *Foss v. Lowell Five Cent Sav. Bk.*, 111 Mass., 285. *Joffe v. Bowery Bk.*, 31 Misc. (N. Y.) 778. (*Inquiry from Pa., Dec., 1913, Jl.*)

Deposits in two names—Joint deposits

Uniform statute

1311. AN ACT relative to payment of deposits in two names.

"Be it enacted, etc.

Section 1. When a deposit has been made, or shall hereafter be made, in any (specify institutions) transacting business in this State in the names of two persons, payable to either, or payable to either or the survivor, such deposit, or any part thereof, or any interest or dividend thereon, may be paid to either of said persons, whether the other be living or not; and the receipt or acquittance of the person so paid shall be a valid and sufficient release and discharge to the bank for any payment so made."

This statute has been passed in the above form or with some change in phraseology in 36 states. Joint or Two-Name Accounts in banks are now quite usual, and the purpose is to clear up any legal doubt concerning the authority of the bank to pay over a savings account to the survivor by expressly providing such authority. In New York

and Michigan the statute, in addition to containing an authority to the bank to pay, declares that the deposit belongs to the persons named as joint tenants.

This law is yet to be enacted in the following states: Alabama, Arizona, Arkansas, Colorado, Dist. of Columbia, Indiana, Kentucky, New Mexico, North Dakota, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas. This law originally enacted in California, had been repealed, due to an oversight, by Laws 1919, chapter 337, page 623, but has since been re-enacted by Laws of 1921. (*April, 1921.*)

Approved form of account in two names

1312. A bank asks, what is the most approved form of account when a depositor desires to place it in two names with payment to survivor in case of death? *Opinion:* In view of the general enactment of statutes which provide that when a deposit is made "in the names of two persons, payable to either or payable to either or the survivor" the bank is authorized to pay either, whether the other be living or not, a form of account "John Doe or Mary Doe, either or survivor" would comply with the statute and authorize the bank to pay the survivor. Such form is in common use by many banks. But while authorizing payment to the survivor, in the absence of notice not to pay by an adverse claimant, such form would not necessarily be conclusive upon the question of ultimate title to the deposit, and it would be open to the representatives of the decedent to prove by extrinsic facts that the sole title always was in him. An account, however, may be so worded—according to some courts at all events—as to vest ultimate title in the survivor. The form of account before the Court of Errors and Appeals of New Jersey in *New Jersey Title Guaranty and Trust Co. v. Archibold*, 108 Atl. 434 is illustrative. One Helena Metz had an individual account which she changed to one in the joint names of "Helena Metz or Louisa Archibold," her daughter and at the same time the two parties named signed and delivered to the bank a writing, referring to the account by number, which contained the following provisions: "This account and all money to be credited to it belongs to us as joint tenants and will be the absolute property of the survivor of us; either and the survivor to draw." Upon the death of Helena Metz, the bank as her executor filed a bill to settle the ownership, as between

the estate of the decedent and the survivor. The court held that upon death of the mother, the undrawn moneys belonged to the surviving daughter. Technically the bank contracted with the mother and daughter that such moneys should be held for them "as joint tenants and will be the absolute property of the survivor; either and the survivor to draw." That contract the bank had a right to make and undrawn moneys so deposited belong to the survivor. In such case the court said "it is not necessary to establish the existence of a technical joint tenancy to create the right of survivorship; in other words the incident of survivorship which exists by implication in a joint tenancy is expressly provided for by such a form of deposit."

But in *Gorman v. Gorman*, 87 Md. 338 where a deposit was entered "A and B Joint owners, payable to order of either or the survivor" and the survivor contended that the words "joint owners" irrespective of the facts and circumstances under which the entry was made, meant "ownership" and not merely agency with authority to draw, the court held that, to ascertain the depositor's intent, not only the entry itself but all the circumstances surrounding her at the time should be considered; and where there were other facts showing that when A made the deposit, no gift to B in joint ownership was intended, the estate of the decedent was entitled to the fund. The court distinguished *Metropolitan Savings Bank v. Murphy*, 82 Md. 314 where a husband deposited money in the joint names of himself and wife "subject to order of either; balance at death of either to belong to survivor," saying it was decided "under the facts of that case and because of the express language of the entry that the balance should belong to the survivor, the bank was right in paying it to the survivor."

To summarize: The form of account first above suggested "John Doe or Mary Doe, either or survivor" will authorize the bank to pay the survivor and protect it in the absence of notice not to pay. But whether the survivor or the estate of the decedent is ultimately entitled to the fund as owner, will generally depend upon facts outside the mere form of entry. The question is one of intent to create a joint tenancy with the incident of survivorship at the time the account is opened. Upon this question, while the entry itself is evidence the courts generally hold it is not

conclusive and determine the question from a consideration of all the facts. But some courts have held that the particular language of an entry of an account and contract of deposit with a bank, is so positive and explicit as to, of itself, create a joint tenancy, with right of survivorship, as illustrated in *New Jersey Title Guaranty & Trust Co.*, supra. Where such be the intention of the parties, the form passed upon in that case might be regarded as an approved form and utilized. (*Inquiry from N. Y.*, June, 1921.)

Statutory authority to bank to pay survivor

1313. Where a deposit is made in two names the certificate of deposit or pass-book should read payable to A or B or survivor, and under the law of New Jersey applicable to banks, trust companies and savings banks, the institution is authorized to pay the survivor without administration. Comp. Stat. N. J., 1910, Sec. 43. (*Inquiry from N. J.*, April, 1911, *Jl.*)

Right of survivor as against widow of decedent

1314. A father and son, have a joint account, with the provision that the balance shall belong to the survivor. If the father dies without a will, may his widow claim an interest in the account? *Opinion:* The son takes the whole deposit as survivor under the express terms of the deposit; there is nothing to which any claim of the widow can attach. *New Jersey Title Guaranty & Trust Co. v. Archibald*, 108 Atl. (N. J. 1919) 434. Such a contract between a depositor or depositors and a bank is a valid contract. *Chippendale v. North Adams Sav. Bank*, 222 Mass. 499, 111 N. E. 371. *Deal v. Merchants & Bank*, 120 Va. 297. See also *Hoboken Bank for Savings v. Schwoun*, 62 N. J. Eq. 503, 50 Atl. 490, involving a joint account.

The New Jersey Statute fully protects the bank in paying the deposit to the surviving son. Comp. St. N. J. 1910 p. 178, Sec. 43. (*Inquiry from N. J.*, Feb., 1921.)

Ultimate title to joint account

1315. A bank states that joint accounts have in the past few years been more or less in favor with depositors for various reasons. It has been the custom of the bank to open such accounts as follows: "John Doe or Mary Doe." Occasionally the bank would add the clause "Either or Survivor." Recent discussion regarding such an account has led to the inquiry. What is the legal aspect of such an account? The bank states

that it has always felt that, while such accounts met the wishes of a number of depositors, they were open to some question, as they did not imply direct ownership of either depositor, and in case of a large balance having been so carried for a number of years, standing of the accounts might be impaired by a will made subsequent thereto. *Opinion:* The New Jersey statute provides as follows with respect to deposits in the names of two persons:

"When a deposit has been made, or shall hereafter be made in any bank or trust company transacting business in this state in the name of two persons, payable to either, or payable to either or the survivor, such deposit, or any part thereof, or any interest or dividend thereon, may be paid to either of said persons whether the other be living or not." (N. J. Pub. Laws, 1907, p. 75.) This authorizes the bank to pay the account to the survivor. The ultimate ownership of the account is a different matter, depending on circumstances other than the mere form of the account. Suppose, for example, John Doe deposited only his own money in an account in two names, told the bank and others that it was his money and that he had added Mary Doe simply for convenience in case he wished her to withdraw the money for him; and that he then made a will leaving the money to somebody else. It would be safe for your bank to pay the money to Mary Doe on the death of John Doe in the absence, of notice not to pay, but the facts of the case would outweigh a presumption that the money belonged to her and the court would probably determine that the estate of John Doe was ultimately entitled thereto. In short, the above form of account alone is not conclusive upon the question of title but under the statute the bank is safe in paying to the survivor and relegating to the adverse claimants the litigation over the ultimate ownership. Where, however, in addition to the above, the depositors sign an agreement on the signature card to the effect that the account and all money to be credited to it belongs to them as joint tenants and will be the absolute property of the survivor, this will be held to entitle the survivor to the balance remaining on deposit at the time of the decedent's death. See *N. J. Title & Tr. Co. v. Archibald*, 108 Atl. 434. (*Inquiry N. J.*, March, 1919.)

Ultimate title under form of Alabama bank

1316. A bank is frequently called upon to

open a checking account which is to be subject to the check of either of the two parties who open the account, it being understood that on the death of either, the balance remaining in the bank to belong to the survivor. The attorney for the bank has prepared a stamp which reads as follows: "All funds deposited to the credit of this account, and all additions thereto, are, and shall be the joint property of the undersigned, subject to the order of either. The balance, upon the death of either, to belong to the survivor, and such shall be payable on the individual check or order of such survivor, being surviving joint owner." While the use of this stamp on the signature card and pass book might seem to protect the bank in paying the money to the survivor, the bank is still in doubt as to whether children or other heirs of the deceased joint owner could not claim a share of the money, on the ground that he could not assign their rights away. Bank would like opinion on this matter. *Opinion:* The question raised is whether the owner of property has the right to create a joint ownership with another of such property so that, in case of his death, the survivor will get all and his children or heirs will get nothing. The owner of property, of course, has the right to dispose of it in any way he sees fit and the question in most of the joint account cases of adverse claim to deposit between heirs of decedent and survivor has not been whether the decedent had the right to create a joint tenancy but whether from all the evidence he has done so, the form of the bank account alone not being conclusive in all cases. Concerning the form which has been prepared for your bank, it indicates the creation of a joint tenancy under which the survivor would be entitled to the whole but in an action between the survivor and heirs of the decedent, notwithstanding the language so indicates, outside evidence might be admitted showing a different intention of the parties which might affect the question of who was entitled to the deposit. In other words, extraneous evidence has been admitted in many cases to prove a different intent from that indicated from the form of entry alone. In this case, however, the stamped words so explicitly create a joint tenancy with right of survivorship, as to make it improbable that such legal effect could be negated by evidence of a contrary intent. However this may be, the bank is amply protected by such a form in making payment to the survivor, leaving any controversy over the

right to the deposit between heirs and survivor to be settled directly between such parties. (*Inquiry from Ala., June, 1915.*)

Form protecting Pennsylvania bank in paying survivor

1317. A bank asks for form of account in two names to protect it in making payment to survivor. *Opinion:* The following form would fully protect the bank: "We the undersigned, having opened a joint account with Savings Bank, hereby agree that all moneys deposited by us or either of us in said account shall be placed to the credit of us jointly and may be withdrawn from or paid out by said bank upon the request or order of BOTH or EITHER of us; and also that upon the death of either of us, the survivor shall have the absolute right to withdraw or to be paid all moneys then remaining to our credit in said account." (*Inquiry from Pa., Sept., 1913.*)

Stopping payment to survivor on joint certificate of deposit

1318. A certificate of deposit was issued by bank A to B and C "Payable to the order of either or the survivor." B died and the administrator of his estate notified the bank not to pay C and claimed the money. Would the bank be justified in paying C? *Opinion:* The law in Illinois is not made clear by any decisions of its courts as to the exact legal effect of a certificate such as the one in question. But as it certifies that B and C have deposited the money payable to either or the survivor, the bank, in the absence of notice not to pay, would be authorized to pay the survivor. However, in the face of a notice not to pay and claim for the money by the administrator of B the bank would pay C at its own risk. Nor would it be safe to pay the money to the administrator because if it should be established that the survivor was entitled to it, the bank would then be again liable. If an amicable adjustment cannot be effected between the claimants, the safest course for the bank would be to interplead the parties and pay the money into court. (*Inquiry from Ill., Sept., 1915.*)

Payment of c/d to survivor in Mississippi

1319. A certificate of deposit is issued by a bank in Mississippi payable to A or B, and it is asked whether in case of the death of one of them, the bank could with safety pay amount to survivor on surrender of certificate bearing his indorsement? *Opin-*

ion: The Mississippi statute with respect to deposits in two names provides that, when a deposit is made in the name of two persons, payable to either or to either or the survivor, the deposit may be paid to either whether the other be living or not, and the receipt or acquittance of the person so paid shall be valid and sufficient release and discharge to the bank for any payment so made. (Miss. Code 1917, Sec. 3613). Under this statute the bank could with safety pay its certificate to the survivor of A or B upon surrender, bearing the indorsement of such survivor. (*Inquiry from Miss., Oct., 1919.*)

Trust deposits

1320. AN ACT (relative to payment in trust).

"Be it enacted, etc.

Section 1. Whenever any deposits shall be made in (specify institutions) by any person in trust for another, and no other or further notice of the existence and terms of a legal and valid trust shall have been given in writing to the bank, in the event of the death of the trustee, the same, or any part thereof, together with the dividends or interest thereon, may be paid to the person for whom said deposit was made."

The above draft, which is modeled upon the New York law, or a law substantially to the same effect with changed phraseology, has been enacted in 30 States. The law is yet to be enacted in the following States: Alabama, Arizona, Arkansas, Colorado, District of Columbia, Florida, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, New Hampshire, New Mexico, Oklahoma, South Carolina, Tennessee, Virginia, Washington. (*April, 1921.*)

Legal effect of deposit "A in trust for B"

1321. Under a decision of the New York Court of Appeals a deposit by A in trust for B is revocable at will until the depositor dies, or unless he completes the gift in his lifetime by some unequivocal act such as delivery of the pass-book or notice to the beneficiary. Under a New Jersey decision, such deposit in trust was held testamentary in character and would not be effectual unless made in accordance with the statute of wills. In re Totten, 179 N. Y. 112. Nicklas v. Parker, 61 Atl. (N. J.) 267. Stevenson v. Earl, 65 N. Y. Eq. 721. (*Inquiry from N. J., Dec., 1910, Jl.*)

Right of bank to pay trustee

1322. A savings bank allowed funds

deposited to the credit of "A, trustee for B," to be withdrawn on orders signed, "A, Trustee." Is it liable to the beneficiaries for a wrongful appropriation? *Opinion*: During the lifetime of the trustee the bank may pay the drafts of the trustee drawn upon the fund without liability. The bank is under no legal duty to inquire into the use to be made of the money by the trustee and if the trustee makes an improper use of the money the bank is not liable. Sayre v. Weil, 94 Ala. 466, 10 So. Rep. 546. Pennsylvania Title and Trust Co. v. Meyer, 201 Pa. 299, 50 Atl. Rep. 998. Hemmerich v. Union Dime Savings Institution, 129 N. Y. Supp. 267. (*Inquiry from Vt., Sept., 1917.*)

Payment to trustee on death of beneficiary

1323. A savings account was opened by Richard Roe in the following form: "John Doe, by Richard Roe, Trustee." John Doe is dead, leaving a will disposing of the money. Has the executor or the trustee the right to draw the money? *Opinion*: Construing the form of the account as being the equivalent of "Richard Roe, trustee for John Doe" (Petition of Atkinson 16 R. I. 413)—in other words, assuming that the deposit was made by Richard Roe as trustee for John Doe—payment should properly be made to him as the contract of the bank was to pay the deposit to the trustee on demand, unless the executor of John Doe should serve notice on the bank claiming the deposit. In such event, the bank should interplead the parties and pay the money into court. See Hemmerich v. Union Dime Sav. Instn. 129 N. Y. Supp. 267. (*Inquiry from D. C. Nov., 1912.*)

Disaffirmance of trust

1324. A deposit was made in a savings bank in trust for a friend of the depositor. The depositor became ill and wished to withdraw the deposit. She signed a draft payable to a third person, which the savings bank refused to honor, on the ground that the signature was not correct, and before a new draft could be signed, she died. Is the appointment of an administrator necessary in order to obtain the deposit? *Opinion*: The law of New York as to the effect of a deposit by one in trust for another has been stated by the New York Court of Appeals in the Matter of Totten, 179 N. Y. 112, as follows: "A deposit by one person of his own money, in his own name as trustee for another, standing alone, does not establish an irrevocable trust during the lifetime of

the depositor. It is a tentative trust merely, revocable at will, until the depositor dies or completes the gift in his lifetime by some unequivocal act or declaration, such as delivery of the pass-book, or notice to the beneficiary. In case the depositor dies before the beneficiary without revocation, or some decisive act or declaration of disaffirmance, the presumption arises that an absolute trust was created as to the balance on hand at the death of the depositor." In this case the evidence might develop that the trust was disaffirmed, by drawing the draft to the third person, assuming it could be shown that the depositor intended to give the deposit to the third person and delivered check and pass-book to him to effectuate such intent. What was done might be held sufficient to create an equitable assignment to the payee. Upon this theory, the deposit would not belong to the estate of the decedent, but to the payee of the draft, and there would be no occasion for the appointment of an administrator. If on the other hand what was done as indicated by the bank was not sufficient to disaffirm the trust, then upon the death of the depositor, the fund vested in the beneficiary of the trust. (*Inquiry from N. Y., Oct., 1917.*)

Where both parties die in same disaster

1325. Where a savings account is held by a husband in trust for his wife and both perish in same disaster, no presumption at common law that one survived the other, but survivorship must be proved—if wife survived husband, her next of kin entitled to deposit, but if husband survived wife or both died simultaneously, deposit goes to husband's next of kin. In re Totten, 179 N. Y. 112. Smith v. Croom, 1 Fla. 81. Newell v. Nichols, 75 N. Y. 78. Males v. Sovereign Camp, 30 Tex. Civ. App. 184, 70 S. W. 108. Hollister v. Cordew, 76 Cal. 649. Cal. Code Civ. Proc., Sec., 1963. Langles' Succ., 105 La. 39. La. Civ. Code, Arts. 936-939. Cowman v. Rogers, 73 Md. 403, 21 Atl. 64. Middeke v. Bulder, 198 Ill. 590. U. S. Casualty Co. v. Kacer, 169 Mo. 301. Stinde v. Goodrich, 3 Redf. Surr. (N. Y.) 87. Johnson v. Merithew, 80 Me. 111. Fuller v. Linzee, 135 Mass. 468. Robinson v. Gallier, 20 Fed. Cas. No. 11951. In re Wilbor, 20 R. I. 126. Y. W. C. Home v. French, 187 U. S. 401. Pell v. Ball, Cheves Eq. (S. C.) 99. Moehring v. Mitchell, 1 Barb. Ch. (N. Y.) 264. (*Inquiry from N. Y., March, 1913, Jl.*)

A and B or survivor in trust for C and D

1326. A person sends a sum of money to another to deposit in trust for the children of the former. The person requested to open the account asks a savings bank to open the account as follows: "John Jones and Mrs. John Jones, or the survivor of them, in trust for James Hill and Edward Hill, minors." Should the account be opened in this form? In case of the death of one of the trustees can the bank pay the amount to the surviving trustee without administration or a court order? Where an account is opened in one name in trust for another person, on the death of the trustee, may the bank pay the money to the beneficiary without a court order? Is the situation different when there are two trustees? *Opinion:* Where an account is opened in one name in trust for another person, on the death of the trustee the bank may pay the deposit to the beneficiary without a court order. There seems to be no objection to the opening of the account in the form suggested. If one trustee should die, the survivor would become sole trustee, having control of the fund. In the event, and only in the event, of the death of both trustees, would the deposit be payable to the beneficiaries. "Co-trustees take as joint tenants, rather than as tenants in common and upon the death of one of them the doctrine of survivorship applies and the whole trust vests in the surviving trustees." 39 Cyc. 308, and cases cited. Some cases are contra, holding that the authority of the trustees terminates upon the death of one of them, where there are no words of survivorship in the instrument creating the trust. O'Brien v. Battle, 98 Ga. 766. Dillard v. Dillard, 97 Va. 434. But here there are express words of survivorship, so that even under the minority rule the deposit could be paid to the surviving trustee. (*Inquiry from Cal., May, 1914.*)

Form of gift to minor payable at majority

1327. A person wishes to make a deposit as a gift in such a way that it will not be payable to a minor until he reaches the age of twenty one. Can this be done? If so, a suggested form is desired. Would a deposit in a savings account serve the purpose, with a memorandum on the pass-book something like this: "Payable with accrued interest, only on or after (date of reaching maturity) the printed condition that interest shall cease at the end of two years from presentation of pass-book being hereby waived until

that date"? *Opinion:* The important thing, if the transaction takes the form of a gift inter vivos, is that there be a complete and irrevocable delivery. (Bond v. Bond, [Ga. App.] 95 S. E. 1005. County v. Bank [Ida.] 170 Pac. 98. State v. Chaplain, 101 Kan. 413, 166 Pac. 238. Turner v. Cement etc. Co., [Md.] 104 Atl. 455. Hess v. Sander, [Mo. App.] 198 S. W. 1125. Gannon v. McGuire, 106 N. Y. 476. Askew v. Mathews [N. C.] 95 S. E. 163. McHale v. Toole, 258 Pa. St. 293, 101 Atl. 988. Gardner v. Moore [Va.] 94 S. E. 162). See also, for instance of insufficient delivery, Sherman v. New Bedford Five Cent Sav. Bank, 138 Mass. 581. Delivery, however, need not be made to the donee personally, but may be made to a third person as agent or trustee, for the use of the donee, if under such circumstances as indicate that the donor relinquishes all right to the possession or control of the property, and intends to vest a present title in the same. (Arrington v. Arrington, 122 Ala. 510. Ruiz v. Dow, 113 Cal. 490. Devol v. Dye, 123 Ind. 321. In re Fenton [Iowa] 165 N. W. 463. Scallan v. Brooks, 66 N. Y. Suppl. 591. Osmond's Estate, 161 Pa. St. 543. Citizens' L. & T. Co. v. Holmes, 116 Wis. 220, 93 N. W. 39). The donor may constitute himself a trustee for the donee in an express trust, in which case no further delivery of the gift is necessary. Sewall v. Glidden, 1 Ala. 52. Yokem v. Hicks, 93 Ill. App. 667. Sanderson v. Marks, 1 Harr. & G. [Md.] 252. Taylor v. Kelly, 5 Hun. [N. Y.] 115. Crouse v. Judson, 84 N. Y. Supp. 755. Martin v. Funk, 75 N. Y. 134. In the particular case in question, the deposit could be made in trust with the depositor as trustee. It might be well, in addition to the inscription on the pass-book to file with the account a brief declaration of trust, signed by the donor, creating an irrevocable trust in behalf of the beneficiary to be payable only when he reaches majority; with any other provision desired, as to interest, etc. It might be well to add a brief clause as to disposition of the fund in event of the death of the beneficiary before he reaches 21. (*Inquiry from Ohio, Dec., 1919.*)

Deposit by "A as guardian for B"

1328. A person deposited her own money in a bank to the credit of herself as guardian of nephews and nieces, presumably informing them of the fact, but herself retaining the pass-book. What are the rights of the aunt and of the nephews and nieces to the de-

posit? *Opinion:* To constitute a perfect gift there must be not only an intention to give but also the gift must be completed by delivery. Here the pass-book was not delivered. However, a gift may be perfected in the form of a trust, created by declaration. The courts generally hold that the mere fact that a person deposits his money in his own name in trust for another does not, in itself, create an irrevocable trust, but nothing more than a presumptive trust. But if it could be proved that it was the intention of the aunt at the time of making the deposit that the money should be no longer hers, but should be held by her as trustee or guardian for the children and they were so informed, an irrevocable trust would probably be created. In *Kerrigan v. Rantigan*, 43 Conn. 17, A deposited money in the name of "B; C Guardian" and informed C she had put the money in bank for B, although A kept the book. It was held that A intended to make a valid gift to B and the making of the deposit, taking the book in the name of the donee and notify the guardian, gave effect to the intention and made the gift complete and irrevocable.

In some jurisdictions, as in New York, a trust such as that created here would be revocable at will, and would be absolute only as to the balance remaining upon death of the trustee. But in other jurisdictions upon the facts assumed, and probably in Alabama, an irrevocable trust would be created.

The right of the beneficiaries to have the money placed in their own names and absolutely under their control would depend on the terms of the trust. It is doubtful if the aunt could be compelled to relinquish control, unless it is shown that it was her declared intention at the time of the creation of the trust, that when the beneficiaries arrived at a certain age, and that age has now been reached, the money should be paid over to them absolutely. (*Inquiry from Ala., Jan., 1920.*)

Preference in deposits held by trust company as fiduciary

1329. Deposits are held by a trust company, acting as executor, guardian and depository. In the event of failure, the tendency of the courts is to class such deposits as general indebtedness and not to give the claimant a preference unless (1) such funds are kept separate and specially marked as trust funds, or (2) where the organic law provides that funds so held shall

be preferred to commercial deposits or general creditors. In Arkansas the beneficiary would only come in for a *pro rata* share with the other depositors, unless the funds were kept separate and marked as trust funds. *Vail v. Newark Sav. Inst.*, 32 N. J. Eq. 627. *Groff v. City Sav. Funds, etc., Co.*, 46 Pa. Super. Ct. 423. *Miller's Appeal*, 218 Pa. 50. *Capital Nat. Bk. v. Coldwater Nat. Bk.*, 69 N. W. (Neb.) 115. *Smith v. Fuller*, 86 Ohio St. 57. N. Y. Banking Law, Sec. 188 (8). *Morris v. Carnegie*, 139 N. Y. S. 969. (*Inquiry from Ark., Aug., 1914, Jl.*)

Investment of trust funds

1330. Under the laws of North Carolina, guardians, trustees and other fiduciaries may invest trust funds in United States securities and in consolidated bonds of the state. Rev. Code N. C., Sec. 1792. (*Inquiry from Pa., Feb., 1911, Jl.*)

Deposit account with "John Doe, trustee"

1331. A bank carrying an account for John Doe, Trustee, or John Doe, Agent, does not inquire as to the identity of the cestui que trust or principal, nor as to the extent of John Doe's authority. The question arises whether banks are safe in carrying such accounts without making inquiry. *Opinion:* It is unlikely the New York courts will go to the extent of holding that where John Doe deposits checks payable to himself as agent or trustee, the bank is under duty of inquiry for whom he is acting or the extent of his powers; the presumption, according to the weight of authority elsewhere, is that Doe is acting honestly and within his powers. It would be only where the bank has knowledge of additional facts, as where a trustee check is given for a personal debt to the bank, or where two accounts, an individual and trustee, are carried, and a deficit in the individual is made good from the trustee account, or where there are other suspicious facts, that the bank would be put upon inquiry. But it might be safer, in view of the uncertainty in the New York law, especially where numerous transactions are carried through such an account, to make inquiry as to the person for whom Doe is acting and the extent of his authority. *Gerard v. McCormick*, 130 N. Y. 261. *Rochester, etc., Co. v. Paviour*, 164 N. Y. 281. *Ward v. City Tr. Co.*, 192 N. Y. 61. *Squire v. Ordemann*, 194 N. Y. 394. *Havana Cent. R. v. Knickerbocker Tr. Co.*, 198 N. Y. 422. *Niagara Woolen Co. v. Pac. Bk.*, 141 App. Div. (N. Y.) 265. *Ford v. Brown*, 114 Tenn. 467.

Wisconsin, etc., Baptists v. Babler, 115 Wis. 289. *Hazletine v. Keenan*, 54 W. Va. 600. *Batchelder v. Central Nat. Bk.*, 188 Mass. 25. *Safe Dep., etc., Co. v. Diamond Nat. Bk.*, 194 Pa. 334. *Jeffray v. Towar*, 63 N. J. Eq. 530. *Nat. Bk., v. Ins. Co.*, 104 U. S. 54. (*Inquiry from N. Y., Jan., 1913, Jl.*)

Deposit by one in name of another

Government's deposit to soldier's credit

1332. The Government deposited a soldier's allotments in a bank to the soldier's credit, and now seeks to withdraw it because deposited in error, the soldier having been dead since November 25, 1918, and, therefor, not entitled to allotment after death. Can the bank safely refund to the government? *Opinion:* The courts hold quite generally that, where one person makes a deposit to go to the credit of another person, this creates a debt on the part of the bank to the person named as depositor, and the fact that such deposit is made by another, does not entitle such other to withdraw the deposit, except by the consent of the person named as depositor. But in a case like the present, there would be no risk in repaying the money thus deposited in error, and no occasion for application of the above rule because none of the soldier's heirs could make claim of title, superior to that of the Government. The bank is entitled to have the fact clearly established that the soldier died on November 25, 1918, and that the subsequent payments were made in error in ignorance of his death, and when such facts are established, the bank would be fairly safe in refunding the money to the Government. (*Inquiry from Texas. Nov., 1920.*)

A's check on deposit by him in B's name

1333. Money is deposited in a bank by A to the credit of B with instructions to pay on check of A. The bank seeks to know whether it can without liability cash A's checks in the absence of authority from B to honor such checks. *Opinion:* Where money is deposited in a bank by A to the credit of B with instructions to pay on check of A, the bank can safely honor A's check only in the event it is assured the deposit belongs to A and has been put in B's name simply for convenience. If the money belongs to B and has been deposited by A as his agent, the bank cannot safely pay A without express authority from B. It would be unsafe for

bank to pay A without first ascertaining the true owner of the money. *Branch v. Dawson*, 36 Minn. 193. *Kerr v. People's Bk.*, 158 Pa. 305. (*Inquiry from Ark.*, Sept., 1918, *Jl.*)

Payment of deposit on death of "A agent"

1334. Where a bank carries a deposit to the credit of "A Agent" for certain heirs, *Opinion* that upon death of A his agency is revoked and deposit is payable to A's principals and not to his administrator. Rule is different where deposit is in name of "A trustee for B," in which case it may be paid to administrator of A, except where changed by statute. *Ryder v. Johnston*, 45 So. (Ala.) 181. *Mills v. Union Central Ins. Co.*, 77 Misc. (N. Y.) 327. *Merrick's Estate*, 8 Watts & S. (Pa.) 402. *Whitecomb v. Jacob*, 1 Salk; *Burdett v. Willet*, 2 Vern. 638. *Tyson v. George's Creek, etc.*, Iron Co. 81 Atl. (Md.) 41. *Boody v. Lincoln Nat. Bk.*, 70 Hun (N. Y.) 392. *Schulter v. Bowery Sav. Bk.*, 117 N. Y. 125. *Boone v. Citizens Sav. Bk.*, 84 N. Y. 83. *Grafiing v. Irving Sav. Inst.*, 69 App. Div. (N. Y.) 566 *In re Belt's Est.*, 70 Pac. (Wash.) 74. (*Inquiry from N. J.*, Oct., 1913, *Jl.*)

Deposit by judgment debtor in name of son

1335. A judgment debtor said that the money to be deposited belonged to his wife and desired to put in her name. It was finally arranged to deposit it in the name of their son. Should the bank pay the money to the widow of the depositor on the order of the son, without a bond of indemnity? *Opinion:* If the bank knows the money really belonged to the depositor, it should not pay it out without letters of administration or a satisfactory bond. But unless the bank so knows it would be fairly safe in paying to the widow on the order of the son, to whose credit it has been placed. Deposits are frequently made by one person in the name of another and banks are justified in relying on statements of depositors that the deposits belong to the persons in whose names they are made. In fact, a bank has been held liable for paying money to another than the person to whom it was credited. *Heath v. New Bedford Safe Deposit & Trust Co.*, 184 Mass. 481. There would be no liability to creditors. While it is natural for a judgment debtor to deposit his own money in his wife's or son's name to place it beyond the reach of his creditors, the creditor must protect himself by attachment or other legal proceedings and a bank cannot

assume the burden of setting up unknown rights of third persons. There can, therefore, be no rights of possible creditors violated by payment on the son's check to the widow. See opinion No. 1336. (*Inquiry from N. Y.*, June, 1919.)

1336. After the rendition of the opinion No. 1335 the widow mentioned therein made affidavit that she gave the money to her husband to deposit for her and an officer of the bank made affidavit that the depositor stated that the money belonged to his wife and wished to deposit it in her name, but owing to the fact that she could not write, he concluded to deposit it in the name of the son. The children make no claim to the deposit and are willing to execute a general release. Is it safe for the bank to pay the money to the widow? *Opinion:* It is safe for the bank to pay the money to the widow. It might be well to have the son in whose name the deposit was credited execute a special release or acquittance to the bank embodying his consent that the money be paid over to his mother. (*Inquiry from N. Y.*, July, 1919.)

Savings deposits

When classed as time deposit

1337. A savings deposit in a national bank evidenced by pass-book requiring thirty-five days' notice of withdrawal but providing that the bank may waive the notice, is a time deposit within the definition of Section 19 Federal Reserve Act as further defined by Regulation D, Series of 1916. But a certificate of deposit payable on return and "thirty-five days demand if required" is not a time certificate as defined by Regulation D, although a court might hold that it came within the definition of time certificates provided by Section 19 of the Act. Federal Res. Bull. Dec., 1916, p. 686. (*Inquiry from Pa.*, May, 1917, *Jl.*)

Notice of withdrawal of savings deposit in national bank

1338. There is nothing in the National Bank Act which denies the right of a national bank to refuse payment on demand and require thirty days' notice before withdrawal of a savings deposit where the pass-book rules provide for such notice. (*Inquiry from Pa.*, Aug., 1913, *Jl.*)

Deposits by husband and wife

Husband's check on wife's account

1339. A man deposits \$100 to the credit

of his wife and informs the bank that his wife has instructed him to sign checks. The bank asks if it would be safe in relying upon the husband's word without proof of authority from the wife. *Opinion*: The bank would not be safe in paying the husband's checks because if the deposit was her separate property and under her separate administration, the husband would have no right to withdraw the deposit, and payment to him where he had not been authorized would not protect the bank; although if the deposit was community property or constituted a portion of her separate estate that was under the control and administration of the husband, the latter would probably have the right to withdraw the deposit without authority of the wife. The system of community property prevails in some of the Southwestern and Pacific states, including Louisiana and Texas. *Brown v. Daugherty*, 120 Fed. 526. *Bates v. First Nat. Bk.*, 89 N. Y. 286. *Kerr v. Bk.*, 158 Pa. St. 305. *Honig v. Bk.*, 73 Cal. 464. *Armstrong v. Johnson*, 93 Mo. App. 492. *Boyer's Succ.*, 36 La. Ann. 506. *Lebean v. Jewell*, 9 La. Ann. 168. *Bouligny v. Fortier*, 16 La. Ann. 209. *Richard v. Blanchard*, 12 Rob.(La.). 524. *Stauffer v. Morgan*, 39 La. Ann. 632. *Coleman v. First Nat. Bk.*, 94 Tex. 605. (*Inquiry from La., Feb., 1915, Jl.*)

Authority of wife to check out husband's account—Physical disability of husband

1340. A customer of a bank broke his arm which incapacitated him to sign checks. His wife appeared at the bank with a check signed in his name by her own and upon her statement of the situation and that the money was needed to pay certain bills due by the husband and for necessary household expenses, the money was paid her and the amount charged to the husband's account. A portion of this money was expended for the husband including payment of doctor's bill. When the husband recovered he sued the bank for the amount. The bank is desirous to know its rights in the matter. *Opinion*: A married woman may be agent of her husband either by express appointment or by implication of law. But there is no implied authority or presumptive agency to check out his money from bank. Thus in *Allen v. Williamsburg Sav. Bank*, 2 Abb. N. C. 342; aff'd 69 N. Y. 314 where a wife wrote her husband's name to a check on a savings bank and received the money on presentation of the check and pass-book, the court said:—"There was no evidence to show that

the plaintiff's wife was his agent in the matter of drawing the money, or had authority to thus act for him. Such authority could not arise or be inferred from the mere marital relation." But if the husband has knowledge at the time of the acts performed by his wife and makes no objection thereto this will be presumptive evidence of her agency and may estop him from denying such relation. *Huff v. Price*, 50 Mo. 228. *Kreyer v. Smith*, 13 Mont. 235.

In the present case, if the bank can prove the husband knew of his wife's act and made no objection thereto he may be estopped from denying her authority. But if he was ignorant of her act, the bank would be liable except probably the bank would have a good defense to the extent that the money went for the legitimate expenses of the husband. The proper procedure in such case would have been for the bank to have communicated with the husband and obtained his authorization which need not necessarily have been in writing; or if he was capable of making his mark, his check made by mark with a responsible witness would have been sufficient protection. (*Inquiry from Okla., April, 1921.*)

Wife signing husband's name to check on savings account

1341. A woman opened a savings deposit in her husband's name presumably with money furnished by him and continued to make deposits to the credit of the account and to sign her husband's name to orders. Apparently the husband knew of her practice of signing his name for he protested against the non-payment of a check drawn by his wife. The wife, however, deceived her husband by withdrawing all the money and making false entries in the pass-book. A rule printed in the pass-book provided that "in all cases a payment upon presentation of a deposit book shall be a discharge to the bank for the amount so paid." Is the bank liable to the husband for allowing the wife to draw out the funds? *Opinion*: Some decisions hold that where a deposit is made by one person in the name of another, such deposit belongs to the person in whose name the deposit is made. *Meteye's Succ.* 113 La. 1013. *Health v. New Haven Safe & Co.*, 184 Mass. 481. *Walker v. State Trust Co.*, 57 N. Y. Supp. 525. On the other hand, there are cases holding that a deposit may be made in the name of a person other than the depositor and yet remain the property of the depositor, so that the bank

is justified in recognizing his ownership where the circumstances are such that the deposit has not been put beyond his control. *Davis v. Lenawee County Sav. Bank*, 53 Mich. 163. *Leech v. Maryville First Nat. Bank*, 99 Mo. App. 681. *Greene v. Camas Prairie Bank*, 7 Ida. 576. *Baltimore State Sav. Bank v. McCarthy*, 89 Md. 194. *Weitzel v. Traders' Nat. Bank*, 18 Pa. Super. Ct. 615.

In this case, the fact that the wife signed her husband's name to the checks would indicate that the ownership was in the husband; but the facts also tend to establish that the husband authorized or ratified by acquiescence the withdrawal of the money by the wife. This being so, the fact that the wife deceived her husband by withdrawing all the money and by making false entries in the bank book, would not render the bank liable.

The rule in the pass-book that payment upon presentation of the book discharges the bank does not relieve the bank from the exercise of reasonable care; but under the facts here the husband would probably be estopped from denying the wife's right to withdraw the fund. (*Inquiry from Ill., Aug., 1916.*)

Special and specific deposits

Distinction between "special" and "specific" deposit

1342. A bank desires to know the legal distinction, if any, between a special deposit and a specific deposit. *Opinion:* In the case of a special deposit, money or valuables are left with a bank for safekeeping and the identical money or thing so deposited, is to be returned. The relation between bank and depositor in such case, is not debtor and creditor, as in the case of a general deposit, but is bailee and bailor. In case of loss, the liability of the bank depends upon whether the legal degree of care in safe-keeping of the deposit has been used. The term "specific deposit" is applied where money is received by a bank, not on general deposit nor for safe-keeping and return, but to apply to a specific purpose. In such case, although the money may be mingled with the bank's own funds, it is generally held, though not universally, that the bank is a trustee and not a debtor with respect to the deposit. Some courts apply the term "special deposit" to deposits of this class, but the term "specific deposit" is technically more correct. (*Inquiry from N. Y., April, 1921.*)

Bank receiving deposit for specific purpose a trustee according to majority view

1343. A fund is deposited with an accepting bank for the special purpose of meeting an acceptance about to fall due. If the accepting bank fails is there the basis for a preferred claim? *Opinion:* There is a conflict of decision upon this proposition. The minority view is that there is no preferred claim, since it is the custom of banks, upon receiving money for a specific purpose, to mingle the funds with their own and to pay the instrument at the proper time and there is no practical difference between such a deposit and a general deposit as to which the bank is a debtor. The majority view however is that the relation is more than that of debtor and creditor because the bank undertakes the duty of applying the deposit to the specific purpose; therefore the bank becomes a trustee and the customer has a preferred claim and the right of recovery in full, provided the funds can be traced into and identified among the assets. *People v. City Bank of Rochester*, 96 N. Y. 32, citing *Libby v. Hopkins*, 104 U. S. 303. *In re La Blanc*, 14 Hun 8 (affirmed in 75 N. Y. 598). *Van Alen v. Bank*, 52 N. Y. 1. *Dows v. Kidder*, 84 N. Y. 121. (*Inquiry from N. Y., March, 1919.*)

Theft of proceeds of check set aside for delivery for pay-roll purposes

1344. A depositor left with the bank a pay-roll slip, together with his check to cover the amount, stating that he would call for the money later. In the meantime the bank was robbed and the money stolen. Who stands the loss? *Opinion:* (1) If the bank was robbed before the money was set aside for pay-roll purposes and before the check was charged to the drawer's account, the bank would be the loser as the check would not have been paid by the bank and it would have been the bank's own money which was lost. (2) If the money had been set aside at the request of the depositor for the specific purpose of delivery to him when called for, it would be transformed into a special deposit, and the bank's relation would be changed from debtor to bailee for hire. As a bailee for hire, the test of its liability is whether it used ordinary and reasonable care—the same degree of care that a prudent man would take of his own property under like conditions—and whether such care has been exercised in any particular case is a question for the jury. If reasonable care has been exercised, the

loss would fall upon the depositor. (*Inquiry from Pa., Mar., 1921.*)

Notice to teller that deposit is to pay specified check

1345. A bank dishonored A's check for lack of funds. Later A deposited a check for a larger amount. It is disputed whether or not A gave notice to the receiving teller that the deposit was made on account of the particular check, which A advised the holder to return for payment. Other checks of A were honored before the dishonored check was returned for payment, which so reduced the balance that when presented it was again dishonored for lack of funds. Shortly after this A made an assignment for the benefit of creditors. Is there any liability of the bank to the holder of the dishonored check? *Opinion:* If the deposit was general, it was the bank's right and duty to honor the checks first presented until the deposit was exhausted and there is no liability to the holder of the check. But the disputed statement to the receiving teller complicates the situation. A deposit may be made with a bank for a specific purpose, and it is the duty of the bank to carry out this purpose. *Drovers National Bank v. O'Hare*, 10 N. E. (Ill.) 360. *American Exchange National Bank v. Loretta et al.*, 46 N. E. (Ill.) 202. *Parker v. Hartley*, 91 Pa. 465. *Bank of British North America v. Cooper*, 137 U. S. 473. *Wagner v. Citizens Bank*, 122 S. W. (Tenn.) 245. *Slaughter v. Bank of Texline*, 164 S. W. (Tex.) 27.

Assuming, however, the receiving teller was advised that the deposit was to take care of the particular check in question. It is very doubtful if the bank would be bound by a mere oral statement over the counter to a busy teller, that a certain check was to be paid out of the deposit made. In *Myers v. Twelfth Ward Bank*, 28 Misc. Rep. (N. Y.) 188, the court held that the burden of proof is on the holder of the check to establish a specific trust on the part of the bank and that an agreement of this kind, to be binding on the bank, can be made only by an executive officer. (*Inquiry from W. Va., April, 1917.*)

Mistaken payment of customer's check from specific deposit

1346. A customer closed his account and left the sum of \$350 with the bank for the specific purpose of paying two outstanding checks, one for \$250 and one for \$100. Afterwards his checks of \$50 and \$75 were

presented and paid, leaving insufficient funds to meet both outstanding checks. *Opinion:* The mistake of the bank in paying the checks out of the specific deposit was due to the action of the customer and the bank would not be held responsible therefor. A deposit for the purpose of paying specified checks is no longer a general one, subject to general check, but is a specific or trust deposit, applicable solely to the payment of such specified checks, and not to be appropriated in any other manner, but in this case payment was justified. (*Inquiry from Fla., July, 1909, Jl.*)

Money borrowed for specific purpose deposited in general account

1347. A borrowed \$800 from a bank to buy feed for his live stock. To secure payment of the note given, a mortgage was executed stating that the note was given for the purpose of purchasing feed. The proceeds of the note were deposited to his checking account at the bank. A drew checks for purposes other than buying feed. The bank asks if it is permissible to refuse payment. *Opinion:* If this money was loaned by the bank on condition that it should be used to purchase feed and the proceeds of the note were deposited in bank for the specific purpose of paying the borrower's checks, given for feed, the bank would probably have the right to refuse payment of checks drawn for other purposes. But although borrowed for a specific purpose, if the money was placed on general deposit subject to check, and accepted as such by the bank without any restrictions as to its use, it is doubtful if the bank could rightfully refuse to pay a check of the depositor against such deposit given for something else than feed. The right of the bank would depend upon the precise agreement and conditions surrounding the transaction. See *Dolph v. Cross*, 153 Iowa, 289, 133 N. W. 669. *McGorray v. Stockton Sav., etc., Soc.* 131 Cal. 321. *Scranton First Nat. Bank v. Higbee*, 109 Pa. St. 130. *El Paso Nat. Bank v. Fuchs*, (Tex. Civ. App.) 34 S. W. 203. *In re Dairs*, 119 Fed. 950. (*Inquiry from Neb., March, 1920.*)

Deposit of Mexican bank bills

1348. A received from bank B a deposit slip reciting the fact of the deposit of a sum of money in Mexican bank bills upon which the bank agreed to pay interest until withdrawn. About five years after deposit A demanded payment in Mexican silver or

gold coin which at the time was worth about 57 cents per dollar in American money. At the time of the deposit the bills were worth 49½ cents in American money, but at the time of the demand were worth only about 15 cents. Could bank B discharge its legal obligation by paying A in Mexican bank bills of the same kind or their value in American money at the time of demand? *Opinion:* There is no precise precedent for a case of this kind. The first thing to consider is whether bank B became a bailee or debtor at the time of the deposit. If it did not use the bills, pay same out and receive others in their place, it might be held to be a bailee, and that the contract would be satisfied by a tender of an equivalent amount of Mexican bank bills; or not having made such a tender at the time of demand, the value of the bills at the time in American money. But as the bank paid interest on the deposit it doubtless used the bills and became a debtor for their amount, in which case the value of the Mexican bills at the time of deposit and not at the time of demand when they had depreciated would be the amount for which bank B would doubtless be held liable. See *Marine Bank v. Fulton Bank*, 69 U. S. (2 Wall.) 253, in which case it was held that money collected by one bank for another, placed by the collecting bank with the bulk of its ordinary banking funds and credited to the transmitting bank in account, becomes the money of the former, and that any depreciation in the specific bank bills received by the collecting bank which may happen between the date of the collection bank's receiving them and the other banks drawing for the amount collected fall upon the former. (*Inquiry from Tex., Jan., 1919.*)

Deposits in escrow

1349. A bank desires a complete and comprehensive definition of an escrow. *Opinion:* An escrow is a written instrument which by its terms imports a legal obligation, deposited by the grantor, promisor, or obligor, or his agent, with a stranger or third person, that is, a person not a party to the instrument, such as the grantee, promisee, or obligee, to be kept by the depositary until the performance of a condition or the happening of a certain event, and then to be delivered over to take effect. (16 Cyc. 56). "Where a deed is deposited with a person other than the grantee upon an agreement to deliver it upon the performance of certain conditions it is an escrow, and it is not necessary that the terms authorizing its

delivery be expressed in writing, but may be declared orally at the time of the deposit." (*Tharaldson v. Everts*, 87 Minn. 168). An escrow is a deed delivered to a stranger, to be delivered by him to the grantee upon the performance of some condition, or the happening of some contingency, and the deed takes effect only upon the second delivery. Till then the title remains in the grantor. (*Hubbard v. Greeley*, 84 Me. 340). An escrow is a name applied to a deed or other instrument delivered to a third person, to be held by him until the performance of a specified condition, and then to be by him delivered to the grantee. (3 Washburn on Real Property [5th Ed.] 583. *Abbott's Law Dict.*, tit. Escrow; [cited, with approval, in *Cannon v. Handley*, 72 Cal. 133]. Another use of the term is to express the custody in which such a writing so deposited is. (See *Century Dict.*) The transaction is frequent where A sells land to B, to make draft on B for the price and attach deed to draft and deposit in escrow with bank, deed to be delivered to B on payment of draft; and there are various other escrow transactions in which banks are used as intermediaries. (*Inquiry from Iowa, Feb., 1917.*)

Deposits for safe keeping and safe deposit boxes

Duty of care in safe keeping of securities

1350. A bank which undertakes the safe-keeping of securities or valuables for a customer, either gratuitously or for hire, as by receiving rental of safe deposit boxes, is not an insurer against loss by fire, burglary or theft, but in the absence of special contract of hire which would define the terms of liability is under duty to exercise reasonable care in the safe keeping of the property. Where the bank is a gratuitous bailee it is responsible for gross negligence, and where it receives compensation it is responsible for ordinary negligence. *Preston v. Prather*, 137 U. S. 604. *Gray v. Merriam*, 148 Ill. 179. *Pittsburgh Safe Dep. Co. v. Pollock*, 85 Pa. 391. *N. Y. Central R. Co. v. Lockwood*, 17 Wall. (U. S.) 357. *Third Nat. Bk. v. Boyd*, 44 Md. 47. *Cutting v. Marlor*, 78 N. Y. 454. *Pattison v. Syracuse Nat. Bk.*, 80 N. Y. 82. *Cussen v. Southern Cal. Sav. Bk.*, 133 Cal. 534. *Schouler on Bailments and Carriers*, Sec. 35, 101. 2 *Kent Com.* 588, 591. *Lockwood v. Manhattan Storage, etc., Co.*, 28 Hun (N. Y.) 68. *Roberts v. Stuyvesant Safe Dep. Co.*, 123 N. Y. 57. *Slafin v. Meyer*, 75 N. Y. 262. (*Inquiry from Wis., April, 1913, Jl.*)

General rule of ordinary care of securities left for gratuitous safe keeping

1351. What is the responsibility of a bank for Liberty Bonds left for safe-keeping without charge? *Opinion:* A bank, which receives securities of a customer for gratuitous safe-keeping is bound to exercise ordinary or reasonable care. While some courts have applied the technical rule that slight care is all that is required in the case of a gratuitous bailment and the bank only liable for gross negligence the more modern cases hold that a gratuitous bailee of securities is under duty to use ordinary or reasonable care, and is liable for a lack of such care, or ordinary negligence. What is reasonable care is a question for the jury in each case. (*Inquiry from Pa., Feb., 1921.*)

Duty of care in safe keeping of Liberty bonds in Arkansas

1352. A bank in Arkansas inquires as to certain recent decisions in that state bearing on the degree of care required of a bank of Liberty bonds left for safe-keeping and the liability of the bank in connection therewith. *Opinion:* In *Merchants National Bank of Vandervoort v. Affholter*, 215 S. W. (Ark.) 648, plaintiffs subscribed for registered bonds and deposited sufficient funds to cover the subscriptions. The bank ordered and received, not registered, but coupon bonds, which were stolen. The bank was held liable for the amount of these bonds which it had purchased for the plaintiffs irrespective of any degree of care, because of its failure to buy registered bonds as directed. In addition one of the plaintiffs had left a coupon bond with the bank for safe-keeping. This bond with others, belonging to numerous persons, including officials of the bank, was not kept in the burglar-proof money compartment of the safe, but in the outer part of the safe. During the night the door of the safe was blown off by burglars, and the bonds taken, although the burglar-proof compartment was not entered. The testimony on the part of the bank was to the effect that all the bonds kept by the bank, including those owned by the bank itself and its officials, were kept in the same manner, and that such was the customary way to keep the bonds. There was also testimony to the effect that there was no room inside the money compartment for the bonds. The court held that while the bank was merely a gratuitous bailee and consequently liable

for gross negligence only, the above was sufficient proof of gross negligence to sustain a verdict for plaintiffs. It was a question for the jury whether it constituted gross negligence to keep bonds payable to bearer in an insecure place. In a companion case, *Maloney v. Merchants Bank of Vandervoort*, 217 S. W. (Ark.) 782, involving the same burglary, and the loss of coupon bonds, also left in the outer part of the safe, it was held that the burden was on the bank to show that it had made some disposition of the bonds authorized by the customer or that they were lost without fault on its part. An instruction imposing the burden of proof upon the customer to show that the bank had not exercised common prudence was held incorrect, as was an instruction that if the bank took the same care of the customer's bonds that it did of its own and those of its officers, it was not liable, as the bank might have been negligent in the care of its own bonds: Citing *Erie Bank v. Smith, Randolph & Co.*, 3 Brewst. (Pa.) 9. *Griffith v. Zipperwick*, 28 Ohio St. 388, *Patriska v. Kronk*, 57 Misc. (N. Y.) 552, 109 N. Y. Supp. 1092. *Ray v. Bank of Kentucky*, 10 Bush. (Ky.) 344. In this companion case, judgment for the bank, based on a verdict for it, was reversed for the above erroneous instruction. (*Inquiries from Ark., April and June, 1920, Jl.*)

Bonds kept in vault outside safe

1353. A bank keeps packages of bonds without charge in envelopes in safe deposit boxes outside of the burglar-proof safe but inside of a steel-lined vault with double doors? Is the bank liable for loss through theft? *Opinion:* The general rule is that while a bank is not an insurer of customer's securities left with it for safe-keeping, it is under a duty to use reasonable care which is determined by the facts and circumstances of each particular case. A recent Arkansas decision goes a little farther with respect to the responsibility of a bank for the gratuitous safe-keeping of securities than other cases. (See No. 1352) If this decision should be followed in Pennsylvania, the bank in the case submitted might be held negligent where it kept the securities, although gratuitously, in the vault outside the burglar-proof safe. If it is impracticable to keep the bonds of customers in the burglar-proof safe, it would be well to have a special stipulation on the deposit receipt limiting the responsibility for loss by burglary, where the bank takes the same care of the customers' se-

curities that it does of its own of like kind. A properly worded clause might safeguard the bank from liability. (*Inquiry from Pa., Dec., 1920.*)

A bank's form of disclaimer of liability and method of safe-keeping

1354. A bank receives bonds for safe-keeping with the following provision in its receipt: "It is hereby understood that this bank will not be responsible for any papers left for safe keeping; we are merely acting as agent for the owner." All bonds so received are placed in the inner safe where the bank keeps its own money. This safe is locked during the day with the combination, except as it is opened to get a new supply of money. At night the combination and time locks are both on. The bank takes the precautions required by its insurance policy on its own money. Would the bank be liable in the event of the theft of the bonds? *Opinion:* A bank is not an insurer of securities left with it for safe-keeping but is bound to the exercise of reasonable care, which is a question of fact for the jury in each particular case. Whether the disclaimer from liability would be effective in the event of loss through gross negligence is questionable. But it would seem that the method employed to safeguard the securities would be held due diligence, and where the bank pursued such method a jury, which is the ultimate arbiter in all these cases, would hold that the bank had exercised due care and was not liable. (*Inquiry from Pa., Dec., 1920.*)

Re-deposit for safe-keeping with city correspondent

1355. A bank is considering sending all of its "bearer securities" to its Washington correspondent. What would be the legal result of such action? *Opinion:* The general rule of responsibility of a bank which holds securities of customers for safe-keeping is stated elsewhere. Opinion No. 1353. Assuming that the bearer securities are transferred to the safe of the Washington correspondent, which presumably is a safer place than the vaults of the Virginia bank, the transfer would seem to be in pursuance of the exercise of reasonable care under the circumstances, for there would be less risk of loss from burglary. At the same time there might be a possibility of loss from inside theft or embezzlement, and assuming such possibility, it would be an uncertain question whether the Washington corres-

pondent would be liable to the Virginia bank, and a further uncertain question whether the latter bank would be liable to its customers. The taking out of a policy of insurance against loss from these causes would be a desirable safeguard. (*Inquiry from Va., March, 1921.*)

Form of safe-keeping receipt protecting bank

1356. Where a bank receives securities and valuables for safe-keeping but does not rent for hire safe deposit boxes to customers, what form of receipt would best protect the bank in case of loss by burglary, theft or other cause? *Opinion:* (1) *Receipt for Gratuitous Safe-keeping.* Where a bank receives securities and valuables for safe-keeping, without compensation, it is a gratuitous bailee and bound to use the reasonable care which the property in its situation demands; the care which ordinarily prudent persons would exercise in the same relationship and under like circumstances. The omission of such care is negligence, whether it be termed gross or ordinary, for which the bailee is liable. The courts do not favor stipulations against liability, even by gratuitous bailees, and construe them most strongly against the bailee. A gratuitous bailee can, of course limit his liability by agreement but there is a difference of view whether he can free himself from liability for his own negligence and, even where he can, he will be held liable for loss chargeable to that cause under a general stipulation against liability, unless he expressly stipulates against liability for his own negligence. *Bean v. Ford*, 119 N. Y. Supp. 1074. The following form of receipt and stipulation against liability is suggested:

"Received from _____ the securities described below, for gratuitous safe-keeping it being expressly understood and agreed that _____ bank shall not be liable for loss of or damage to such securities caused by burglary, theft, embezzlement, fire or any cause whatsoever, whether or not chargeable to its own negligence, but that the entire risk of such loss or damage is assumed by the depositor."

Should a bank in any case not desire to expressly stipulate against its own negligence, that particular phrase can be eliminated.

(2) *Receipt for safe-keeping for hire.*

Where a bank receives securities and valuables for safe-keeping for which it makes a charge it becomes a bailee for hire and is

bound to exercise that degree of care in the safe-keeping which a reasonably careful person would exercise in regard to similar property of his own. The omission of such care is negligence for which it is responsible. According to the majority of courts, a bailee for hire cannot stipulate against his own negligence. Furthermore, it is likely that a bank which makes a charge for safe-keeping, would be subject to the provisions of the Uniform Warehouse Receipts Act, which is the law in most of the states and which defines a warehouseman as "a person lawfully engaged in the business of storing goods for profit." In *New Jersey Title Guarantee & Trust Co., v. Rector*, 75 Atl. (N. J.) 931 the plaintiff was "conducting the business of running safe deposit vaults and warehousing valuable goods and chattels for hire." One R deposited with it a box for which a receipt was given, ownership of which was subsequently claimed by R's wife. The plaintiff was held to be a warehouseman under the act and entitled to interplead the parties according to its provisions. See, also, *Healy v. N. Y. Cent. & H. R. R. Co.*, 138 N. Y. Supp. 287. Under Section 21 of the Warehouse Receipts Act a warehouseman is made liable "for any loss or injury to the goods caused by his failure to exercise such care in regard to them as a reasonably careful owner of similar goods would exercise, but he shall not be liable, in the absence of an agreement to the contrary, for any loss or injury to the goods which could not have been avoided by the exercise of such care," and by Section 3 a warehouseman cannot insert in a receipt terms and conditions which "in any wise impair his obligation to exercise that degree of care in the safe-keeping of the goods entrusted to him which a reasonably careful man would exercise in regard to similar goods on his own." The following stipulation against liability is suggested for insertion in receipts issued by banks which receive securities for safe-keeping for which a charge is made:

"The _____ bank agrees to exercise that degree of care in the safe-keeping of the securities deposited with it which a reasonably careful person would exercise in regard to similar goods of his own; but beyond this the bank shall not be responsible for loss of or damage to such securities caused by burglary, theft, embezzlement, fire or any cause whatsoever and the entire risk of such loss or damage is assumed by the depositor." (*Inquiry from N. J., Jan., 1921.*)

Liability for burglary of safe deposit box

1357. What is the general rule governing liability of a bank for burglary of the contents of safe deposit boxes rented to its customers? *Opinion:* A bank is not an insurer of the contents of a safe deposit box, but according to most courts is a bailee for hire and under obligation, as such, to use reasonable care in safe-guarding the box and its contents from burglars without and thieves within. The general rule is that reasonable care calls for the same degree of care that a prudent person would take of his own property under like circumstances. Whether reasonable care has been used is a question of fact to be determined by a jury in each particular case. Cases involving liability for loss of contents of a box because of inside theft, or where misdelivered through fraud or invalid legal process have heretofore been decided by the courts, but the liability of a bank because of burglary is a new and undeveloped question which is only now coming up for decision in recent cases. (*Inquiry from Kan., Feb., 1921.*)

1358. The safe deposit boxes of a bank are located in one of the latest make of burglar-proof vaults. If it uses due diligence in the protection of the boxes, it is liable for the contents in the event of burglary? *Opinion:* The bank is not an insurer but is bound to use reasonable care. In the event of burglary, it would be for a jury to decide whether, under the facts, the bank had exercised reasonable care. (*Inquiry from Ohio, Feb., 1921.*)

Reasonable care a question for jury

1359. Is a bank renting safe deposit boxes liable for loss of contents from burglary or theft from the outside? From theft by employees of the bank? *Opinion:* A bank is not an insurer of the contents of a safe deposit box but is under the duty to exercise reasonable care. Just what is reasonable care depends upon the facts and circumstances of each particular case and is a question for the jury. (*Inquiry from N. Y., Dec., 1920.*)

Trust company agreement limiting liability to exercise of accustomed diligence

1360. A trust company provides a card containing rules and regulations for its safe department. There is a blank for signature to an agreement, which among other things, provides that the renter of a safe

deposit box agrees "to the above rules and regulations," one of which is that "The liability of the Company, by reason of the letting, is limited to the exercise of its accustomed diligence to prevent the opening of said Safe Deposit Box, by any person other than the lessee or his duly authorized representative." What is the liability of the trust company? *Opinion:* The liability is defined by the quoted agreement; it is limited to the exercise of accustomed diligence. In other words, this is reasonable care under the circumstances of each particular case and if a burglary should occur, the liability would depend in its final analysis on what a jury would find upon the question of reasonable care. (*Inquiry from Pa., Feb., 1921.*)

A bank's form of disclaimer of responsibility for loss from safe deposit box

1361. The bill of a bank for the rent of safe deposit boxes contains on its face the provision: "Subject to rules and regulations made by the National Bank appertaining thereto. (See other side.)" On the reverse side are a number of regulations including the following: "The bank is not responsible for contents of safes except by special contract in writing. . . . The safe is rented subject to all risk against loss by theft and burglary and without any liability whatever against the Bank for any loss or damage occasioned thereby." What is the legal effect of these rules? Should the receipts for rent be signed by the renters? *Opinion:* The degree of responsibility of a bank may be limited or regulated by contract. The rules quoted if agreed to by the customer, would protect the bank according to their terms. Whether they would afford absolute protection is not entirely clear. While they contain a general disclaimer of responsibility and place loss by theft and burglary at owner's risk, some courts hold that a bank cannot stipulate against responsibility for the consequences of its own negligence. As to signing the rules, the acceptance of the receipted bill by the customer containing the rules and the statement that the safe is rented subject to such rules would probably be sufficient as a contract binding on both parties. But it would probably be better to obtain the customers' signatures to avoid all question as to the binding effect of the rules upon a customer who would state under oath that he had never read them and consequently had not assented thereto. (*Inquiry from Mass., Feb., 1921.*)

Liability of bank for robbery of safe deposit box as gratuitous bailee and limitation by contract

1362. What is the liability of a bank to the renters of safe deposit boxes which although somewhat safeguarded would probably yield to the efforts of the professional burglar? (2) What is the liability for the gratuitous safe-keeping of papers, placed in safe deposit boxes? *Opinion:* (1) The general rule of law is that a bank is not an insurer of the contents of a safe deposit box but is bound to exercise reasonable care. What is reasonable care is a question of fact for the determination of the jury in each particular case. In the case submitted were there a burglary, it would be for the jury to decide whether reasonable care were exercised. (2) As for the papers left gratuitously for safe-keeping, while the technical legal rule is that the bank is required to use only slight care and is responsible only for gross negligence, the courts in some late cases have upheld verdicts in which banks apparently using reasonable care have been held grossly negligent. (3) It would be well to make a specific contract with those leaving papers for safe-keeping and with box-renters, which could be incorporated in the latter case with the rent receipt, as to the degree of care to be used, with a stipulation that if such care is used, there will be no responsibility for loss by burglary, theft or other cause. (*Inquiry from Pa., Feb., 1921.*)

Form of safe deposit receipt protecting bank

1363. What form of receipt will give a bank most protection in leasing safe deposit boxes? *Opinion:* The courts quite generally hold that a bank which rents to a customer a safe deposit box, notwithstanding the bank is ignorant of the contents of the box, is a bailee for hire and responsible, as such, for the exercise of reasonable care in safeguarding the box and its contents. The difficulty in framing a receipt which will absolutely protect the bank is due to the fact that the courts in many states apply a rule which has been expressed by one court as follows: "It is the better rule that a bailee for hire cannot, by contract, so limit his responsibility to the bailor as not to be liable for his own negligence or the negligence of his agents and servants." *Pilson v. Tip Top Auto Co.*, 136 Pac. (Ore.) 642. But while the bailor and bailee theory is the prevailing one, a few courts, in certain situations connected with the rental of safe deposit boxes, have applied the landlord and

tenant theory; and it would seem that a contract between bank and box-renter, creating the landlord and tenant relation and exempting the bank from liability for loss, would afford the bank the most protection. The following form is suggested:

"It is expressly understood and agreed that Box No. _____ is leased by _____ Bank as landlord to _____ as tenant, and that in making this lease the bank does not assume the relation and duty of bailee and shall not be liable for loss of or damage to, the contents of said box caused by burglary, theft, embezzlement, fire or any cause whatsoever but that the entire risk of such loss or damage is assumed by the lessee."

The above form could be coupled with other necessary regulations as to access and made binding on the lessee by procuring his signature thereto; or, if printed on the back of a rental receipt, the face should contain a provision that the acceptance of the receipt by the lessee constitutes an agreement to the provisions on the back. (*Inquiry from N. J., June, 1921.*)

Insurance of safe deposit boxes

1364. Does the usual form of burglary insurance policy cover loss of the contents of safe deposit boxes rented to customers? *Opinion:* Under the usual form of bank burglary policy the contents of safe deposit boxes would not be covered unless the bank should be held liable to the customer, in which event there would be a coverage. But special policies or riders to policies are now issued covering contents of safe deposit boxes. (*Inquiry from N. C., Nov., 1920.*)

Liability of bank as renter of safe deposit box and protection by insurance

1365. What is the liability of a bank to renters of its safe deposit boxes? May the bank limit its responsibility? If a bank took out a burglary insurance policy, would the making of a claim thereunder constitute acknowledgment by the bank of responsibility to the renters? What form of policy is best? Would it be desirable to have the renters pay a certain amount for insurance? *Opinion:* A bank is not an insurer of the contents of safe deposit boxes, but is held to the exercise of reasonable care, which presents a question of fact for the jury to be determined from the circumstances of each case. The responsibility may be limited and defined by special agreement. Liability for

loss by burglary has not yet been fully worked out by the courts.

The question of acknowledgment of responsibility by the bank to its renter by making a claim for loss is probably debatable. If the bank protected itself by insurance against loss and the burglary caused loss to the renter but no loss to it—assuming non-responsibility to the renter—it might be argued that the making claim for the amount constituted an admission that the bank deemed itself the loser by reason of liability to its customer; for it is not the loss of the customer which is insured but of the bank.

The better plan is to procure insurance on behalf of the customer. Burglary insurance companies issue two forms of policies or riders to policies (1) to the bank agreeing to indemnify and pay the bank on behalf of the lessee of the safe-deposit box (or pay the lessee directly at the option of the company) and (2) an individual policy of insurance to the box-renter covering the contents of his safe-deposit box. If a bank take out on behalf of its lessees, a policy covering all the boxes, it might be well, instead of paying the premium itself, to apportion it among the box-renters and to collect a certain amount as rent and a certain amount for insurance and frame the receipt accordingly. (*Inquiry from Tex., Feb., 1921.*)

Right of access of surviving joint owner in New York

1366. Is it now legal to open a safe deposit account in the names of two individuals, or is it necessary to open the account in the name of the owner who has then the power to appoint a deputy to transact all his business for him? In case of death can the joint owner, as in question No. 1, have access to the safe deposit box, and in case of death of the owner as in question 2, can the deputy have access to the safe deposit box without release from the State Comptroller? *Opinion:* This point was settled in *People v. Mercantile Safe Deposit Company*, 143 N. Y. Supp. 849, in which it was held that a safe deposit company did not have possession or control of the securities contained in the box within the meaning of the statute prohibiting a safe deposit company having possession or control of securities, etc., from making delivery to the survivor unless notice was served upon the State Comptroller, etc. The court held that the relation of the safe deposit company was analogous to that of landlord who would have no more posses-

sion or control of the securities than would the landlord of an office building have possession and control of the contents of a rented office; that the situation with respect to securities contained in safe deposit boxes was manifestly different from the relation which the safe deposit company occupied towards those who made a physical deposit of valuables for which a receipt was issued. In such cases the safe deposit company was clearly a bailee, having physical custody of the articles with power to control the delivery thereof. (*Inquiry from N. Y., Jan., 1918.*)

Access to box by customer's wife presenting key

1367. A bank leased a safe deposit box to A, who holds the key. His partnership business with B having failed, a receiver was appointed and A moved away. A's wife who found the key demands the right to open the box. *Opinion:* A bank which leases a safe deposit box to a customer who keeps the key is a bailee for hire under duty to exercise reasonable care and should not allow a person other than the customer presenting the key access to such, except upon written authority from the customer, whether such person be the bailee's wife, or a receiver of the bailee or any other person, unless compelled to do so by valid judicial process.

State v. Kelsey, 53 N. J. L. 590. Mayer v. Bresinger, 180 Ill. 110. N. J. Title Guarantee, etc., Co. v. Rector, 76 N. J. Eq. 587. Roberts v. Stuyvesant S. D. Co., 123 N. Y. 57. Bauman v. Nat. S. D. Co., 124 Ill. App. 419. Butler v. Jones, 80 Ala. 436. Ball v. Liney, 48 N. Y. 6. Dowd v. Wadsworth, 13 N. C. 130. Powell v. Robinson, 76 Ala. 423. Freeman v. Perry, 25 Tex. 611. Wilson v. Anderton, 1 B. & Ad. 450 (Eng.). Patten v. Baggs, 43 Ga. 167. Willner v. Morrell 40 N. Y. Super. 222. Babcock v. People's Sav. Bk., 118 Ind. 212. Pippin v. Farmers' Warehouse Co., 167 Ala. 162. Citizens Bk. v. Ark. Compress, etc., Co., 80 Ark. 601. Peoria, etc. R. Co. v. Buckley, 114 Ill. 337. Forbes v. Boston, etc., R. Co., 133 Mass. 154. Mohr v. Langan, 162 Mo. 474. Oswego Bk. v. Doyle, 91 N. Y. 32. Klein v. Patterson, 30 Pa. Super. 495. Providence Fifth Nat. Bk. v. Providence Warehouse Co., 17 R. I. 112. Rex v. James (Tex. Civ. App. 1910), 131 S. W. 248. Higdon v. Warrant Warehouse Co., 10 Ala. App. 496. Jensen v. Eagle Ore Co., 47 Colo. 306. Savannah, etc., R. Co. v. Wilcox, 48 Ga. 432. Ohio, etc., R. Co. v. Yohe, 51 Ind. 181. French v. Star Union Tramp Co., 134 Mass.

288. Bliven v. Hudson River R. Co., 36 N. Y. 403. Street v. Farmers' El. Co., 33 S. Dak. 601. Burton v. Wilkinson, 18 Vt. 186. Morris Storage, etc., Co. v. Wilkes, 1 Ga. App. 751. Edwards v. White Line Transit Co., 104 Mass. 159. McAlister v. Chicago, etc., R. Co., 74 Mo. 351. (*Inquiry from Kan., Oct., 1918, Jl.*)

Deposit by partnership

Sufficiency of firm signature

1368. Under the firm name of "Smith Bros." a partnership opened an account in a bank. By agreement with the bank the signature "Smith Bros." was to be used on all checks and notes, drawn by either partner. *Opinion:* The signature "Smith Bros." as the firm name to checks and notes is legally sufficient without adding the name of the individual partner who signs the firm name. Cal. Code, Sec. 2466. North v. Moore, 135 Cal. 621. Decker v. Howell, 42 Cal. 636. (*Inquiry from Cal., July, 1913 Jl.*)

Withdrawal by surviving partner

1369. A and B are partners and open an account in a bank in the name of "The Star Grocery," subject to the signature of A or B. A dies. *Opinion:* B can draw checks against the partnership account and the bank would not be liable to the heirs of A for the money thus paid. Backhouse v. Charlton, 8 Chan. Div. 444. Com. Nat. Bk. v. Proctor, 98 Ill. 558. (*Inquiry from Wash., Feb., 1915, Jl.*)

Withdrawal of partnership account carried in corporation name

1370. A bank submits a case wherein a depositor was regarded as a corporation and the secretary-treasurer had been specifically designated to draw the corporate funds. The business, however, was discontinued in Tennessee and the President, L—, in Philadelphia, drew a draft through a bank in that city for the balance of funds to its credit, signed in the name of the company by himself as President. The draft was made payable to the company, and he indorsed the same in its name, and also individually, and it was paid by the bank and charged to the company's account. The indorsement was guaranteed by a Philadelphia bank. It was afterwards found that the company had no legal corporate existence. *Opinion:* In view of the facts, it appears that the company was not a corporation, but a partnership, and the general rule as to partnership

accounts is that each has equal right to draw checks on the account in the firm name. Under such circumstances assuming the president was a partner, it seems the payment by the bank would be held authorized; but even if not, and the bank is held liable to the partner designated as Secretary-Treasurer, this draft was payable to the corporation or firm, and the Philadelphia bank guaranteed the indorsement. This guarantee was not only of the genuineness of the indorsement, but included the authority of L—— to indorse the payee's name, and, it seems, if the money was misappropriated and did not go to the purposes of the corporation or partnership, there would be a liability on this guarantee. (*Inquiry from Tenn., May, 1919.*)

Deposits of corporations

Agent acting for corporation

1371. A corporation depositor issued a letter of authority to a bank, containing restrictions upon its agents as to power to sign and indorse paper of the corporation. The account was closed and thereafter the corporation was represented in the locality by an agent, who indorsed checks payable to the corporation for deposit, had them credited to his personal account along with his personal funds, and checked them out the same as his personal credit. The agent would also make shipments and draw bill of lading drafts in the name of the company per himself, which he would deposit and collect through the bank. Is the bank liable for misappropriation by the agent of the proceeds of checks drawn to the corporation? *Opinion:* The closing of the original account terminated the letter of authority limiting the right of signing and indorsing paper. When thereafter the company was represented by an agent in the locality and certain banking facilities were required, the letter of instruction would have nothing to do with this as the company itself was no longer carrying an account with the bank; rather the agent was carrying it as a part of his personal account. If it should be admitted that the agent had no actual authority to do as he did, the question arises whether the company had knowledge of what he was doing and acquiesced the rein, so as to make out a case of implied authority. This question is one of fact. If there was knowledge and acquiescence, or if the company held the agent out to the world as possessing authority to do their business in their name the way he carried it on, a case

of implied authority is made out protecting the bank. The following cases bear on the question of implied authority: *Grabfield v. Haralson County Bank*, 155 N. Y. App. Div. 156. *McStay v. John S. Cook & Co.*, 132 Pac. (Nev.) 545, (full citation of authorities in connection with the deposit by agents of money claimed to belong to a principal). *Carlton v. Texas Banking & Investment Co.*, 152 S. W. (Tex.) 698 (not directly in point but probably useful). *Merchants' & Planters' National Bank v. Clifton Mfg. Co.*, 33 S. E. (S. C.) 750. *Boyle v. Northwestern National Bank*, 103 N. W. (Wis.) 1123. 104 N. W. 917. (*Inquiry from Tex., April, 1914.*)

Opening of corporation account

1372. What authority should be demanded from a corporation when opening an account, as to signatures, etc? *Opinion:* It is usual when a corporation opens an account, not only to file a resolution of the Board of Directors signed by the Secretary under the corporate seal, but also to file with the bank a certified copy of the by-laws. The powers of the directors may be limited by the by-laws which may contain provisions as to whom shall sign and countersign notes and negotiable paper, also checks and drafts, and it might be that a resolution of the Board of Directors would be contrary to the by-laws in some particular. In view thereof, a certified copy of the by-laws should be filed as well as a resolution of the Board of Directors. (*Inquiry from N. Y., Oct., 1920.*)

Deposits in various relations

Deposits by attorney

1373. An attorney who has a number of clients, receives checks payable to him as attorney for A, as attorney for B, etc. The bank fears liability for misappropriation of money by the attorney, and asks for suggestions as to the forms of account to be opened. *Opinion:* In a few states, a deposit in personal account of a check payable to the depositor in A representative capacity, puts the bank on inquiry as to proper disposition of the fund, but in the majority of states, the bank is safe in receiving such deposits in personal account and paying them out on depositor's checks, even though they be misappropriations, provided a personal debt is not paid to the bank therewith. But should the bank desire to be safe beyond question, have the attorney open an account as attorney for each particular client

in which checks payable to the attorney for the clients respectively can be deposited and checked against, without charging the bank with notice. (*Inquiry from N. Y., Nov., 1913.*)

Deposit of military company

1374. Funds of a military company are deposited in a bank under the name "Company Fund—(Officer's Name)." The officer is transferred to another company and the regiment is miles away. The new commanding officer writes the bank for a statement of the account. *Opinion:* Where the funds of a military company are deposited in a bank by its commanding officer and such officer is succeeded by a new commander, the latter is entitled to control the deposit as the representative of the company. It would seem perfectly proper to send the new commander a statement of the account, but the bank should have satisfactory evidence of his authority to control the fund. *Ind. Tr. Co. v. Internat. Bldg. & Loan Assn., 165 Ind. 597. Carman v. Franklin Bk., 61 Md. 467. Tay v. Concord Sav. Bk., 60 N. H. 277. Lewis v. Park Bk., 42 N. Y. 463. (Inquiry from Iowa, Aug., 1918, Jl.)*

Deposit by married woman in former name

1375. A woman, married a second time, desired to open an account in a bank under her former name. *Opinion:* It would be lawful and proper to receive the married woman's account under her former name, provided the purpose is honest and not fraudulent. *Davis v. Lenawee Co. Sav. Bk., 53 Mich. 163. Cal. Laws 1909, Chap. 76, Sec. 16. Bk. v. Rockmore & Co., 129 Ga. 582. (Inquiry from Cal., May, 1915, Jl.)*

Deposits belonging to Indians on Reservations

1376. Moneys belonging to Indians on Reservations under the supervision of an agency may be deposited in either state or national banks which submit bids therefor, giving the rates of interest on open accounts and time deposits and otherwise complying with certain requirements. *U. S. Comp. Stat., 1918, Sec. 4226. (Inquiry from Wash., March, 1915, Jl.)*

Gift of deposits

Attempted testamentary gift of deposit

1377. On May 6, 1910, a depositor submitted to a bank a paper and requested that the president and cashier affix their signatures thereto, the same reading as follows:

"I make request that a condition on which my individual deposit account with your bank may be held shall be as follows: That in the event of my decease or any calamity befalling me making me incapable of checking on same, then and in the event of such happening any and all balances that then may be due me shall be transferred to the account of my wife,——— Mr.——— Dear Sir: The Bank which we have the honor to represent is quite willing to receive your deposits on the condition named in the foregoing request. ——, President, ——, Cashier." The paper was executed in duplicate, the bank keeping one copy and the depositor the other. The bank writes that the depositor recently died and his wife requests that the amount of deposit be transferred to her account. The bank desires to be informed whether it would be perfectly safe to do so. *Opinion:* It is doubtful if the bank would be perfectly safe in transferring the deposit to the widow in accord with the document. This is not a case of an account which is in the name of two parties and as to which the bank can presume that there is title in both so that in the event of death of one the title is in the other as survivor. The account in question is owned by an individual during his entire life and all he does is to execute a paper that in event of his death the balance shall be transferred to the account of his wife which condition the bank accepts in writing. But the courts of Virginia would probably hold that the wife did not take title to this balance of deposit, but that it belongs to the husband's estate because he has not given it to the wife during his life time—a gift must be completed by delivery—and the attempted testamentary disposition is not executed in accordance with the statute relating to wills. This being so, and the likelihood being that the money belongs to the husband's estate, it is a doubtful question whether the paper signed by both parties would be a sufficient authorization to transfer the balance to the wife. It would be safer not to do so. (*Inquiry from Va., Aug., 1914.*)

Opening of account by husband in name of wife and daughter

1378. A married man opened a savings account in the name of his wife and daughter. The husband and wife having separated, both claim ownership and control of the amount deposited. *Opinion:* The mere opening of a savings account by a husband

in the name of his wife and daughter does not constitute a complete gift in the absence of delivery of the pass-book or other evidence of the deposit or of other facts indicating perfection of the gift, and so long as the gift is not completed it may be revoked by the husband. *Montgomery First Nat. Bk. v. Taylor*, (Ala.) 37 So. 695. *Russell v. Langford*, 135 Cal. 356. *Buckingham's Appeal*, 60 Conn. 143. *Telford v. Patton*, 144 Ill. 611. *Davis v. Ney*, 125 Mass. 590. *Martin v. Funk*, 75 N. Y. 134. *Howard v. Windham Co. Sav. Bk.*, 40 Vt. 597. *Miller v. Clark*, 40 Fed. 15. *Deposit Co. v. Miller*, (Conn.) 90 Atl. 228. *Bk. v. Gibboney*, 43 Ind. 492. *Kelly v. Tr. Co.*, 108 N. Y. S. 214. *McMahon v. Lawler*, 190 Mass. 343. *Main's Appeal*, 73 Conn. 638. *Goelz v. People's Sav. Bk.*, 31 Ind. App. 67. *Tucker v. Ticker*, 138 Iowa 344. *Booth v. Bristol Co. Sav. Bk.*, 162 Mass. 455. *Baker v. Baker*, 123 Md. 32. *Roughan v. Bk.*, 144 N. Y. S. 508. *Schippers v. Kempkes*, (N. J.) 67 Atl. 74. *Schweyer v. Brew. Co.*, 21 Pa. Dist. Ct. 31. *Shaw v. White*, 28 Ala. 637. *Merrill v. Gordon*, (Ariz.) 140 Pac. 496. *Britton v. Esson*, 260 Ill. 273. *Stockert v. Sav. Inst.*, 139 N. Y. S. 986. *In re Greenfield*, 14 Pa. St. 489. *Nicholas v. Adams*, 2 Whart. (Pa.) 17. *Ivey v. Owens*, 28 Ala. 641. *Grover v. Grover*, 41 Mass. 261. *Matter of Wachter*, 16 Misc. (N. Y.) 137. *Allen v. Knowlton*, 47 Vt. 512. *Boyett v. Potter*, 80 Ala. 476. *Smith v. Peacock*, 114 Ga. 691. *Johnson v. Stevens*, 22 La. Ann. 144. *Walsh's Appeal*, 122 Pa. St. 177. *Jones v. Weakley*, 99 Ala. 441. *Bk. v. McCormack*, 79 Conn. 262. *Ashbrook v. Ryon*, 2 Bush (Ky.) 228. *Hill v. Stevenson*, 63 Me. 364. *Sheedy v. Roach*, 124 Mass. 472. *Pace v. Pace*, (Miss.) 65 So. 273. *In re Myer*, 129 N. Y. S. 194. *Ridden v. Thrall*, 125 N. Y. 572. *Watson v. Watson*, 69 Vt. 243. *Moore v. Power*, 5 Newfoundl. 466. *Crane v. Brewer*, 73 N. J. Eq. 558. *Holman v. Bk. (Utah)*, 124 Pac. 765. (*Inquiry from Pa., Jan., 1916, Jl.*)

Gift by delivery of pass-book

1379. A savings account was transferred to a donee. The name of the account was changed on the pass-book and on the books of the bank and the book delivered to the donee. Later the donor made a request to the donee for the pass-book and received it. The donee, however, refused to give an order to the bank to transfer the account to the donor's name. In whom is the title to the account? *Opinion:* There was original-

ly a completed gift to the donee. What took place after the gift is virtually the case of a depositor in a savings bank delivery the book standing in his name to another and the other accepting the same. If the intention was to transfer the money, there would be a completed return gift. This intention however is somewhat negated by the refusal to give an order to the bank to transfer the account. The bank should take the position that title remains in the original transferee, until there is more complete evidence that he intended a retransfer. (*Inquiry from Pa., Jan. 1920.*)

Cashing instead of crediting item to depositor

Practice of giving cash instead of credit unsafe

1380. A depositor brought to the bank for credit a check for \$550. After the clerk at the window made out the deposit ticket, the depositor asked for \$250 cash to be taken out of the check and returned to him. The clerk thereupon wrote upon the deposit ticket "cash \$250" and subtracted that amount, leaving a total of \$300, which amount was placed to the credit of the customer. The bank afterwards delivered to him his balanced pass-book showing the amount credited and the depositor retained the book for over a year without objection. Afterwards he denied receiving the \$250 cash. *Opinion:* The fact that the customer retained the balanced pass-book for over a year without objection makes the balance an account stated, which is conclusive unless the depositor can show fraud, mistake or omission. If the depositor impeaches the account, the bank can show facts connected with the deposit. In cases where a customer at the time of deposit wants the whole or part cash, it would be better for the bank to enter credit for the entire deposit and have the customer draw a check for the cash in the regular way. *Kenneth Inv. Co. v. Nat. Bk. of Rep.*, 96 Mo. App. 125. *Harley v. Eleventh Ward Bk.*, 76 N. Y. 618. *Fisk v. Basche*, 31 Ore. 178. *Goff v. Stoughton St. Bk.*, 84 Wis. 369. (*Inquiry from Ore., July, 1912, Jl.*)

Difficulty of proof of return of cash for deposited item

1381. If a customer of a bank presents a check for \$200 and asks for \$50 in cash and to be credited with \$150, and the receiving teller or the depositor himself makes out a deposit slip entering the amount as a check

for \$200 less cash \$50, would the bank be safe in handling the transaction in this way?

Opinion: It would be better to give the depositor credit for the full \$200, and let him draw a check for \$50. Should the depositor be dishonest and some time afterwards claim he did not receive the \$50 he would doubtless be able to obtain from the drawer, and produce the cancelled check for \$200 as evidence that it has been indorsed and collected by the bank for that amount. The bank's books would show a credit for \$150 only. If the deposit slip were in the handwriting of the depositor and were preserved this would protect the bank by showing the depositor received \$50 cash, but if it were in the handwriting of the teller, it would result in a question of veracity between depositor and teller if the depositor should assert that he did not receive the \$50 and that the teller had deducted that amount without his knowledge or consent. Should the deposit slip be lost or destroyed there would be no evidence to support the true transaction. (*Inquiry from Cal., Nov., 1917.*)

Cashing for messengers, instead of crediting, checks indorsed with rubber stamps

1382. Local merchants, either in person or by messenger, present checks to be cashed by bank teller, indorsed with rubber stamps. Bank asks whether, if money were obtained on these items fraudulently, the loss would fall on the paying bank or on the merchant? *Opinion:* It is not clear whether the checks so presented are drawn on the bank cashing them or on other banks. Assuming they are drawn on other banks, the practice is objectionable for the following reasons: (1) Should the merchant afterwards make claim that he had never received the cash on the check, but had deposited it without receiving credit, the bank would be in a bad position to refute this. There is more than one decided case where a bank has cashed a check for a customer, instead of receiving it on deposit and letting him draw his own check for the amount, in which the bank has been held liable to the customer as it could not prove that it had given cash to him over the counter. (2) Furthermore, should it be the practice to cash such checks for messengers, and should a messenger steal the check from his employer, the merchant, and indorse it with rubber deposit stamp and obtain the cash, the bank would in all probability be held the loser, as it would derive no title to such a check indorsed without

authority. A further objection to the practice is the general one that indorsement for deposit is not the proper kind of indorsement to negotiate an instrument for cash. (*Inquiry from Colo., Dec., 1920.*)

Erroneous credit, over-payment and dispute as to deposits

Credit to wrong account

1383. A. Doe, a member of the firm of Doe and Doe, and who also conducted an independent business, deposited checks to the credit of the firm, but the bank mistakenly credited the amount to A. Doe's personal account. Before the mistake was discovered A. Doe sold his business to a successor, including his credit in bank. *Opinion:* The bank has a right to charge the amount back to the depositor's account, unless the depositor, relying on the truth and accuracy of the statement of account rendered him by the bank, is led to act to his detriment in a manner he would not have done but for his faith in the correctness of such statement, then the bank is bound to stand the loss. The right of the bank to hold A. Doe liable would depend on whether he would be prejudiced by the mistake if compelled to pay the money back. *Skyring v. Greenwood*, 4 Barn. & Cress. 281. *Heane v. Rogers*, 9 Barn. & Cress. 577. *Hume v. Bolland*, 1 C. & M. 130. (*Inquiry from Ariz., May, 1915, Jl.*)

Credit to wrong correspondent

1384. M bank erroneously credited a deposit to N bank instead of to H bank, and rendered a statement of account from time to time to H bank, which was acquiesced in for seven years without objection, during which time N bank became defunct. *Opinion:* After a reasonable time the accounts rendered became accounts stated, subject to correction only for fraud or mistake. The seven years' delay of the H bank by which the M bank was prejudiced in its recourse upon the N bank, was such laches as would preclude the H bank from questioning the correctness of the account. *Louisville Banking Co. v. Asher*, 112 Ky. 138. *McKeen v. Boatmen's Bk.*, 74 Mo. App. 281. *Young v. Walker*, 12 So. (Miss.) 546. *Emmons v. Stahlnecker*, 11 Pa. 366. *Gover v. Hall*, 3 Harr & J. (Md.) 43. *Brands v. Depue*, 20 Atl. (N. Y.) 206. *Hutchins v. Hope*, 7 Gill (Md.) 119. *Hemmick v. Standard Oil Co.*, 91 Fed. 332. *Bruen v. Hone*, 2 Barb (N. Y.) 586. *Leather Mfg. Bk. v. Morgan*,

117 U. S. 96. *Nat. Bk. of Commerce v. Tacoma Mill Co.*, 182 Fed. 1. *Morgan v. U. S. Mtge. & Tr. Co.*, 208 N. Y. 218. (*Inquiry from Miss., Dec., 1914, Jl.*)

Excess total of deposit slip entered in pass-book

1385. An excessive total on a deposit slip is entered in the pass-book. How shall the bank proceed to correct the error, discovered by it after the depositor left the bank. *Opinion:* The proper course is to charge the excess credit to the depositor's account and notify him that this has been done, explaining how the error occurred. If the deposit slip has been made out by the teller and the depositor should claim that he had deposited the entire amount credited to him and not consent to be charged back with the excess, the only way of settling the dispute would be by court proceedings. But if the deposit slip has been made out by the depositor, and not by the teller, this of itself would be conclusive evidence to support the claim of the bank, as the error would be simply one of addition. (*Inquiry from Ga., Feb., 1920.*)

Entry in pass-book by error

1386. An entry was made in a depositor's pass-book by error, and in balancing the account a red line was drawn through the entry. The customer claimed he made the deposit, but is unable to state what it consisted of or any business transaction leading to it. Is the entry in the bank book prima facie evidence that the deposit was made? *Opinion:* The entry in a pass-book of a credit is prima facie evidence that the deposit was made, but this can be rebutted by the bank's positive testimony of error and such evidence should outweigh the prima facie presumption and where the customer is unable to substantiate his claim by any reasonable evidence, if the matter was brought into court, the bank should be successful. (*Inquiry from Kan., Aug., 1915.*)

Recovery from depositor to whom wrong credit given

1387. A bank credited a check deposited by A to B's account, and later, when the mistake was discovered, paid A but could get no settlement with B who had drawn about all of his money from the bank and had admitted at one time that a mistake had been made. The inquiry is as to what course the bank should take. *Opinion:* The bank can sue B and by proving that the

money was credited to him by mistake, which should be easy as he has admitted it, obtain a judgment for its recovery. The bank's right of recovery rests upon the general rule supported by numerous cases that money paid under a mistake of fact to one not entitled thereto may be recovered back. See *James River Nat. Bank v. Weber*, 19 N. D. 702, 124 N. W. 952. (*Inquiry from Mo., June, 1914.*)

1388. Where a bank credits a deposit to the wrong account and the amount is checked out, the bank can recover the amount from the depositor as having been paid by mistake, without consideration. (*Inquiry from Pa., Aug., 1912, Jl.*)

1389. Where a bank erroneously credited its depositor with \$600, which the depositor drew out, it is not precluded from suing and recovering judgment against him for the amount, provided it can prove the mistake. (*Inquiry from Mont., March, 1911, Jl.*)

Over-payment of balance incorrectly figured

1390. A customer handed in to his bank several checks amounting to several hundred dollars, and from this amount a note and interest was deducted and a balance struck in favor of the customer, which was paid over. It was afterwards discovered that the balance was incorrectly figured at an excess of \$30. *Opinion:* The bank can recover the money as being paid under a mistake of fact. The fact that the error was made in figuring the balance makes the case stronger for the bank than if the balance was correctly struck and the mistake occurred in paying over the cash, for the teller's testimony of over-payment would be supported by the original figures. *James River Nat. Bk. v. Weber*, (N. Dak.) 124 N. W. 952. (*Inquiry from Ill., Feb., 1912, Jl.*)

Deposit slip for excess total figured by cashier

1391. A customer came to the bank to buy a draft for \$355, as the cashier understood him to say. He handed in certain items for deposit and remarked that he would have to borrow \$100 more to make up the amount. The cashier made out a note for \$100 and had him sign it and listed the various items including the \$100 note on a deposit slip. This totaled \$218.55. The cashier remarked it will take \$36.45 more to make the amount large enough to buy the draft and the depositor handed over this amount which was entered on the deposit slip under the total of \$218.55 and a new

total erroneously figured \$355. The cashier wrote a draft for \$355 but the depositor then said "no, I said a \$255 draft." The draft for this amount was then given the customer and deducted from \$355 total and the \$100 entered at the foot of the deposit slip as the total amount deposited and a duplicate deposit slip given the depositor for the \$100 balance which had been figured in error on the original slip. The question is whether the bank can recover the \$100 erroneously credited to the depositor on the deposit slip, in addition to recovering on the note. *Opinion:* The right of recovery will depend entirely on the question of fact whether the deposit slip receipt which was given the customer actually represented a deposit of \$100 or was an error in figuring the balance on the other deposit slip. There is no doubtful principle of law involved. The law is that a mistaken credit given by customer may be revoked and the sole question is one of fact for determination of a jury. Looking at the case as a jurymen would, the two deposit slips afford strong corroborative evidence of the bank's statement of the transaction. While the customer claims he deposited \$100 in bank of which the duplicate slip is evidence, the claim does not seem plausible for he certainly would not give his note to the bank for \$100 at the same time in order to complete the purchase price of a \$255 draft. According to the customer's version he wanted to purchase a \$255 draft and deposited in cash and checks \$255 and gave his note for an extra \$100. There would be no reason for giving the note where he had sufficient without it. It would seem in a suit against the customer that a jury would find as a fact that the deposit slip was issued in error and that the bank was entitled to recover the amount (*Inquiry from Wash., July, 1914.*)

Claim that deposit made not shown by bank's records

1392. A dispute arose as to whether or not a certain deposit had been made. The bank carefully checked over its records and every item of the size of the disputed deposit has been accounted for. The teller's daily sheets for the period in question show that he was not over this amount. The customer is not clear as to the date and can come no nearer than to give the month. The customer's husband testifies that he saw the receipt, which she claims to have lost, although he does not give its date. Is the bank liable? *Opinion:* On a question

of fact as to whether a particular deposit was made the burden of proof is on the depositor (*Jackson Ins. Co. v. Cross*, 9 Heisk, [Tenn.] 283) and the general rules as to weight and sufficiency apply. It would seem in this case that the weight of the evidence is in the bank's favor. See *French v. Eastern Trust & Bank*, 91 Me. 458, in which a verdict for the customer was set aside in a case which was stronger for him than the one now submitted. See also *Lemon v. Mechanics' Bank*, 107 N. Y. Supp. 9. (*Inquiry from Tenn., Aug., 1917.*)

Adverse claims to deposit

Deposit by A claimed by B

1393. A deposits with bank \$500, and the money is placed in savings department. A checks out in the usual manner all but \$50. B is bringing suit against both A and the bank, claiming the entire deposit of \$500 and interest thereon, claiming that the money rightfully belongs to him. At the time the money was deposited by A and until suit was brought, the bank did not know but that it rightfully belonged to A. *Opinion:* The bank, of course, is not liable to B for the money paid out under order of A before notice of B's claim thereto. When the money was deposited by A the bank had a right to assume that it lawfully belonged to A but as to the unpaid portion, the bank should hold the money and not pay it either to A or B until termination of the suit. It would seem that the proper procedure would be to make answer showing the payment of \$450 before notice of adverse claim and offering to pay the balance according as the court may direct. (*Inquiry from Ala., June, 1916.*)

Sufficiency of notice of adverse claim

1394. B having possession of A's money, deposited it in a bank to B's individual credit, the bank having no notice that the ownership is in any other than its depositor, B. In suit by X against A an attachment is issued against effects of A and served on the bank, with notice that the credits of A are thereby seized and making inquiry whether B or any other depositor held credits of A. After such notice, but before the bank answers to accompanying interrogatories, B drew a check for the amount of the deposit, which the bank honored. X, on his motion against the bank to condemn the deposit, proves that the real ownership of the fund was in A. Should the bank now

be made to pay the amount of the deposit to X, or into court, or was it right in paying its depositor's check? *Opinion*: A bank is under duty to honor its depositor's checks until notice of an adverse claim of ownership, or presentation of facts affording reasonable ground for belief that the deposit belongs to another, in which event payment to the depositor is at its peril; but the mere serving of an attachment on funds of A and making inquiry at the bank whether A has funds in the name of B or any other depositor, without specific notice of adverse claim of ownership of B's deposit, or presentation of facts affording reasonable ground for belief that B's deposit belongs to A, is not sufficient to justify the bank in refusing to pay B's check on demand. (Jaselli v. Riggs Nat. Bank, 36 App. D. C. 159. McEwen v. Davis, 39 Ind. 109. Pearce v. Dill, 149 Ind. 136. Drumm-Fluto Com. Co. v. Gerlach Bank, 92 Mo. App. 326. Nehawka Bank v. Ingersoll, 2 Neb. [Unof.] 617. Bell v. Hunt, 3 Barb. Ch. [N. Y.] 391). (*Inquiry from D. C., Jan., 1921, Jl.*)

Unclaimed deposits

New Mexico statute requiring publication inapplicable to national banks

1395. A New Mexico statute requires national and state banks to publish lists of dormant and unclaimed deposits with a view to informing the heirs of deceased depositors of such deposits, failing which it provides escheat of the money to the state. *Opinion*: The state is probably without the power to enforce such a statute against the national banks. In its application to state banks, the statute is probably constitutional, though its validity is not entirely free from doubt. State v. Clement Nat. Bk., 78 Atl. (Vt.) 944. Waite v. Dawley, 94 U. S. 527. Whitney v. Ragsdale, 33 Ind. 107. First Nat. Bk. of Elizabethtown v. Commonwealth, 137 S. W. (Ky.) 518. Easton v. State, 188 U. S. 220. Cent. Nat. Bk. v. Pratt, 115 Mass. 539. First & Second Nat. Bks. v. Auditor, 5 Cinn. Law Bull. 515. Langenberg v. Decker, 131 Ind. 471. In re Davies, 68 Kan. 791. Starwood v. Greene, 22 Fed. Cas. No. 13301. Int. Rev. Act 1868, 15 Stat. 144, Sec. 49. In re Meador, 16 Fed. Cas. No. 9375. In re Platt, 19 Fed. Cas. No. 11212. In re Strause, Fed. Cas. No. 3548. In re Phillips, Fed. Cas. No. 11097. (*Inquiry from N. M., May, 1914, Jl.*)

Unclaimed deposits in New York

1396. A person finds a savings bank book of his deceased father apparently showing a credit of many years standing. In the meantime the bank has discontinued business. What steps can be taken to prove the claim and procure the money? *Opinion*: The present Banking Law of New York requires the superintendent of banks to publish a list of unclaimed deposits every five years in a paper published in Albany and also requires the superintendent to keep in his office an index of the names of all persons entitled to any unclaimed deposits. The superintendent is authorized to take and hold as trustee for the owners any unclaimed deposits where the bank has gone out of business. This new Banking Law, however did not go into force until 1914, and the old Banking Law of 1882 simply required every bank to publish each year in a paper at Albany a list of unclaimed deposits. Presumably when the bank went out of business any unclaimed deposits were turned over to the superintendent of banks. Inquiry should be made of this officer, as to whether or not he holds in trust a deposit of this description. (*Inquiry from N. Y., Oct., 1917.*)

Dormant account in national bank

1397. Where there has been no entry in an account in a national bank, for six years or more can the depositor compel the bank to pay over the funds? *Opinion*: The rule is well settled that since a general deposit is only payable on demand, the statute of limitations does not begin to run against an action for funds so deposited until such demand. Green v. Odd Fellows, 65 Cal. 71. Mitchel v. Beckham, 64 Cal. 117. Farmers' and Merchants' Bank v. Planters' Bank, 10 Md. 422. Strong v. Com. Trust Co., 199 S. W. (Mo.) 1034. Bank of British North America v. Merchants Nat. Bank, 91 N. Y. 106. Adams v. Orange County Bank, 17 Wend. (N. Y.) 514. Girard Bank v. Bank of Pa., 39 Pa. St. 92. It follows that the depositor can compel the bank to pay over the funds after six years. (*Inquiry from N. Y., Jan., 1916.*)

Crediting of interest does not obviate reporting dormant accounts in Oregon

1398. A bank inquires with respect to savings accounts which have not been drawn against nor deposits made for seven years—Does the fact that interest has been added each six months relieve the bank from re-

porting these accounts to the state? *Opinion:* By statute in Oregon, bank officers must report as to deposits which have not been added to and no part of which have been withdrawn for more than seven years, unless such officers know the depositor to be living and they are not relieved from the duty of making such reports because of the fact that interest has been added each six months. Sec. 7378, Lord's Oreg. Laws 1910, as amended by Chap. 214, Oreg. Gen. Laws 1917. (*Inquiry from Ore., April, 1920, Jl.*)

Unclaimed deposits in national banks

1399. A national bank refers to a request by the comptroller of the currency that national banks report the amount of their dormant accounts as suggesting the possibility that the government may in the future attempt to confiscate such accounts and raises the following questions. (1) Can a bank deposit ever become outlawed? (2) If an account can be outlawed, can the state or the national government claim the funds, or may the bank retain them, crediting them to their "profit and loss accounts?" (3) What has been the practice of the larger and older banks with respect to such accounts. (4) Is there any distinction in this respect between an ordinary deposit and a certificate of deposit? *Opinion:* There is no federal legislation requiring national banks to publish lists of dormant accounts. Such statutes exist in many states, and in some cases state statutes provide for escheat to the state after a certain number of years. In Indiana there is apparently no statutory requirement as to publication or escheat and dormant deposits remain the property of the bank, which continues to be indebted to the depositor. If a statutory requirement existed it would not apply to a national bank. (1) A general deposit is not due until demand, and the statute of limitations begins to run from demand. (2) Neither the national nor state government can require a bank to pay over a dormant deposit in the absence of statute; but statutes so requiring have been held constitutional. (3) It seems to be the practice of the larger and older banks not to advertise dormant account unless compelled to do so by statute. (4) In the case of certificate of deposit, there is a conflict of authority, some courts holding that the certificate is not due until demanded and others holding that the statute runs from the date of the certificate or from the date of maturity, if it be a time cer-

tificate. See opinion No. 1396. (*Inquiry from Ind., March, 1917.*)

Bank deposit Escheat act of Pennsylvania not applicable to national banks

1400. Does the Pennsylvania statute (Laws [1915] No. 391) which requires reports of unclaimed deposits and provides that deposits and property unclaimed in banks are liable to escheat to the state apply to national banks? *Opinion:* By Section 1 of the act, it is applicable to "every person, bank organized or doing business under the laws of this commonwealth." Notwithstanding, the act contains no specific exemption of national bank's from its provisions, the state is without power to require national banks to make such reports nor to confiscate its assets by escheat. (*Inquiry from Pa., Dec., 1915.*)

Note: In 1916, Deputy Attorney General Hargest of Pennsylvania rendered an opinion that national banks in the state came within the provisions of the law; while General Counsel Elliott of the Federal Reserve Board held that the act was not intended to apply to national banks, but suggested that reports be made by national banks under protest in deference to the opinion of the Attorney General. The constitutionality of the escheat Act was upheld by the Dauphin County Court in 1918, but its applicability to national banks was not passed upon.

Guaranty of deposits

Protection of holder of interest-bearing certificate in Oklahoma

1401. Where a deposit in an Oklahoma state bank represented by interest-bearing certificate is included in the daily average upon which annual assessment is levied, and it bears no greater rate of interest than is permitted by the Commissioner, the depositor is protected by the Depositor's Guaranty Fund equally as if his deposit is on open account subject to check. Okla. Banking L., Secs. 46, 49. *State v. Corning St. Bk.*, 128 Ia. 597. *Taylor v. Hutchinson*, 145 Ala. 202. *In re St. Bk.*, 13 Pa. Co. Ct. Rep. 433. *State v. Shove*, 96 Wis. 1. *St. Sav. Bk. v. Foster*, 118 Mich. 268. (*Inquiry from Okla., Feb., 1915, Jl.*)

Holder of cashier's check as guaranteed depositor in Texas bank

1402. A bank holds a cashier's check drawn by a Texas bank, which was returned

to it marked "Bank closed." As the indorser is not responsible, the bank desires to know if it is protected by the bank guaranty deposit law of *Texas*, and if so what action it should take. *Opinion*: Where a person deposits money in a state bank in *Texas* subject to the Depositors' Guaranty Fund Law, which provides for payment in full of depositors in failed banks where the deposits do not bear interest and are not otherwise secured, and receives therefor a cashier's check which he indorses for value to a bank in another state, the indorsee bank is to be regarded as a depositor within the definition of the law, and entitled to payment in full out of the Guaranty Fund. (*Lummus Cotton Gin Co. v. Walker* [Ala.] 70 So. 754. *Brown v. Sheldon State Bank*, [Iowa] 117 N. W. 289. *State v. Corning State Sav. Bank* [Iowa] 113 N. W. 197. *McEachin's Tex. Civ. St. Ann.*, tit. 14 art. 486. And see *State Sav. Bank v. Foster*, 118 Mich. 268). As to the procedure in filing claims against the insolvent bank, see *McEachin's Tex. Civ. St. Anno.*, tit. 14, arts. 463, 365. (*Inquiry from N.M., Jan., 1920, Jl.*)

Guaranty of deposits—state laws

Note: The following states have passed laws relative to guaranty of deposits: *Kansas*, (1915) Sec. No. 595-612; Sec. 606 amended by Laws 1917, c. 678. amended 1921. *Mississippi*, Laws 1918, c. 165, p. 179 Sec. 35; *Hemingways Annotated Mississippi Code* 1917 No. 3591 etc. *Nebraska*, Rev. Laws (1913) Art. 1, c. 6; 1917 c. 6, p. 59; 1919, c. 17, p. 78. *North Dakota*, 1917, c. 126, p. 177; 1919 c. 110; p. 138; 1919, c. 147, p. 198; *Bank of North Dakota Created*, Sec. 10 deposits therein guaranteed by state. *Oklahoma*, 1912, Sec. 298-307. *South Dakota*, Rev. Code 1919, No. 9005-9031, Laws (1919) cc. 122, 123, pp. 107, 108. *Texas*, Bank Deposit Guaranty Law, Complete Tex. Statutes of 1920; Arts. 445-517. Same as Acts 1909, 2S. S. p. 406, etc. *Washington*, *Pierce's Code* (1919) Sec. 333-354. Amended 1921.

Statutory limit of deposit liability

Limit in proportion to capital

1403. (1) A bank inquires whether there are any states that prescribe a relationship or proportion of bank capital to bank de-

posits, i. e. any banking laws which make mandatory an increase of capital upon certain increased deposits. (2) Opinion is desired as to whether there should be a fair proportion of, say, not over five or ten of deposits to one of capital. Is it a proper precaution the state should take to protect its population? *Opinion*: (1) In *Iowa* any savings bank may receive deposits equal to twenty times the aggregate amount of its capital and surplus, but no greater amount without a corresponding increase. In *Texas*, if it shall appear from a statement of the average daily deposits for the year ending November 1st, that they amount to more than five times the capital and surplus, if capital not more than \$10,000, or more than six times, if capital and surplus more than ten and less than twenty thousand dollars, or more than seven times, if more than twenty thousand and less than forty thousand dollars, or more than eight times, if more than forty thousand and less than seventy five thousand dollars; or more than nine times, if more than seventy five thousand and less than one hundred thousand dollars, or more than ten times capital and surplus, if capital stock is \$100,000, or more, then the State Banking Board may require a state bank to increase its capital stock by 25% thereof within sixty days. In *Kansas*, it is held to be unlawful for any state bank to accept deposits continuously for six months in excess of ten times its paid-up capital and surplus. In *California*, the limit of deposit liability to paid-up capital and surplus, in the case of commercial banks, is ten to one. In *Illinois*, banks in cities and villages of from ten to fifty thousand inhabitants must have a minimum capital of \$50,000, but banks in such cities with capital of less than \$100,000 cannot accept deposits in excess of five hundred thousand dollars without increasing capital. Indeed, not more than ten states, and probably less than that number, have provisions limiting the amount of deposits in proportion to capital, and require and increase of capital when the deposits exceed the prescribed limit. (2) The Legislatures of some states, as observed supra, believe in so doing, but the very large proportion have not, as yet, made any such requirements, nor does the National Bank Act contain any such provision as to national banks. (*Inquiry from Ind., Nov., 1920.*)

DRAFTS AND BILLS OF EXCHANGE

Exchange clauses

Draft payable "with exchange"

1404. A bank receives a draft for collection drawn by an individual on another in bank's town, payable "with exchange." The bank is instructed to remit par. The drawee refuses to pay exchange in addition, but tenders face of draft, and it is desired to know if the draft is protestable. *Opinion:* The draft would be satisfied by tender of the amount of its face without the exchange, and it would not be properly protestable for refusal to pay exchange. The draft being payable in the place of the drawee and not providing for exchange on another place but simply providing for payment "with exchange," the words "with exchange" would probably be held indefinite and without effect. (*Inquiry from La., March, 1920.*)

Effect of words "with New York exchange"

1405. A draft payable in Philadelphia "with New York Exchange" was presented for payment. The acceptor tendered the face amount in New York exchange, which was refused by the collecting bank. The collecting bank considered "with New York Exchange" meant "plus New York Exchange" and required the payment of the cost of exchange on New York. *Opinion:* The draft called for payment of the face amount plus the cost of exchange on New York, and the collecting bank would be justified in protesting and returning the draft. *Chandler v. Calvert*, 87 Mo. App. 362. *Hogue v. Edwards*, 9 Ill. 153. *Haslack v. Wolfe*, (Neb.) 92 N. W. 574. *Lowe v. Bliss*, 24 Ill. 168. *Buck v. Harris*, 125 Mo. App. 365. *Security Tr. Co. v. Des Moines Co.*, 198 Fed. 331. (*Inquiry from Conn., March, 1914, Jl.*)

Original and duplicate

Words "duplicate unpaid" on draft

1406. The words "duplicate unpaid" do not affect the negotiability of a draft but they constitute notice to the purchaser of the existence of a second draft, payment of which would discharge the draft he is buying. (*Inquiry from S. D., Feb., 1912, Jl.*)

Rights of purchaser of original where duplicate paid to another holder

1407. A bank has one part of a bill of

exchange drawn on a New York bank. It has printed in one corner "Original if duplicate unpaid." The instrument was cashed by one of the bank's customers for the person named as payee. It was returned to the bank stamped on its face "Payment stopped." Also there was a printed slip attached reading "Duplicate paid." Bank wishes to know if exchange drawn thus can be refused payment provided it is indorsed by the proper parties, and is held by an innocent third party. *Opinion:* Where a bill of exchange is issued in a set of two parts, and the original contains the condition that it is payable only if the duplicate is unpaid, the two parts constitute one bill, and payment by the drawee of the duplicate extinguishes the bill, and the liability of the drawer upon the original. The sole recourse of a purchaser of the original from the payee is against the latter, and he cannot hold the drawer liable. *Coras v. Thalmann*, 123 N. Y. S. 97. *Casper v. Kuhne*, 147 N. Y. S. 502. *Wells v. Whitehead*, 15 Wend. [N. Y.] 527. *Kenworthy v. Gopkins*, 1 Johns. Cas. [N. Y.] 107. *Holdsworth v. Hunter*, 10 B. & C. 449. Sec. 180 Neg. Inst. Law. (*Inquiry from Miss., Feb., 1920, Jl.*)

Bankers foreign drafts

Liability of drawer of foreign draft

1408. A bank states that in exchange for value received, it issues its drafts to the purchasers upon drawees in Poland to whom the bank's New York correspondents make remittance to cover the drafts. The bank inquires as to its responsibility in case the drawees do not honor the drafts, or honor them in different currency or for a lesser amount than the draft as drawn. *Opinion:* The bank's liability is as drawer of a foreign bill of exchange. Under the Negotiable Instruments Law the drawer engages "that on due presentment the instrument will be accepted or paid or both, according to its tenor, and that if it be dishonored and the necessary proceedings on dishonor be duly taken, he (the drawer) will pay the amount thereof to the holder or to any subsequent indorser who may be compelled to pay it." If, therefore, the foreign draft is duly presented, dishonored, protested, and due notice of protest is given to the bank, it will be liable. If, however, the holder accepts payment in a different currency or in a less amount than called for

by the draft, the drawer would be discharged (*Inquiry from N. Y., Feb., 1920, Jl.*)

Taking up unrepresented foreign draft

1409. During September and October 1915, the X bank issued to some of its customers foreign exchange drawn on G. & Company of London, England, through a New York bank. These drafts were mailed to different parties abroad in the belligerent countries. The customers of X bank later advised it that their families had not received the money, so the X bank traced the drafts through its New York correspondent, and found they had not been presented for payment. Accordingly the X bank placed a stop-payment order on them, which the London office acknowledged, as well as the bank in New York, and the money was returned to X bank's New York correspondent, with the advice that X bank was not relieved from responsibility should the drafts be presented later. The X bank asks when the Statute of Limitations will expire on such transaction, and whether it would be protected in surrendering this money to its customers without indemnity bonds. *Opinion:* It would not be safe in the case stated for the bank drawing these drafts to surrender the money without a good and sufficient indemnity bond. True, payment has been stopped, but a liability as drawer may remain for there is always the possibility that the draft has been negotiated to an innocent purchaser within the reasonable time period for negotiation which, in the case of a banker's draft, might cover several months. By the Wyoming statute the right of action based upon these drafts would expire five years from the date of such drafts. Wyo. Comp. Stat. 1910, Sec. 4298. (*Inquiry from Wyo., March, 1919.*)

Banker's domestic drafts

Statute of limitations on long outstanding bankers' demand drafts

1410. A bank has outstanding a number of small drafts issued by it from five to fifteen years ago, and asks whether they can properly be credited to loss and gain. *Opinion:* In some jurisdictions the courts have held that paper payable on demand does not become due until demand is made, so that a demand is necessary before the statute of limitations will begin to run. Lee v. Cassin, 15 Fed. Cas. 8184. Nott v. State Nat. Bk., 51 La. Ann. 871. Nash v. Woodward, 62 S. C. 418. Barough v.

White, 4 B. & C. 325. Yet the law is well settled in most jurisdictions that an instrument so payable with or without interest is due immediately, and that the statute runs in favor of the maker from the date of its execution. Sullivan v. Ellis, 219 Fed. 694. Jones v. Nicholl, 82 Cal. 32. Ade v. Ade, 181 Ill. App. 56. De Raismes v. De Raismes, 70 N. J. L. 15. Howland v. Edmonds, 24 N. Y. 307. Causey v. Snow, 122 N. C. 326. In re Harttrauft, 153 Pa. St. 530. According to the rule above stated, the statute of limitations would commence to run on these instruments from their respective dates, and by the Iowa statute would be barred in ten years from the date thereof. Iowa Code 1897, Sec. 3447. and in view thereof, it would be necessary to hold these accounts open for a period of ten years before crediting the respective amounts to "loss and gain." (*Inquiry from Iowa, Jan., 1919.*)

Bank exchange on another town

1411. A bank's customer buys exchange on another town frequently asking that drafts be made payable to a bank in that town. The drafts are usually forwarded by the customer for his credit. The bank asks whether the bank in whose favor draft is made payable would be responsible for the proper credit of the item. *Opinion:* The bank to whom the draft is made payable would be responsible to the customer for the proper credit of the item and there would be no responsibility resting upon the drawer of the draft. (*Inquiry from Cal., Feb., 1919.*)

Rubber stamps

Acceptance of draft by rubber stamp

1412. A bank inquires whether it is proper for a cotton mill to use a rubber stamp acceptance on bills of exchange drawn against existing values in farm products. *Opinion:* Signatures by rubber stamp indorsement have been held valid by the courts. Homer v. Missouri Pac. Ry. Co., 79 Mo. App. 285. R. Wallace & Co., 1 Tex. App. Civ. Cas. Sec. 753. Sequin M. & P. Co., v. Guinn, (Tex. Civ. App. 1911) 137 S. W. 456. Melino Natl. Bk. v. Cobbs, (Tex. Civ. App.) 115 S. W. 345. (*Inquiry from Tex., Nov., 1918.*)

Mistakes in payment

Draft payable to creditor after notice that debt assigned

1413. The purchaser of a bill of goods

from a firm in New York City brought the invoice of the goods to his bank, which at his request made and sent a draft payable to the firm in payment for the goods. The invoice contained the following notation printed in red ink, which was overlooked by the bank and the debtor: "This bill is assigned and payable to A, B, & Co., Bankers." *Opinion:* In the event the firm did not refund the amount of the draft which was paid by mistake, the debtor who had notice of the assignment must pay again to the assignee. The notice of the assignment printed in red ink was of such prominence as to be regarded as sufficient. The bank would not be liable for negligence in overlooking the notice of assignment, because debtor also overlooked same and the mistake was mutual. *Campbell v. Sneed*, 9 Ark. 118. *Turner v. McCarthy*, 22 Mich. 265. *Hogan v. Black*, 66 Cal. 41. *Pulliam v. Cantrell*, 77 Ga. 563. *Deach v. Perry*, 25 N. Y. St. Rep. 891. *Com. v. Sides*, 176 Pa. St. 616. *St. v. Jennings*, 10 Ark. 428. *Graham Paper Co. v. Pembroke*, 124 Cal. 117. *Met. L. Ins. Co. v. Morrow*, (Ga. 1912) 73 S. E. 607. *Manning v. Matthews*, 70 Iowa 503. *Nat. Fertilizer Co. v. Thomason*, 109 Ala. 173. *Renton v. Monnier*, 77 Cal. 449. *Crouch v. Mullen*, 141 N. Y. 495. *City Bk. v. Thorp*, 79 Conn. 194. *Stoner v. Zachery*, 122 Iowa 287. (*Inquiry from Ariz. Aug., 1914, Jl.*)

Remittance of proceeds b/l draft to wrong person

1414. A bank collected A's bill of lading draft from B and remitted the proceed by mistake to C, who was a creditor of B on open account; C took the money and applied it on B's debt and thereafter settled with him and relinquished security for indebtedness. The bank paid A and having paid twice made demand on C. C refused to refund, claiming that it is B's duty to return the money to the collecting bank. *Opinion:*

It is a general rule that money paid under a mistake of fact may be recovered back, and unless C received this money in the honest belief that it was intended as a payment on account of B's indebtedness and on faith thereof surrendered the security to B, C would be liable. *Clifford Bk. Co. v. Donovan Com. Co.*, 195 Mo. 262. *Security Co. v. King*, (Ore.) 138 Pac. 465. *Behring v. Somerville* (N. J.) 44 Atl. 641. *Pine Belt Lumber Co. v. Morrison* (Ga.) 79 S. E. 236. (*Inquiry from Tex., July, 1915, Jl.*)

1415. A bank in Montana received from a Kentucky bank a sight draft for \$72.67 with a bill of lading attached covering a balance claimed due on a shipment of liquor from a Kentucky distillery to a local liquor dealer. The local dealer paid the Montana bank the amount, surrendered the bill of lading and obtained his goods. The Montana bank by mistake sent its draft payable to the distillery instead of to the bank. The distillery under the misapprehension that the draft came from the local dealer, instead of turning it over to its bank or returning it to the Montana bank, indorsed it in blank and returned it to the local dealer. The dealer cashed it at the Montana bank and held the money, claiming that the distillery was indebted to him for \$68. The Montana bank wishes to be advised. *Opinion:* The local dealer is not a holder in due course and the Montana bank has a right of recovery of the money paid to him under the rule that money paid under mistake of fact is recoverable. *German Sec. Bk. v. Columbia Fin., etc., Co.*, (Ky.) 85 S. W. 581. *Yarborough v. Wise*, 5 Ala. 292. *Pelettier v. St. Nat. Bk.*, (La.) 41 So. 640. *Behring v. Somerville*, (N. J.) 44 Atl. 641. *Fegan v. Great North, Ry.*, (N. Dak.) 81 N. W. 39. *Peterson v. Union Nat. Bk.*, 52 Pa. 206. (*Inquiry from Mont., Feb., 1918, Jl.*)

FORGED PAPER

Cross Reference—See Altered and Raised Paper, 266-231

Forged and raised check statute

1416. A statute recommended by the American Bankers Association, limiting the time of liability of a bank to its depositor for payment of forged or raised checks, the time limit ranging from thirty days to one year after the return of the paid vouchers to the

depositor, or in some stated period after notice that they are ready for delivery has been passed in the following states: California, Idaho, Illinois, Iowa, Kansas, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Jersey, New York, North Carolina, North Dakota, Ohio, Oregon, Rhode Island, South Dakota, Vermont, Washington, West Virginia, Wisconsin and Wyoming.

Payment of forged check not chargeable to depositor

Claim of forgery by depositor three months after return of vouchers

1417. A bank paid two small checks which were charged to account and statement rendered a few days later. Nearly three months later the depositor claimed the checks were forgeries. Is the bank compelled to refund to depositor the amount of these checks? *Opinion:* The bank will be compelled to refund to its customer the amount of the forged checks paid by it in the absence of proof that the three months' delay after receiving a statement of his account before he notified the bank of the forgery, prejudiced its position. *McKeon v. Boatmen's Banks*, 74 Mo. App. 281. The rule of law is clear that payment of a forged check cannot be charged to the depositor's account, nor can money paid on a forgery of the signature be recovered from a bona fide holder who is free from negligence. As the delay to notify the bank of these checks did not result in its paying subsequent similar forged checks, it does not seem that the case is one where the bank has been injured for failure to promptly notify and, therefore, the amount charged to the customer must be refunded to him. (*Inquiry from Tex., Nov., 1914.*)

Check bearing genuine signature of treasurer but forged counter signature of president

1418. A bank paid a check of a corporation drawn payable to bearer, signed by the treasurer, the counter signature of the president being forged. The check was stolen and cashed by an employee. The understanding between bank and customer was that all checks should have both signatures. The bank questions as to its right to charge the amount to the corporation's account. *Opinion:* A check signed by one only and bearing a forgery of the other signature is not an authority and direction to the bank to pay, and is not chargeable in the absence of negligence on the customer's part. *First Nat. Bk. v. Shaw*, 149 Mich. 362. (*Inquiry from Ohio, June, 1909, Jl.*)

1419. A drew his check for \$27 to order of "John Jones." B, a merchant, cashed the check for a merchant giving the name of John Jones, and deposited and received credit for the check with the drawee bank. Two days later A notified the bank that the check had been stolen and the indorsement was a forgery. B claims there was careless-

ness on the part of A and objects to being charged with the amount. *Opinion:* The check having been paid on a forgery of the indorsement cannot be charged to the drawer's account, and the drawee can recover from the person receiving payment. The amount is therefore chargeable to B. The facts stated disclose no negligence on the part of A, which would estop him from questioning the validity of the payment. *Russell v. First Nat. Bk.* 56 So. (Ala.) 868. *Weisberger Co. v. Barberton Sav. Bk. Co.*, 95 N. E. (Ohio) 379. (*Inquiry from Ala., May, 1914, Jl.*)

Payment on forged indorsement not chargeable

1420. A bank paid at its window a check drawn upon it which had been mailed to payee but which he claimed he never received, and, while the check is genuine, both maker and payee named claimed the indorsement to be a forgery. *Opinion:* If the fact is established that the indorsement of the check is a forgery, the bank would be the loser, as it could not charge the amount to its customers account. (*Inquiry from Mo., Nov., 1917.*)

Drawer not liable to purchaser unless negligent

1421. A state penal farm had a "trusty" acting as bookkeeper in the farm office, who had full access to cash, checks and records and was allowed to go to town frequently, dressed in citizens clothes. He called at the bank where the farm manager kept a personal account and deposited a draft for \$840 drawn by M—— Mgr. on the Board of Penitentiary Commissioners to the credit of the personal account of M, requesting that he be paid \$500 thereof in cash, which was done. The draft was a forgery and when received by the drawee, M was advised by telephone that the draft, if paid, would overdraw his account, to which he replied denying making such a draft. The "trusty" was at liberty for several hours thereafter and escaped that night. The banks asks whether under these circumstances, there is any ground for recovering the amount from the prison authorities. *Opinion:* While it was careless of the prison authorities to repose such trust and allow the "trusty" such freedom, the facts would not be sufficient, under the authorities, to make them liable to the bank. The bank itself was negligent in paying the money to the "trusty" on his mere oral statement that he was authorized by the manager to receive it.

The bank is the loser because of paying its money upon a forged check. (*Inquiry from Tex., May, 1919.*)

No duty of drawer to purchaser to examine returned check and detect forged indorsement

1422. A business house sent a check to its traveling salesman, which he did not receive, whereupon he sent several letters and a telegram to the company advising of the non-receipt. Then the office manager wrote him that he must be mistaken as the company had the voucher from the bank with his signature. The explanation was that the mail had been stolen and the salesman's indorsement forged. This check had been cashed by a bank and subsequently cleared through the clearing house, bearing the usual bank endorsement, including the statement, "Previous endorsements Guaranteed." It was paid late in August and returned to the maker about September first. About the middle of October the business house asked the bank which cashed the check to refund and, on refusal, sent the check to its bank, which asked refund on the strength of the clearing house endorsement. The cashing bank defends on the ground of unreasonable delay in calling attention to the forgery. Is this a good defense? *Opinion:* A bank which cashes a check under forged indorsement acquires no title and ordinarily must refund the money collected thereon. In this case the paid check was returned to the drawer as a voucher and, although the drawer had the payee's signature on file—the payee being its own salesman—and although it wrote the payee that it had his signature to the check and delayed a month and a half in discovering its mistake, such facts would probably not estop the drawer nor the drawee from asserting the forgery as against the purchasing bank. In *Prudential Ins. Co. v. National Bank of Commerce*, 125 N. E. (N. Y.) 824 it was held that where the depositor is in possession of the genuine signature of the payee, there may be a duty to the drawee bank of examination as to forgery of indorsement and notification and whether or not the drawer is negligent, is a question for a jury. See opinion No. 1436. But it is improbable that a purchaser under forged indorsement could maintain that the drawer was under duty to him to examine and detect forgeries of indorsements of checks returned by the bank as paid. In this case the general rule will doubtless apply that money paid by the

drawee upon forged indorsement is recoverable from the bank receiving payment. (*Inquiry from Kan., Feb., 1921.*)

Payment chargeable where drawer negligent, or estopped

Delay in notifying bank after discovery of forgery

1423. A depositor having knowledge that his signature was forged to certain checks, which were returned to him as paid vouchers by the bank, omitted for a considerable period of time thereafter to give the bank notice. *Opinion:* It was the depositor's duty to promptly notify the bank upon the discovery of the forgery of the checks. Neglect of such duty relieved the bank of liability, if it can show resulting damage, and in some jurisdictions the bank is absolved from liability, irrespective of such damage. *Leather Mfrs. Nat. Bk. v. Morgan*, 117 U. S. 96. *Murphy v. Met. Nat. Bk.*, 191 Mass. 159. *McNeely Co. v. Bk. of North America*, 221 Pa. 588. *Connors v. Old Forge Disc. & Dep. Co.*, 91 Atl. (Pa.) 210. (*Inquiry from Ala., Aug., 1916, Jl.*)

1424. A bank cashed a check of \$45 signed by John Doe and indorsed by Richard Roe and Peter Roe. When John Doe received the cancelled check from his bank, he discovered forgery of his signature but did not notify the bank until eight months thereafter. It also developed that Richard Roe's indorsement was forged. The bank seeks to escape liability to its depositor, or if recovery is allowed to have recourse on Peter Roe. *Opinion:* Where a bank pays a forged check and returns same to its customer as a voucher and the customer, after discovering the forgery, fails for eight months to notify the bank thereof, the bank can hold the customer responsible for the amount, if the unreasonable delay has worked to its injury. Where a bank pays a check upon which both drawer's signature and payee's indorsement are forged, some courts hold, and others deny, the bank can recover the money as paid upon a forgery of the indorsement, and in Nebraska the Supreme Court has expressed the opinion that the rule allowing recovery in such case is sound. In this case the bank could probably prove injury caused by delayed notification and hold the customer responsible; furthermore, it would have right of recovery from Peter Roe. *Janin v. London & San Fran. Bk.*, 92 Cal. 14. *Murphy v. Met. Nat. Bk.*, 191 Mass. 159. *McNeely Co. v. Bk. of*

North America, 221 Pa. 588. St. Bk. of Chicago v. First Nat. Bk. of Omaha, 127 N. W. (Neb.) 244. (*Inquiry from Neb., Nov., 1918, Jl.*)

1425. A bank wishes to know whether A, the drawer of a check, has lost his right of recovery from the drawee bank, B, on a check which was honored by the latter, bearing a forged indorsement of the payee's name, by reason of the negligence of A in failing to give bank B notice of such forgery for two months after its discovery. *Opinion:* The general rule is that the drawee bank which pays a check upon which the payee's indorsement is forged does not pay according to authority of the drawer, and cannot charge him with the payment, but has a right of recovery from the bank receiving payment, which has collected money upon an instrument to which it has no title. The application of this rule would not be changed, even though the forgery of the indorsement was not discovered by the drawer for a considerable period after the payment, for the drawer, ordinarily, is not obliged to examine returned checks as to indorsement. There is a conflict of authority as to the effect of delay in notifying of a forgery, after discovery thereof. According to the majority of cases, the mere delay is not sufficient to create an estoppel, but it must be affirmatively proved by the bank to the satisfaction of a jury that injury resulted therefrom which an earlier notice would have prevented. (*Janin v. London, etc., Bank*, 92 Cal. 14. *Yatesville Bank Co. v. Fourth Nat. Bank* [Ga. 1911] 72 S. E. 528. *Cont. Nat. Bank v. Met. Nat. Bank*, 107 Ill. App. 455. *Wind v. Fifth Nat. Bank*, 39 Mo. App. 72. *Murphy v. Met. Nat. Bank*, 191 Mass. 159. *Hardy v. Chesapeake Bank*, 51 Md. 562. *Harlem, etc., Build. Assn. v. Mercantile Trust Co.*, 31 N. Y. Suppl. 790. *Weinstein v. Nat. Bank*, 69 Tex. 38. *Brixen v. Deseret Nat. Bank*, 5 Utah 504. *Contra: McNeely Co. v. Bank of N. Amer.*, 221 Pa. St. 588, 70 Atl. 891. *Leather Mfg. Nat. Bank v. Morgan*, 117 U. S. 96). The more equitable rule would seem to be that enunciated by the Pennsylvania and Federal Courts, which is to the effect that any delay on the part of the depositor, after learning of a forgery, in notifying the bank thereof, is a breach of its duty to the bank, for it deprives the bank of a substantial right to immediately proceed both civilly and criminally against the forger, and although such procedure, so far as recovering anything, might be fruitless,

yet it nevertheless should have the right of which the depositor by failing to give prompt notice, deprives it. (*Inquiry from Tex., Nov., 1920.*)

Drawer cashing his own forged check

1426. A check was cashed for a third person by the payee A in ignorance that it bore his own forged signature as drawer and was deposited by him in B bank and collected from C bank upon which it was drawn, A carrying an account in both banks. *Opinion:* The check is chargeable by drawee bank to A's account, he being estopped the forgery of his own signature. (*Inquiry from Minn., Feb., 1915, Jl.*)

Check signed by treasurer left exposed and counter signature forged

1427. A corporation check requiring the signature of the treasurer and the counter signature of the manager was signed in blank by the treasurer, carelessly exposed, then stolen, the counter signature of the manager forged and afterwards paid by the bank, after it had been cashed by another bank upon the forgery of the indorsement of a fictitious payee. The corporation failed to notify its bank of the theft. *Opinion:* While the mere carelessly leaving exposed of a check book containing blank checks has not been held responsible negligence on the part of the customer, the leaving of such checks exposed containing the genuine signature of one of two officials required to sign, coupled with the fact that the customer did not notify the bank and place it on its guard, might be held sufficient to relieve the bank from the application of the general rule that money paid on a forged check is not chargeable and to make the customer responsible. *Robb v. Pa. Co.*, 186 Pa. 456. *Williamsburgh Tr. Co. v. Tum Suden*, 120 App. Div. (N. Y.) 518. (*Inquiry from N. Y., June, 1909, Jl.*)

Statutory limit of bank's liability in South Dakota

1428. What is the time limit in South Dakota in which a depositor must notify the bank of forgery of his check? *Opinion:* The statute in South Dakota relieves a bank from liability to depositor for payment of a forged check unless the depositor notifies the bank of the forgery within three months after return to him of forged check as voucher. S. Dak.—S. L. 1905, Chap. 56. (*Inquiry from S. D., Dec., 1913, Jl.*)

Check bearing forged and genuine signatures

1429. The treasurer of a corporation signed checks in blank and left them in the drawer of the desk of his confidential clerk for counter signature of the president by rubber stamp. The desk drawer was accessible to a bookkeeper who wrongfully appropriated the checks, affixed the rubber stamp signature of the president thereto, filled out and negotiated the checks to a bank, which collected the same from the drawee. *Opinion:* Under the law of Missouri the corporation is estopped by its negligence from denying the genuineness of its signature, and from asserting that such checks never had a valid inception by delivery. It can hold neither the purchasing bank nor the payor, but is chargeable with the amount of such checks. The facts here make out a case of conduct on the part of the corporation so grossly negligent as to estop it from denying the delivery of the checks as completed instruments. *Allen Grocery Co. v. Bk. of Buchanan Co.*, 182 S. W. (Kan.) 777. *Neg. Inst. A.*, Sec. 15 (Comsr's dft.), Sec. 9986, (Kan. R. S. 1909). *Robb v. Pa. Co.*, 186 Pa. 456. (*Inquiry from Mo.*, March, 1919, *Jl.*)

Estoppel of labor union to question forgery of counter signatures by treasurer

1430. A labor union carried three accounts with bank A—a "General Fund," "Sick Fund" and "Savings Account." The officers authorized to sign checks were B, the treasurer, countersigned by C, the president and D the recording secretary. B had been handling the business of the union for some time, making all deposits, and attending to the accounts and was under bond. A cashed a check on the "Savings Account" for him, signed by B, and D, and F, as president pro tem. B had the pass-book with him and entry of amount was duly made in it by paying teller. Later the bank cashed another check for B, drawn on the "Sick Fund," signed by B, C, and D. It is claimed that the signatures of C, D and F on the checks are forged, all three persons making affidavits to this effect. The question is, is the bank responsible? *Opinion:* A bank is bound to know the signatures of its depositors, and if it pays a check upon which the drawer's signature is a forgery, it cannot charge the amount to his account in the absence of negligence and fraud on his part. A check signed in the names of three officials of an association, the signatures of two of whom were forged, would be a forged check

within this rule. The question here is whether there was responsible negligence on the part of the union. The treasurer was bonded and entrusted with the financial management of the business of the union; he made all deposits and attended to the bank accounts. It would seem this state of facts whereby the union placed the treasurer in a position of trust and confidence, accrediting him to the bank as their financial manager, would be sufficient to estop it from questioning the validity of the payment of the checks to the treasurer, even though he had forged the signatures of two other officials thereon. See *Journal March 1919*, p. 486, also, *Israel v. State Nat. Bank*, 124 La. 885, 50 So. 783. *Otis Elevator Co. v. First Nat. Bank of San Francisco*, 163 Cal. 31, 124 Pac. 204. As to the amount paid out of the "Savings Account" on presentation of the pass-book and entered in it, the courts hold that where the bank prints a rule in its savings pass-books that payment made to a person producing the book shall discharge the bank, such rule is reasonable and binding on the depositor, and the bank is discharged by such payment where it uses reasonable care, even though made on a forged order to a person other than the owner of the deposit. (*Inquiry from Fla.*, June, 1919.)

Drawer in North Carolina estopped to claim forgery after six months

1431. A forged check is paid by the drawee bank. Some months later the forgery discovered, and the bank's customer makes demand upon it for recovery. Prior indorsers when requested to do so, refused to make refund, and it is asked if the drawee bank has any recourse upon them, or is a permanent loser? *Opinion:* The drawee must be the loser, unless it can charge the payment to its customer. Ordinarily payment of a forged check is at the loss of the bank. But there is a duty of the depositor to examine his pass-book and returned vouchers within a reasonable time and report to the bank anything wrong, and if he fails in this duty, and as a result of the delay, the bank is damaged, the depositor is responsible. In North Carolina, furthermore, there is a statute to the effect that no bank shall be liable to a depositor for the payment by it of a forged check unless within six months after the return to the depositor of the voucher, the depositor shall notify the bank. In this case, if the depositor neglected for more than six months after return of the forged check, to notify the bank, he

would be chargeable with the amount. (*Inquiry from N. C., June, 1916.*)

Payment on forged indorsement to treasurer of drawer who delays two years in making claim

1432. A check drawn by a loan association to the order of A on bank B was cashed at that bank by the treasurer of the association who indorsed after what purported to be the indorsement of payee. Over two years afterwards the association claiming that the indorsement of the payee is a forgery, seeks to hold bank B liable. *Opinion:* The general rule is that a bank which pays on a forgery of the indorsement cannot charge the amount to the drawer. But in this case the payment was made to the treasurer of the drawer who indorsed the check, and this would raise the question whether the drawer would be estopped from questioning the validity of the payment, although it might be held that such transaction was irregular and charge the bank with the duty of inquiry. The New Jersey Statute providing that a bank shall not be liable to a depositor for payment of a forged or raised check unless within one year from return of the voucher, the depositor notifies the bank that the check paid was forged or raised, has been held not directly but by implication in the case of *Pratt v. Union Nat. Bank*, 79 N. J. L. 117, 75 Atl. 313, to apply to forged indorsements and under this decision if such ruling be adhered to, it would seem that, after one year from the return of the voucher, bank B would not be liable to its depositor. (*Inquiry from N. J., May, 1919.*)

Drawer delivering check to person believed to be payee

1433. A railway pay check, made payable to John Smith, is by mistake delivered by the paymaster to a person whom he believes to be John Smith, but who is not the true payee, and the money is paid by the drawee bank upon indorsement of the payee's name by the person to whom the check was delivered. Will the company be responsible by reason of the mistake? *Opinion:* There are cases which hold that in such circumstances the loss should be borne by the drawer of the check, on the theory that the check was delivered to the precise person intended to receive payment, and his indorsement of the name of the payee passes good title. (See, for example, *Maloney v. Clark*, 6 Kan 82. *Emporia Nat. Bank v.*

Shotwell, 35 Kan. 360. *Land Title, etc., Co. v. North, Nat. Bank*, [Pa.] 46 Atl. 420). There are other cases to this effect, but there are some cases contra. (See *Jung v. Second Ward Sav. Bank*, 55 Wis. 364, which has an indirect bearing on the point). It has, also, been held to be responsible negligence on the part of the drawer of a check to address the envelope by mistake to the payee at an address in a city other than where he resides, whereby a person of the same name receives the check from the postmaster, indorses and collects it. In such case the drawer, and not the payor bank, is the loser. (*Weisberger Co. v. Barberton Sav. Bank* [Ohio] 95 N. E. 379). From the above it would appear that there would be a fair chance in the case of delivery by the railway company of a pay check to the wrong person, that the company would be held responsible by reason of the mistake. (*Inquiry from Wis., Aug., 1919.*)

Due diligence in examining statement

1434. What is the rule of diligence required of a country bank in checking up daily statement from its city correspondent? *Opinion:* It is the duty of a country bank receiving a daily statement from its city correspondent to check up the statement, use due diligence in examining it and to give due notification of any errors. What constitutes due diligence has not yet been specifically defined by the courts. In the light of a recent New York decision in the *Morgan* case discussing the degree of diligence required by a depositor, upon the return of a statement of accounts and vouchers to a depositor, reasonable diligence requires a very prompt examination of the account and reporting of errors, failing which the bank will not be chargeable in the event subsequent forged checks were paid which would not have been paid had the depositor exercised due diligence in the matter of prompt examination and notification. *Morgan v. U. S. Mortgage & Tr. Co.*, 208 N. Y. 218. (*Inquiry from S. D., Dec., 1914, Jl.*)

Drawer's duty of examination and verification

1435. A series of checks covering a period of over a year, signed by a wife payable to her husband, were cashed by a bank for the husband and paid by the drawee. During this time the pass-book was balanced several times and no objection to the vouchers was made by the wife. Three years later she claimed that all of the checks were forgeries. *Opinion:* The drawee is not responsible to the depositor who is estopped

by the neglect of duty to make examination and give notice of the forgeries. The bank receiving payment is not liable because after the first check was paid it was justified in cashing the successive checks. *Morgan v. U. S. Mtge. & Tr. Co.*, 101 N. E. (N. Y.) 871. *Young v. Lehman*, 63 Ala. 19. *Johnston v. Bk.*, 27 W. Va. 348. *Nat. Bk. of Rolla v. First Nat. Bk.*, 141 Mo. App. 719. *First Nat. Bk. v. Bk. of Cottage Grove*, 117 Pac. (Ore.) 293. (*Inquiry from S. C., Sept., 1913, Jl.*)

1436. The rule stated in the case of *Morgan v. U. S. Mortgage & Trust Co.*, 208 N. Y. 218, 101 N. E. 171, has been generally held not to extend to an examination by the depositor of the indorsements of the payee of his checks to ascertain the genuineness of such indorsements. But in the case of *Prudential Ins. Co. v. National Bank of Commerce*, 227 N. Y. 510, 125 N. E. 824, decided on January 6, 1920, it was held that a bank depositor, receiving a statement with paid checks, is bound to examine the account and checks, and report to the bank without unreasonable delay any errors discovered, and while such duty does not generally extend to an examination of the payees' indorsements to ascertain their genuineness, yet, when the depositor possessed the payees' genuine signatures, whether he was negligent in not discovering forged payee's indorsements was a question of fact for the jury.

Ten months' delay in notifying bank of forgery

1437. Inquiry is made as to whether a delay of ten months after the return of paid voucher to the depositor before notification to the drawee of the fact that a check was forged would operate to relieve the bank. *Opinion*: Under the general rule of law, the courts hold that the depositor owes the bank the duty of examining returned vouchers and detecting forgeries, and that the examination must be made within a reasonable time. The courts are at variance as to what precise period is a reasonable time; it depends upon the circumstances of each particular case. Owing to the efforts of the A. B. A., a considerable number of states have passed statutes limiting the time of liability of a bank to its depositor for payment of raised or forged checks, but as yet Colorado has no such statute, nor has the specific point been decided by the state courts, but it would seem that ten months' delay in examining vouchers after their

return would not be a reasonable time and might relieve the bank from responsibility to its depositor. (*Inquiry from Colo., March, 1917.*)

Banks duty to return vouchers to depositor

1438. A received a check drawn on bank B, and instead of cashing it he obtained from the bank a duplicate deposit slip. He subsequently opened an account with the bank, but the first deposit was not included in it. Although A's pass-book was balanced on a number of occasions, the bank did not return his cancelled checks given against the first deposit for years. When he did receive them, he discovered one of the checks to be forged, and at once notified the bank. The inquiry is as to whether or not A is responsible for not looking after the matter more closely to see if these checks were not included in those returned with the pass-book. *Opinion*: The laws of Iowa provide that no bank shall be liable to a depositor for the payment by it of a forged or raised check, unless within six months after the return to the depositor of the voucher of payment and depositor shall notify the bank that the check so paid is forged or raised. (Supp. Code Iowa 1913, Sec. 1889-a.) This statute is not applicable, however, as bank B delayed the return of the cancelled vouchers for years and the depositor A notified the bank of the forgery immediately on its discovery. The statute does not impose upon the depositor the duty of demanding the return of the vouchers, or charge him with neglect if he fails to procure them. The bank, however, in order to avail itself of this statute, must see that the vouchers are returned to the depositor; otherwise it cannot plead the statute in defense to an action by the depositor on the forged instrument. (*Inquiry from Iowa, June, 1919.*)

Note: In *McCarty v. First National Bank*, 85 So. (Ala.) 754 (decided May 1920) the court stating that it was the first case of this kind to be decided by any court, held that "In the absence of a rule or agreement expressed or implied, a depositor owes the bank no duty to call for his pass-book and the cancelled checks within a reasonable time and he is not in the same position as to imputed knowledge of forgeries and negligence as to the fact of their disclosure to the bank as he would have been if he had actually received the checks and the book from the bank."

Right of bank to require guaranty of drawer's signature

1439. A bank received its depositor's check of \$1,600 and as a condition of payment required that the drawer's signature be guaranteed by the holder bank. *Opinion:* Apart from the exceptional case where a depositor cannot write, the bank has no right to require guaranty of the drawer's signature to the check as a condition of payment, and refusal to pay the genuine check without such guaranty would be a dishonor for which the bank would be liable to the drawer. Payment of the check, should the signature prove to be forged, even though guaranteed by the holder bank, could not be charged to the drawer's account. (*Inquiry from S. D., April, 1913, Jl.*)

Non-recovery by drawee of money paid on forged check

Forged check given hotel in Alabama

1440. A check drawn on bank A, bearing the indorsement of payee and also of the manager of a hotel where check had been cashed, was paid by A on presentation, and within an hour's time it was discovered that drawer's signature was forged. The bank asks if it can recover from hotel. *Opinion:* It is a general rule that a drawee which pays a check under forgery of the drawer's signature cannot recover the amount from the person to whom paid. A has no right of recovery from the hotel even though forgery was discovered a short time after check was paid. (*Inquiry from Ala., March, 1916.*)

Forged check given Alabama firm

1441. An employee of a firm that indorsed a check taken in payment for goods, cashed it at the drawee bank. Subsequently the drawer's signature was found to be forged, and the bank asks if the firm could be held liable. *Opinion:* The firm indorsing the check being an innocent holder, the drawee would have no right of action against it. *Young v. Lehman*, 65 Ala. 519. (*Inquiry from Ala., Oct., 1918.*)

Indorser does not warrant drawer's signature in Arizona

1442. A drawee bank having paid to a collecting bank a check upon which the drawer's signature had been forged, demanded that the collecting bank reimburse it, basing its right of recovery upon Sections 4210-4211 of the Revised Statutes of Arizona (1913). *Opinion:* It is a general rule sup-

ported by many decisions that the drawee which pays a check to a bona fide holder where the signature of the drawer is forged is bound by the payment and cannot recover the money. Sections 4210-4211 of the Revised Statutes of Arizona being provisions of the Negotiable Instruments Act which provide warranties by the indorser of the genuineness of the instrument, do not apply as a warranty to the drawee of the genuineness of the drawer's signature. The drawee bank in this case would be bound by the payment and could not recover the money. (*Inquiry from Ariz., Sept., 1917.*)

Forged checks paid indorsing customers

1443. Bank A honored five small checks drawn on it which ten days afterwards it learned were forged. Four were indorsed by customers of A and one by a local bank. A notified these indorsers about ten days after discovery of forgery and asks if it has legal recourse on them? *Opinion:* The general rule is that the law presumes a bank knows the signature of its depositor, and where it pays a check bearing a forgery of such signature to a bona fide holder the payment is final and it cannot recover the money back. A few cases qualify this rule where the holder receiving payment was negligent, holding that a bank cannot recover unless the holder negligently contributed to the success of the fraud or his conduct tended to mislead the drawee. *Swan-Edwards Co. v. Union Savings Bank*, 17 Ga. App. 572, 87 S. E. 825. A probably would have no recourse upon the indorsers in this case. (*Inquiry from Ark., Feb., 1919.*)

Forged check taken in payment for goods

1444. D, who was employed by B, made out a check to himself, forging B's name. L, who received the check in payment for goods, deposited it two days later at the drawee bank and received credit therefor. *Opinion:* By the greater weight of authority under the Negotiable Instruments Law, there can be no recovery from L in such a case where the drawee mistakes the drawer's signature and pays a forged check to a bona fide holder not guilty of negligence. *Bk. v. Ricker*, 71 Ill. 439. *First Nat. Bk. v. Northwestern Nat. Bk.*, 152 Ill. 296. (*Inquiry from Ill., Jan., 1913, Jl.*)

Attempted identification of proceeds in hands of third person

1445. A man succeeded in cashing a forged check on drawee bank, and, on being

apprehended some days later, he made full restitution. It develops that on the same day he made good on the first forgery, he cashed a forged check on another bank for a larger amount. The latter bank now claims that the first bank received the proceeds of the forged check cashed by them, and seeks to recover same. Have they a cause of action? *Opinion*: Money has no "earmarks," and even were it proved that the forger paid his debt to the first bank arising out of a forged check with money which he had derived from another bank, upon another forged check, this would create no liability on the part of the first bank. The money so paid was completely negotiable, and having been received by the first bank upon a valuable consideration, namely, an indebtedness arising out of a forged check, there would be no liability therefor to a former holder of the money from whom it had been obtained by fraud. U. S. v. Read, 2 Cranch [U. S.] 159. Robinson Bank of Darien, 18 Ga. 65. Garvin v. Wiswell, 83 Ill. 215. Shipley v. Carroll, 45 Ill. 285. See also Secs. 25 and 57 Neg. Inst. Law. Mass. Nat. Bank v. Snow, 187 Mass. 160. City of Adrian v. Whitney Cent. Bank, 180 Mich. 171. Schaeffer v. Marsh, 90 Misc. [N. Y.] 307. Jefferson Bank v. Chapman, 122 Tenn. 415. (*Inquiry from Ill., Feb., 1918.*)

The law in Illinois

1446. A cashed a check at his bank B. It was paid by drawee bank C, and several days later it was found to be forged. C returned the check to B, and that bank charges it against A's account, basing its right to do so on the decisions rendered in the cases of Beattie v. National Bank of Illinois, 69 Ill. App. 632, and the First National Bank v. Northwestern National Bank, 152 Ill. 196. *Opinion*: Under the general rule the drawee which pays a forged check to a bona fide holder is bound to know the signature of drawer and cannot recover the money. As the money was not recoverable by the drawee from B, and chargeable by that bank to A's account, A would have a right of action against bank B. In the case of the First National Bank v. Northwestern National Bank, which was a case where both the signature of the maker and indorsement of payee were forged, the rule is clearly recognized that the drawee is bound to know the drawer's signature and cannot recover money paid on a forgery thereof. But it was held where the payee's indorsement is also forged, that the drawee

would have a right of recovery. That is not this case. In the Beattie case mentioned the court in its opinion makes a quotation from a text book that "the indorsee also warrants the genuineness of all the signatures to the paper." This must be taken to mean a warranty to all subsequent holders in due course, for the law is well settled that the indorsee does not warrant to the drawee the genuineness of the maker's signature. It has been repeatedly so held by the courts. (*Inquiry from Ill., Aug., 1918.*)

Rule of non-recovery in Indiana

1447. C forged D's signature to a check drawn on bank A, and being known at bank B, the only other bank in town, cashed it there. A paid the check and charged it to D's account. Within two months the forgery was discovered and A now demands repayment from B. *Opinion*: A majority of courts hold that a bank is bound to know the signature of its customer, and where it pays a check on a forgery thereof, cannot recover back the amount from the person to whom it has been paid, provided the latter was a bona fide holder and did not contribute to the success of the fraud by bad faith or misconduct. This is the rule in Indiana. See Commercial Bank v. Citizens Nat. Bank, Ind. App. 120 N. E. 670, Nov., 1918, which holds that a drawee of a forged check who has paid to a bona fide holder for value and without fault cannot recover the payment. (*Inquiry from Ind., Oct., 1919, Jl.*)

No warranty of genuineness of drawer's signature by indorser in Indiana

1448. A check drawn on bank A to the order of C was collected by bank B. It was soon after discovered to be forged, and A demanded repayment from B, claiming that under Sections 65 and 66 of the Negotiable Instruments Act B, when it indorsed the check and delivered it to A for payment, warranted to that bank the genuineness of drawer's signature. *Opinion*: A drawee bank, having paid a check bearing a forgery of the drawee's signature, cannot recover the money back from a party who received payment of the same in good faith. See Commercial Savings Bank v. Citizens Nat. Bank, (Ind. App.), 120 N. E. 670. Sections 65 and 66 of the Negotiable Instruments Act, whereunder the indorser warrants that the instrument is genuine in all respects and is valid and subsisting, does not make the indorser liable for a forged signature of the drawer. An indorser of a check does not

warrant the genuineness of the drawer's signature to the drawee who pays it. The drawee is not a holder in due course under Section 52, nor a holder under the definition in Section 191. (*Inquiry from Ind., Nov., 1919.*)

Drawee in Iowa cannot recover from subsequent holder though first holder negligent

1449. A bank paid three checks aggregating \$35, upon which the drawer's signature was forged. The checks were indorsed by three different indorsers and came to the drawee bank through the clearings. The bank seeks to recover from the indorsers, if possible. *Opinion:* The general rule supported by numerous authorities is that the drawee which pays a forged check to a bona fide holder cannot recover the money back. The indorsement does not warrant the genuineness of the drawer's signature. But in Iowa, if the first holder is negligent, recovery may be had of him, but such negligence cannot be imputed to subsequent holder so as to make him liable. *First Nat. Bk. of Marshalltown v. Marshalltown St. Bk., 107 Iowa 327. (Inquiry from Iowa, March, 1918, Jl.)*

1450. Two checks drawn on bank A were cashed at a local bank B which received payment from A. A few weeks later the checks were found to be forged and B refused to reimburse A although it was the custom with the local banks to return checks to the local bank that first cashed them and the latter stood the loss or collected from the party for whom it cashed them. *Opinion:* It is incumbent upon the drawee to be satisfied that the signature of the drawer is genuine, for he is presumed to know the handwriting of the drawee, and if he pays a check to which the drawer's name has been forged to a bona fide holder, he is bound by the act and cannot recover the money paid. See *First Nat. Bank v. Marshalltown State Bank, 107 Iowa 327, 77 N. W. 1045, 44 L. R. A. 131*, where it was held that as between the drawee and a good faith holder payment of a check on a forged signature is final, except when the holder has been negligent in not making due inquiry if the circumstances were such as to demand inquiry when he took the check. In case of such negligence the drawee may recover, but the negligence of the first holder is not imputable to a subsequent good faith holder so as to make him liable to the drawee. The rule in this case would preclude A from recovering from B the money paid to it upon

forgery of its customer's signature. (*Inquiry from Iowa, March, 1919.*)

Two-fold reason for rule holding non-recovery by drawee

1451. The rule that a drawee is bound to know the drawer's signature and cannot recover money paid to a bona fide holder on forgery thereof is supported by the following two underlying reasons: (1) The drawee is in a better position than the holder to judge as to the genuineness of the drawer's signature. (2) The drawee bank should be regarded as the place of final settlement of the transaction of payment. A stipulation on the face of the instrument providing that "All indorsers guarantee that the maker's signature is genuine" does not affect the negotiability of the instrument, but extends the existing liability of the indorser upon a forged check to subsequent holders to the drawee. (*Inquiry from Kan., Feb., 1915, Jl.*)

1452. A bank paid a check upon which the drawer's signature was forged and which was presented by a merchant who had taken the check from another person. *Opinion:* The bank can neither charge the amount to the drawer nor recover from the bona fide holder who received payment. (*Inquiry from Apr., 1916, Jl.*)

Indorsers not liable

1453. Inquiry is made upon whom the loss would fall should a bank in Kansas pay a forged check on which there were a number of indorsements, all indorsers being responsible, where the check had been charged up and the forgery not discovered until some days later. *Opinion:* The rule is well settled that a bank which pays a check upon which the signature of its customer is forged cannot recover the money from the person who received it. Where the latter was a bona fide holder, having no connection with, knowledge of, or reason to suspect the forgery, and where the forged check had been paid and charged up and the forgery not discovered until some days later, the bank could neither charge the amount to its depositor nor recover the payment from any of the responsible indorsers, as the indorsers do not warrant to the drawee the genuineness of the signature of the drawer. (*Inquiry from Kan., Jan., 1917.*)

Non-recovery by drawee in Maine

1454. A check purporting to be drawn by A to the order of B was cashed by bank

C which collected from the drawee bank through its correspondent D. Within a few days the check was discovered to be forged, and the drawee bank thereupon had the check protested and returned it to bank D. The question is—who is the loser? *Opinion:* The protest of the check was a nullity, as a forged instrument is not subject to protest. In the present case the drawee bank is the loser, as the general rule of law that a bank is bound to know the signature of its depositor has been adopted in Maine in the case of *Neal v. Coburn*, 92 Me. 139, 42 Atl. 348, which holds (1) that a bank is presumed to know the signature of its depositors, (2) that, if a bank pay to an innocent holder for value the amount of a check purporting to be drawn upon it by one of its depositors, but the signature of which was in fact forged, the bank cannot recover the amount from such holder, (3) that, if such holder on demand repay the amount to the bank, that does not entitle him to recover the amount from a prior innocent holder for value who has indorsed the check. (*Inquiry from Me., Feb., 1919.*)

Payment through clearings by Michigan drawee non-recoverable

1455. A check drawn on bank A is deposited in bank B, and paid through the clearings. Later on it is discovered to be forged, and A seeks to charge same back to B. *Opinion:* The law is well established that a bank is bound to know the signature of its depositor, and, when it pays a check to a bona fide holder, cannot recover the money back upon discovering the check to be a forgery. This is the general rule as established in numerous cases and precludes recovery by the drawee unless there are some special circumstances which would make retention by the holder inequitable. Under this general rule bank A which paid a forged check through the clearings was bound by the payment and cannot charge the same back to B. The United States Supreme Court upheld this rule in its decision in the case of *U. S. v. Chase National Bank*, 252 U. S. 485, handed down in April, 1920, affirming 250 Fed. Rep. 105. (*Inquiry from Mich., June, 1920.*)

Non-recovery by drawee in Mississippi

1456. Bank A took a check for collection, and, after receiving advice of payment from its correspondent bank B, paid the same. The drawee bank C, after charging amount to its depositor's account, learned a

month later that his signature was forged, and seeks to hold bank A liable. *Opinion:* It is held by the courts in a majority of states that, when the drawee of a check or bill pays it to a bona fide holder, he cannot recover the money back upon discovering the bill or check to be a forgery. In a few states it has been held the bank may recover where the holder receiving payment would not be prejudiced by return of the money, but the weight of authority is contrary to even this. There does not appear to be any Mississippi case in which the question is passed upon, but, following the general rule elsewhere held, bank C as drawee was bound to know the signature of the customer, and cannot recover from bank A which has received payment on a forgery thereof, especially as the latter did not part with the proceeds until after advice of payment and would, therefore, be prejudiced if compelled to refund. (*Inquiry from Miss., Feb., 1916.*)

Rule in Missouri

1457. Under the law of Missouri a bank cashing a check upon which the drawer's signature is forged is not liable to refund the money to the drawee which has paid the check. *Nat. Bk. of Rolla v. First Nat. Bk. of Salem*, 125 S. W. (Mo.) 513. *Nat. Bk. of Commerce v. Mechanics Nat. Bk.*, 127 S. W. (Mo.) 429. *Price v. Neal*, 3 Burrows 1355. (*Inquiry from Mo., May, 1911, Jl.*)

1458. Bank A turned in with its clearing checks a check on one of the local banks, B, which later turned out to be forged. Bank A was not notified of the forgery until two months afterwards, when B, which had charged the check to its customer's account, requested bank A to take the check back. Should it do so? *Opinion:* It was held by the Court of Appeals of Missouri in *National Bank of Rolla v. First Nat. Bank of Salem*, 141 Mo. App. 719, 125 S. W. 513 (Mo.), that, where the drawee bank pays a check to another bank which is a bona fide holder, such drawee cannot recover the money back on discovering such check to be a forgery, holding that the drawee is bound to know the signature of its customer. Under the law as decided in this case, bank A should object to taking the check back. (*Inquiry from Mo., Oct., 1914.*)

Non-recovery by drawee in Montana

1459. Bank A paid its customer's check after presentation by Bank B which had cashed it for one of its customers. Later

the drawee, discovering that it bore a forgery of the drawer's signature, returned the check to the first indorser, who was the customer of Bank B, and received cash for same, but during the same day the customer presented the same check to Bank A and received payment. Bank A then claimed the right to return the check to Bank B and recover the money. *Opinion:* Bank A, mistaking the signature of its customer and paying money upon a forged check, cannot recover same from Bank B, the innocent holder, who received payment, and the fact that a prior indorser, after discovery of the forgery, returned the money to the drawee, but afterwards demanded and received the same back again does not alter the case. *First Nat. Bk. v. Bk. of Cottage Grove*, 117 Pac. (Ore.) 293. *Johnston v. Bk.*, 27 W. Va. 343. *Rev. Code Mont. Suppl. 1915, Sec. 4015 a.* (*Inquiry from Mont., March, 1919, Jl.*)

Non-recovery by drawee in Nebraska unless holder negligent

1460. A person forged a check for \$10, signing the name of John Doe, drawn on the X National Bank. It was payable to himself and cashed at a store, which deposited it at the Y State Bank. It was paid by the X National Bank and charged to the account of John Doe. When the latter received his cancelled vouchers he discovered the forgery, and immediately notified the drawee bank. The X bank immediately returned the check to the Y bank, requesting reimbursement, which was refused by the Y bank. Bank wishes to know if a bank is the loser the minute it cashes a forged check under the Nebraska law, or is the party the loser which cashed the check for the forger? *Opinion:* In Nebraska a drawee bank which pays a check upon which the drawer's signature is forged cannot recover the money unless it pleads and can prove that the holder who cashed the check, and from whom recovery is sought, was negligent in cashing the check for the forger, a stranger, without requiring him to identify himself. *Nat. Bank of Commerce v. Farmers & Merchants Bank* [Neb.] 128 N. W. 522. *State Bank v. First Nat. Bank* [Neb.] 127 N. W. 244. (*Inquiry from Neb., March, 1920, Jl.*)

1461. On June 2nd Mr. A. gave his employee, R. W., a check for \$11.25, and the latter made a copy, forging the name of Mr. A. on the copied check. The forged check was cashed and later deposited at the B bank, who in turn presented the check to

the drawee bank and received the money. Several months later, when Mr. A. received his checks, he discovered the forged check and called upon the drawee bank for the amount. *Opinion:* Under the law of Nebraska the drawee who pays a check upon which the drawer's signature has been forged cannot recover back the money unless he pleads and proves that the holder was negligent in purchasing or indorsing the instrument, or guilty of bad faith. *St. Bk. of Chicago v. First Nat. Bk. of Omaha*, 127 N. W. (Neb.) 244. *Nat. Bk. of Commerce v. Farmers & Merchants Bk.*, 128 N. W. (Neb.) 522. (*Inquiry from Neb., June, 1917, Jl.*)

Non-recovery by drawee rule in Nebraska unaffected by one month's delay in discovery

1462. A check purporting to be drawn by A to the order of B on bank C was cashed at D's store. D deposited it with bank C which credited him and charged A's account with it. A month after A received his cancelled checks he discovered that the check was forged, and notified the bank. It is asked if this delay in notification does not make him liable and, if not, who stands to lose as between C and D. *Opinion:* The failure of the drawer of the check to discover the forgery for one month after cancelled checks were sent to him, he, then, immediately notifying bank C, would probably not be held such laches as to charge him with liability. Bank C as drawee, having paid a check upon which the drawer's signature was forged, would be the loser as between itself and D to whom the credit was given. The drawee is bound to know the signature of the drawer and cannot recover back the money paid unless it can prove that the holder was negligent in purchasing the instrument or in indorsing it or withheld from the drawee at the time the check was paid some information or ground for suspicion within his knowledge concerning its genuineness. See *State Bank v. First Nat. Bank of Omaha*, 87 Neb. 351, 127 N. W. 244. *National Bank of Commerce v. Farmers' & Merchants' Bank*, 87 Neb. 841, 128 N. W. 522. (*Inquiry from Neb., Dec., 1916.*)

Rule in Massachusetts

1463. The Massachusetts decisions adhere with certain modifications to the old rule established in the case of *Price v. Neal*, 3 Burrows 1354, that the drawee of a draft is bound to know the drawer's signature, and is precluded from recovering

money paid to an innocent holder upon a forgery thereof. *Price v. Neal*, 3 Burrows 1354. *Nat. Bk. of North America v. Bangs*, 106 Mass. 441. *First Nat. Bk. of Danvers v. First Nat. Bk. of Salem*, 151 Mass. 280. *Dedham Nat. Bk. v. Everett Nat. Bk.*, 177 Mass. 392. (*Inquiry from N. H., Sept., 1910, Jl.*)

Non-recovery rule supported in New Jersey by dictum

1464. A check which he made payable to his own order drawn on bank A was forged by B who persuaded another to indorse it after him and obtain cash for it at bank C. The latter collected from A, which asks if it cannot hold C liable under the circumstances. *Opinion:* By the great weight of authority a bank which has paid a forged check cannot recover the money from the person who received it, where the latter was a bona fide holder, having no connection with, knowledge of, or reason to suspect the forgery. It seems that the New Jersey courts have had no occasion to declare this rule in a case where a drawee has paid a forged check and sought to recover the money, but the case of the *National Bank of New Jersey v. Berrall*, 70 N.J.L. 757, 58 Atl. 189, 66 L. R. A. 599, 103 Am. St. Rep. 821, supports the rule by dictum. In this case, therefore, A would seem to have no right of recovery against bank C which is a bona fide holder. (*Inquiry from N. J., March, 1917.*)

Non-recovery by drawee in New Mexico

1465. A person draws a check in favor of himself, but forges another's name. He indorses it and cashes it through another person who presents it to the bank where it is accepted and paid and charged to the man whose name is forged. Later the forgery is detected. Who loses? *Opinion:* The general rule is that a bank which pays a check upon a forgery of the signature of its customer can neither charge the amount to his account nor recover the money from a bona fide holder who has received payment. Under this rule, ordinarily, the bank, upon which the check was drawn is the loser. (*Inquiry from N. M., Jan., 1920.*)

Rule in New York

1466. Inquiry is made as to whether or not a drawee bank which paid a check upon which a customer's signature was forged has recourse upon the person who first cashed the check and deposited it in his own bank

for collection. *Opinion:* If the person who first cashed the forged check acted honestly and not in collusion with the forger, the drawee bank would have no recourse upon him. It has been held in New York that where a bank upon which a check has been drawn pays it, in ignorance that the drawer's signature was forged, it cannot as a rule recover back the amount if the person to whom the money was paid was a bona fide holder. *Trust Co. of America v. Hamilton Bank*, 127 App. Div. 515, 112 N. Y. Supp. 84. *National Park Bank v. Ninth Nat. Bank*, 46 N. Y. 77, 7 Am. Rep. 310. (*Inquiry from N. Y., May, 1914.*)

1467. Bank A paid a check upon which a customer's signature had been forged, and five months afterwards, when the customer's pass book was balanced and the fraud discovered, made claim upon bank B, which had received payment, for reimbursement. The latter refused to refund, giving as its reason, the delay in making claim, and the inquiry is as to whether or not B is right in its contention. *Opinion:* As the signature of the drawer was forged, the general rule would apply that the drawee bank paying a forged check can neither charge the amount to the depositor's account nor recover the money from a bona fide holder to whom it has been paid, and the five months' delay in having the pass book balanced and discovering the forgery would not affect the question. (*Inquiry from N. Y., Oct., 1916.*)

Non-recovery by drawee in North Carolina

1468. Two checks drawn on bank A were cashed with merchants and cleared through a local bank B and paid. One was discovered to be forged the morning after, and before the check was stamped paid, and the forgery of the other was discovered three days afterwards. In neither case did the delay affect indorser's opportunity to collect from forger. Can A recover from B? *Opinion:* The majority of courts hold that a bank is bound to know the signature of its depositor, and where it pays a forged check to a bona fide holder it cannot recover the money from the person who received payment. A few courts modify this rule by holding that where the person taking the check from the forger is guilty of negligence in taking the same from a stranger without inquiry or identification, this makes him liable to refund. A few courts also hold that where the person who received the money will be in no way prejudiced by being compelled to make repayment, the drawee

may recover. The North Carolina courts do not appear to have taken any stand on this question. The great majority of courts hold the drawee bound and concluded—and if the majority rule is to prevail in the state, A cannot recover the money and must stand the loss. (*Inquiry from N. C., Jan., 1918.*)

Rule of non-recovery in Ohio

1469. A check drawn on bank A was cashed by it for a customer who had taken it, and later in the day it was found to be forged. The customer refused to make good. *Opinion:* In the case of First Nat. Bank of Belmont v. First Nat. Bank of Barnesville, 58 Ohio St. 207, 50 N. E. 723, 41 L. R. A. 584, 65 Am. St. Rep. 748, the Supreme Court said: "The general rule has been, and is, that, when the drawee of a check or bill pays the same to a bona fide holder, such drawee cannot recover the money back upon discovering such check or bill to be a forgery. The drawee is presumed to know the signature of the drawer." In an earlier case, Ellis v. Trust Co., 4 Ohio St. 628, 64 Am. Dec. 610, the Supreme Court recognized this general rule, but allowed the drawee bank to recover money paid upon a forged check because of a local custom requiring a purchasing bank to ascertain the identity of the negotiator of a check and make careful inquiry as to his right to the paper. These seem to be the only Ohio decisions on the subject, and, under the general rule, bank A would be the loser. (*Inquiry from Ohio, July, 1917.*)

Non-recovery by drawee in Oklahoma under Negotiable Instruments Act

1470. A bank paid a check to which the drawer's name was forged. Can it recover from the bank first indorsing? *Opinion:* The loss is that of the drawee bank which paid on a forged signature of the drawer. The rule in Oklahoma is thus stated in Cherokee Nat. Bank v. Union Trust Co., 125 Pac. (Okla.) 464: "Where a bank, in good faith and for value, purchases from an indorser a check upon another bank, and thereupon indorses and forwards the same to its collection agency for collection, and the same is presented by the collection bank to the drawee bank, and is paid by the drawee bank, the drawee bank, upon thereafter discovering the check to be a forgery, cannot, by reason of the Negotiable Instruments Law (Sections 4496, 4662, Comp. Laws 1909), recover the money back from

the bank to whom it was paid." (*Inquiry from Okla., Feb., 1921.*)

1471. According to the law of Oklahoma the drawee paying a forged check cannot in the absence of negligence or fraud recover the amount from a bona fide holder receiving payment. Cherokee Nat. Bk. v. Union Tr. Co., 125 Pac. (Okla.) 464. Am. Exp. Co. v. St. Nat. Bk., 27 Okla. 824. (*Inquiry from Okla., Nov., 1912, Jl.*)

1472. A check drawn on bank A was cashed at a store and deposited with bank B which collected from A. The check was subsequently found to be forged, and the name of the payee fictitious. The inquiry is as to A's right of recourse. *Opinion:* The Supreme Court of Oklahoma in the case of Cherokee Nat. Bank v. Union Trust Co., 33 Okla. 342, 125 Pac. 464, has held that (1) where a bank in good faith and for value purchases from an indorser a check upon another bank, and thereupon indorses and forwards the same to its collection agency for collection, and the same is presented by the collection agent to the drawee bank and is paid by the drawee bank, the drawee bank, upon thereafter discovering the check to be a forgery, cannot by reason of the Negotiable Instruments Law (Sections 4496 and 4622 Comp. Laws, 1909) recover the money back from the bank to whom it was paid. (2) A drawee who pays to a bona fide holder a check to which the drawer's name has been forged cannot recover the amount of such payment. (3) The guaranty of an indorsement on a check applies only to the indorser, and does not protect the drawee against the risk of cashing a check to which the maker's name is forged. In some states it is held that, if the merchant cashes the check for a stranger without due inquiry, he is negligent and responsible for the loss, and it is also held in some states that where the indorsement of the payee is also a forgery, the bank can recover because of forgery of the indorsement. The courts of Oklahoma have not yet passed upon either proposition. The probabilities are that bank A would have no right of recovery either from bank B or the merchant. (*Inquiry from Okla., Feb., 1918.*)

Guarantee of indorsements does not apply to drawer's signature

1473. A check drawn on bank A was indorsed by the payee B and deposited by latter with bank C which indorsed "Previous indorsements guaranteed" and collected from A. Four months later the check was

discovered to be forged, and A seeks to hold C liable because of its indorsement. *Opinion:* A, having paid the check, has no right of recovery against bank C which is a bona fide holder. The fact that the holder receiving payment has indorsed thereon "Previous indorsements guaranteed" does not give the drawee a right of recovery, for, as is said in *Cherokee Nat. Bank v. Union Trust Co.*, 33 Okla. 342, 125 Pac. 464, "the guaranty applies only to the indorser and does not protect the drawee against the risk of cashing the check to which the maker's name is forged." (*Inquiry from Okla., Aug., 1918.*)

The rule in Oregon

1474. Where the drawee pays a check bearing the forged signature of the drawer to a holder who has received the same in due course, without fraud or negligence, it cannot afterwards recover the money paid. *First Nat. Bk. v. Bk. of Cottage Grove*, 117 Pac. (Ore.) 293. Ore. Laws (Lord's) 4575 a. (*Inquiry from Ore., Dec., 1913, Jl.*)

Note: The law in Oregon has just been comprehensively stated by the supreme court in a decision handed down April 19, 1921. A bank paid checks drawn on it on forged signatures of the drawer, a corporation, which were a "good imitation" of its genuine signature. The checks also bore indorsements corresponding with the names of the payees therein, which, however, were the names of fictitious persons. The drawee bank sued the bank which received the checks from its customers on their genuine indorsements and which received payment from such drawee through the clearing house. The indorsement of the defendant was merely: "Pay through the clearing house." According to the clearing house rules the indorsement acted as a guaranty of prior indorsements. The drawer of the check had an account with defendant as well as with plaintiff drawee and defendant had on file the authorized signatures of the officers of the drawer. Some of the depositors in order to protect defendant had delivered to it the amount of the checks deposited by them. Under these facts the Supreme Court of Oregon in an exhaustive opinion of eight thousand words, citing one hundred and two judicial precedents, held: (1) The rule that a drawee paying a check on a forged signature of the drawer to a holder in due course cannot recover is in applicable where the holder has been guilty of bad faith or negligent. (2) An illustration of

negligence is where a bank cashes a check for a stranger without inquiry and without identification. (3) Any negligence of its depositors cannot be imputed to defendant bank. (4) In the absence of other suspicious circumstances defendant was not negligent as a matter of law in not comparing the signatures to the checks with those on file with it, especially since they were good imitations. (5) The delivery of the money by the depositors to the defendant to protect it is legally immaterial. (6) Defendant's indorsement with the clearing house stamp and its presentment of the checks for payment neither singly nor together constituted a warranty of the genuineness of the drawer's signature. (7) The rule that payment on a forged indorsement may be recovered does not apply where the drawer's signature is also forged. (8) The signature of the holder of a check presenting it for payment is not technically an "indorsement." (9) A guaranty of prior indorsements does not include the signature of the drawer. Applying these rules, the court denied plaintiff's right to recover. *First Nat. Bank of Portland v. United States Nat. Bank of Portland*, 197 Pac. (Ore.) 547.

Non-recovery by drawee in Tennessee

1475. Two checks passed through a bank on May 12th, drawn on a neighbor bank, one of which was received on deposit and the other cashed for a responsible party. On June 4th the neighbor bank discovered they were forged and turned them back. The paying bank deducted the amount of these checks from the amount due the neighbor bank in daily exchange of checks. *Opinion:* Under the rule laid down in the case of *Farmers & Merchants Bank v. Bank of Rutherford* 115 Tenn. 64, in which the court criticises and limits the prior decision in *Peoples Bank v. Franklin Bank* (88 Tenn. 299), a bank in Tennessee which pays a forged check to a bona fide, non-negligent holder cannot recover the money paid and the bank, having cashed one such check and taken the other from its customer on deposit, is not guilty of any negligence and is not responsible to the drawee bank. (*Inquiry from Tenn., June, 1914.*)

1476. A check drawn on bank A was paid by it through the clearing house to bank B which guaranteed indorsements. Shortly afterwards the check was discovered to be forged, and it is asked if A can hold B liable? *Opinion:* The rule of law is that a bank is bound to know the signature of its

depositor, and where it mistakes such signature and pays on a forgery thereof to a bona fide holder, it is bound by the payment and cannot recover same back. This rule is recognized in Tennessee. See *Farmers and Merchants Bank v. Bank of Rutherford*, 115 Tenn. 64, 88 S. W. 939, 112 Am. St. Rep. 817. In the absence of negligence on the part of the holder of the check, bank A cannot recover. (*Inquiry from Tenn., Aug., 1919.*)

1477. A retailer accepted checks upon which drawer's signature was forged, in payment of merchandise, indorsed and transferred them to a wholesaler and the latter deposited them in a bank which collected them from the drawee. The drawer's pass book was not balanced for eight or ten months, at which time the forgery was discovered and notice thereof given. The drawee seeks to recover the amount paid. *Opinion:* The drawee bank has no right of recovery, under the decisions in Tennessee, from the bank receiving payment and probably under such decisions would be denied recovery from the retailer, even though the latter was guilty of first negligence in accepting the checks without proper identification. *Farmers & Merchants Bk. v. Bk. of Rutherford*, 115 Tenn. 64. *People's Bk. v. Franklin Bk.*, 88 Tenn. 299. (*Inquiry from Tenn., Apr., 1918, Jl.*)

The rule in Texas

1478. A draft was forged by the payee, indorsed by him and by his brother, cashed by a bank on faith of the brother's signature, and paid by the drawee. *Opinion:* The drawee must stand the loss where it can be shown that the bank was a bona fide holder and that the forger's brother was not a guilty participant. *Rouvant v. San Antonio Nat. Bk.*, 63 Tex. 612. *Moody v. First Nat. Bk.*, 19 Tex. Civ. App. 278 (*Inquiry from Tex., March, 1909, Jl.*)

1479. A check drawn on a Texas bank was deposited for collection. After it was paid and the amount paid out by the collecting bank, forgery of the drawer's signature was discovered. Which bank stands the loss? *Opinion:* Drawee bank which pays check upon which drawer's signature is forged to a bank receiving same in good faith, and paying out the money before notice of the forgery, cannot recover the money back. *Iron City Nat. Bk. v. Peyton*, 15 Tex. Civ. App. 184. *Moody v. First Nat. Bk.*, 19 Tex. Civ. App. 278. (*Inquiry from Tex., Aug., 1918, Jl.*)

The rule in Washington

1480. A check upon which the drawer's signature is forged is deposited in bank by a customer and paid by the drawee through the Clearing House. Three days later the forgery is discovered and re-payment demanded. *Opinion:* The Supreme Court of Washington held in 1902 that a drawee which paid a forged check to another bank, which had negligently cashed the check upon the payee's indorsement, without inquiry or identification, could recover if it acted within a reasonable time; and also permitted recovery where the recipient would not be prejudiced by the repayment. No reference in this case was made to the Negotiable Instruments Law which had been in force in 1899, but since that decision the courts in New York, Missouri, Oregon and Oklahoma have held the drawee is bound and precluded from recovering money paid on a forged check to a bona fide holder not guilty of negligence. The right of recovery in the present case would be denied if the Washington court should place a similar construction upon the Negotiable Instruments Act. *Canadian Bk. of Commerce v. Bingham*, 30 Wash. 484. *Title Guaranty Co. v. Haven*, 126 App. Div. (N. Y.) 802. *First Nat. Bk. v. Bk. of Cottage Grove*, 117 Pac. (Ore.) 293. *Nat. Bk. of Rolla v. First Nat. Bk. of Salem*, 141 Mo. App. 719. *Cherokee Nat. Bk. v. Union Tr. Co.*, 125 Pac. (Okla.) 464. *Colonial Tr. Co. v. Bk.*, 50 Pa. Super. Ct. Rep. 510. (*Inquiry from Wash., Nov., 1912, Jl.*)

Note: The Supreme Court of Washington in 1920 upheld the general rule holding the drawee bound. See note to next following item.

1481. A check was cashed by a local merchant, deposited to his credit in a local bank through which it was cleared on the drawee bank and paid in the regular manner. A week later the depositor to whose account the check was charged reported it a forgery. The payor bank demands refund of the amount of the check from the bank through which it was cleared. *Opinion:* The general rule is that a drawee bank which pays a forged check to a bona fide holder is bound by the payment and cannot recover the money. This is the general rule prevailing throughout the country. But in 1899 the Supreme Court of Washington in *Canadian Bank v. Bingham*, 91 Pac. 185, held that the drawee had a right of recovery unless the negligence of the bank in mistaking the signature, or in discovering and giving

notice of the forgery, would cause the person receiving payment to suffer loss, in the event he was compelled to refund. If the Supreme Court of Washington still adheres to these views, the bank might have a right of recovery, but it would depend upon whether the local bank could recover from the merchant and whether the local merchant who first cashed the check would be in a worse position if compelled to refund than before receiving the money. The Supreme Court of Washington held in that case that a merchant who cashed a check for a stranger was guilty of negligence in not having the party properly identified. (*Inquiry from Wash., March, 1917.*)

Note: In 1920 the Supreme Court of Washington, in *National Bank of Commerce v. Seattle Nat. Bank*, 187 Pac. 342, distinguishes and limits the application of the decision in the Bingham case and cites with approval authorities which uphold the rule first above stated.

Non-recovery by Washington drawee from Idaho merchant unless latter negligent

1482. A forged check was originally cashed by an Idaho storekeeper, who indorsed it to a bank, and in due course it was paid by the drawee bank. The voucher was returned to the customer who promptly notified the drawee bank of the forgery. What parties are liable for the loss? *Opinion:* The general rule is that the drawee bank is bound to know the signature of its depositor and must at its own risk detect a forgery before paying a check. *National Bank of Commerce v. Seattle Nat. Bank*, 187 Pac. (Wash.) 342. *Canadian Bank of Commerce v. Bingham*, 71 Pac. (Wash.) 43, 91 Pac. (Wash.) 185. Under this general rule the drawee bank would be bound by the payment and could not charge the amount to the depositor nor recover from a bona fide holder to whom paid. It is possible, if the storekeeper first cashing this check took it from a stranger without identification, the bank would have a right to recover the money from him. There is a conflict of authority whether the cashing of a check for a stranger without inquiry or identification is such negligence as authorizes the drawee bank to recover. There is no decision in Idaho on this point. See on this question *Canadian Bank of Commerce v. Bingham*, 71 Pac. (Wash.) 43, 91 Pac. (Wash.) 185, and *Bank of Williamson v. McDowell County Bank*, 66 S. E. (W. Va.) 761, which fully reviews the authorities. (*Inquiry from Wash., Feb., 1921.*)

The rule in West Virginia

1483. Drawee which pays a check upon which the drawer's signature has been forged, to a bona fide holder free from negligence has no right of recovery from such holder of the money paid. Bk. of Williamson v. McDowell Co. Bk., 66 S. E. (W. Va.) 761. (*Inquiry from W. Va., Feb., 1918, Jl.*)

Non-recovery rule not yet declared in Wisconsin

1484. A check was presented at C Bank drawn on the F Bank payable to J. Ashauer, and signed "John Smith." The check was properly indorsed by J. Ashauer, cashed, and on the same or next day presented at the drawee bank, F, where in the usual course it was received and passed to the credit of C Bank. Two weeks later the check was returned to C Bank with statement that name of the drawer, John Smith, had been forged and C Bank was requested to make good the amount to the drawee bank. The C Bank asks whether the F Bank, having accepted and passed the check to the credit of the C Bank, after a lapse of two weeks, can claim reimbursement from C Bank. It appears that one John Smith carries an account at the F Bank, and the check, having been received at the drawee bank, was debited to his account. *Opinion:* The weight of authority is to the effect that a drawee bank, having paid a check bearing a forgery of the drawer's signature, cannot recover the money back from a person who received payment of the check in good faith. A search has failed to disclose a Wisconsin case so holding, but such is the well-established rule. See, for example, *Germania Bank v. Boutell*, 60 Minn. 189. *First Nat. Bank v. Bank of Cottage Grove*, 117 Pac. (Ore.) 293. Where the payee's indorsement is also a forgery, there is a conflict in the decisions as to the bank's right of recovery, but where this element does not enter and the forgery is simply of the drawer's signature, the rule of non-recovery applies. (*Inquiry from Wis., March, 1919.*)

Non-recovery by railroad drawee

1485. A filled in a blank form of draft used by a railroad company, and forged an agent's signature to it. He indorsed it as payee and got B to cash it for him. The latter deposited it in his bank, which sent it through regular channels, and it was presented and paid at the office of the treasurer of the company. Two months after the forgery was discovered, and the railroad

company, instead of sending back the draft the way it came, mailed it to the auditor of the road who tried to collect from B as indorser. *Opinion:* It is the general rule that a bank or other drawee is bound to know the signature of the drawer, and where it mistakes such signature and pays money on a forgery thereof to a bona fide holder, it cannot recover the money so paid. Under this general rule a railroad paying a draft upon a forgery of its agent's signature is bound to know such signature and could not recover the money from a bona fide holder, and if B, who cashed the forged draft for A, did so innocently, under the rule referred to, the railroad could not hold him liable and would be the loser. (*Inquiry from Miss., May, 1914.*)

Conflict of law

Drawee's right of recovery from holder in another state where conflict of law

1486. The payee of a check drawn on a South Carolina bank indorses it to a Georgia bank A. The latter collects from drawee. The check subsequently proves to be forged and the drawee charges A's account with the amount, claiming that under South Carolina decisions a guarantee of the indorsement is also a guarantee of the signature of the drawer. The inquiry is whether A would be bound by Georgia or South Carolina law in the matter. *Opinion:* A majority of courts hold that a drawee bank is bound to know the drawer's signature and cannot recover money paid on a forged check to a bona fide holder thereof. But in the case of *Ford v. Peoples Bank*, 74 S. C. 180, 54 S. E. 204, the court virtually holds that the indorsement of a forged check by a holder receiving same from the payee is a representation or warranty to the drawee that the drawer's signature is genuine, sufficient to make such holder liable to the drawee. In the later case of *Newberry Savings Bank v. Bank of Columbia*, 91 S. C. 294, 74 S. E. 615, however, the court seems to recognize the general rule that the drawee cannot recover from a bona fide holder, but makes an exception in the case where the holder has taken the check directly from the supposed drawer. As one of the provisions of the South Carolina Negotiable Instruments Act is that the drawee by accepting admits the signature of the drawer, it is somewhat uncertain whether the courts of that state would now take the view that A warranted to the drawee the signature of the drawer. As to the law in Georgia, A, being

a bona fide holder, taking the check in good faith and without negligence, would not be held liable to refund. See *Wood v. Colony Bank*, 114 Ga. 683, 40 S. E. 720. Upon the specific question whether the South Carolina or Georgia law governs the liability of A, assuming there was a right of recovery under the South Carolina but not under the Georgia law, there seems to be no decision in any of the states where this question has arisen by reason of the parties being in different states in which the law was in conflict. The question must be determined on general principles: (1) If recovery is sought on the ground that the indorser warrants genuineness to the drawee, as claimed to be the South Carolina rule, then, under the well-established rule that the law of the place of indorsement governs the contract and liability of the indorser, the law of the place of the indorser, Georgia, and not of the South Carolina drawee would govern. (2) If recovery is sought in any case on the ground of the holder's negligence, then the law of the place where such negligence occurred would seem to govern the liability. (3) If recovery is sought on the ground that the holder receiving money of the drawee on a forged instrument to which he has no title impliedly promises to refund the money to the drawee, then such promise to refund would seem to be governed by the law of the place of the promisor unless it is to be construed as a promise to refund the money at the place of the drawee and not at the place of the promisor, in which event the rule that a contract made in one place to be performed in another is governed by the law of the place of performance might operate. Just what the law is, in the absence of decision, is not free from doubt; but the preponderance of reason seems to favor the rule that the law of the place of the holder and not of the drawee would govern the liability to refund money received upon a forged check, where the laws of two states differ. (*Inquiry from Ga., Oct., 1914.*)

Difference in New Jersey and Pennsylvania rule

1487. A New Jersey bank, A, accepted for collection a check drawn on a Pennsylvania bank, B, payable to the order of C. A received B's draft in payment and paid C, who had been identified. The next day it received a telephone message from B that the check was a forgery and that it had stopped payment on its draft. Is B responsible for the loss? *Opinion:* The

general rule, which is recognized in New Jersey, is that a drawee who mistakes the signature of his depositor and pays a check upon a forgery thereof is bound by the payment and cannot recover the money from a bona fide holder who has received payment. But in Pennsylvania, by Act of 1849, money paid upon a forged signature is recoverable from the person or persons previously holding or negotiating the forged instrument. The Pennsylvania courts have held that, under this statute to entitle the drawee to recover, prompt notice of the forgery must be given and that delay in giving notice will relieve the person receiving payment from liability unless he is not prejudiced by such delay. See case of *Iron City Bank v. Fort Pitt National Bank*, 159 Pa. 46, 28 Atl. 195, 23 L. R. A. 615, where the court said if the one sending the money could recoup himself therefrom without loss, the date of notice became immaterial but otherwise the drawee must act with due diligence in order to recover. A delay of five days in that case was held to be not due diligence. Bank A received notice the day after it received B's draft in payment that the check was a forgery, although this was too late to enable it to save itself from loss. If the law in Pennsylvania would govern in this case, it would probably be held the Pennsylvania bank had given reasonably prompt notice and could recover; but if the New Jersey law governs the liability of the holder, there would be no right of recovery. The question which law governs in case of conflict is undecided. (*Inquiry from N. J., Sept., 1919.*)

Non-recovery by Pennsylvania drawee from Oregon bank

1488. An Oregon bank, A, collected through its correspondent in Pennsylvania a check drawn on a Pennsylvania bank, B, upon which the drawer's signature was forged. A was not notified of the forgery until twenty days after receiving notice of payment, and up to a few days prior to that time it had in its hands funds of its customer sufficient to recoup itself in case it had known the check was a forgery. It is asked if under the circumstances A can be held liable. *Opinion:* The general rule is that the drawee of a check is bound to know the drawer's signature. If it mistakes the signature and pays a check bearing a forgery thereof to a good faith holder, it is bound by the payment and cannot recover the money back. In Pennsylvania, where payment in

this case was made, the courts early adopted this rule, but in 1849 the legislature of that state enacted a statute designed to relieve the drawee from loss by reason of a mistaken payment on a forged signature, which statute is still in force. Literally construed it would permit recovery by drawee in all such cases, but there have been several decisions by the Pennsylvania courts in which it is given a more restricted meaning, and in the case of *Iron City Nat. Bank v. Fort Pitt Bank*, 159 Pa. 46, 28 Atl. 195, 23 L. R. A. 615, the statute is construed to relieve the payor bank only where it uses due diligence to discover the forgery and notify the party receiving payment. The court in this case held a delay of five days in giving notice of the forgery, not due diligence and said, "The statute does not dispense with the necessity of care and diligence on the part of the payor, nor exempt him from the consequences of his own negligence, if thereby loss would accrue to the other party." Applying this ruling to the present case, the drawee bank B, in a suit against A, could not recover, irrespective of the question whether the liability of A to refund is governed by the law of Oregon or of Pennsylvania. (*Inquiry from Ore., Dec., 1911.*)

Recovery by drawee of money paid on forged check

Alteration of name of drawee

1489. A, an employee of B has cashed by bank C a check purporting to be drawn by B on bank D. The latter bank returned the check to C on account of B having no account with it. A claimed a mistake had been made as to drawee bank, and at his request the president of bank C changed the name of drawee from bank D to bank E. The latter bank paid the check, and a few days later it was found to be forged. The inquiry is—has E recourse on C? *Opinion:* It is a general rule of law that a bank which pays a check upon which its customer's signature has been forged is bound by the payment and cannot recover the money back from a bona fide holder who has received payment. It would seem the rule would not apply in this case, for the reason that bank C could not claim the status of a bona fide holder. That bank through its president, itself changed the name of the drawee, and this was not done at the instance of the supposed drawer, but at the instance of the payee. Even had the signature of B been genuine, neither the payee nor bank C would have had the right

to have changed the name of the drawee bank without B's consent, and such change would have been a material alteration. Under the circumstances the courts would probably hold that bank E was entitled to recover the money from C. (*Inquiry from Ida., Jan., 1916.*)

1490. A check signed "H. Greve," whose signature was forged by the payee, was presented by the payee to the First National Bank of X, Nebraska, as drawee. That bank, having no account with Greve, took it to the X National Bank, where Greve had an account, struck out the word "First," inserted "X," indorsed the check, received the money and paid over the proceeds to the payee. *Opinion:* In view of the policy of the Nebraska courts to place the responsibility in case of a forged check upon the bank which first takes it from the forger, rather than upon the drawee which mistakes the signature and pays it, as between the two banks, the First National Bank would be responsible for the loss. First Nat. Bk. v. St. Bk. of Alma, 22 Neb. 769. Heady v. Hollman, decided Ct. of Appeals, Mo., Feb. 7, 1910. Title Guar. & Tr. Co. v. Haven, 126 App. Div. (N. Y.) 802. Neb. Neg. Inst. A., Sec. 62. (*Inquiry from Neb., April, 1910, Jl.*)

1491. A's check on D bank, indorsed by B, is paid, and afterwards A transfers his account to C bank. One year later the same check with date altered, name of drawee changed to C bank, and bearing an additional indorsement under that of B, is presented by D bank to C bank and paid. The cashier of D bank does not know where he got the check and refuses to make its amount good to C bank. *Opinion:* C bank can recover from D bank which first cashed the altered check, under the rule that money paid under a mutual mistake, without consideration, is recoverable. (*Inquiry from Okla., Nov., 1911, Jl.*)

Where holder has knowledge of suspicious facts

1492. It is the general rule that the drawee bank having paid a check bearing a forgery of the drawer's signature cannot recover the money from a person who has received payment of the same in good faith. Whether the fact that the holder would not be prejudiced if compelled to refund constitutes an exception to the general rule is uncertain in Illinois. It was held in an Illinois case where the holder before receiving payment on a forged check had knowledge of

suspicious facts, which was not imparted to the drawee, and would be in no worse position if compelled to refund, that an exception to the rule existed and the drawee could recover, but in that case the holder was deprived of a status of good faith holder. Most courts hold that the single fact that the holder would not be prejudiced if compelled to refund is not of itself sufficient to create an exception to the general rule denying the drawee the right of recovery from a bona fide holder. Further, a drawee cannot recover from a bona fide holder who has received payment of check drawn by a person having no account in the bank. Bk. v. Ricker, 71 Ill. 439. First Nat. Bk. v. Northwestern Nat. Bk., 152 Ill., 296. (*Inquiry from Ill., June, 1918, Jl.*)

Recovery from payee

1493. The drawee of a check on which the drawer's signature is forged can recover from payee the money paid thereon. The payee should know with whom he is dealing, and if the check is a forgery he is liable to the drawee. Nat. Bk. of Rolla v. First Nat. Bk., 141 Mo. App. 719. First Nat. Bk. v. Bk. of Cottage Grove, 117 Pac. (Ore.) 293. Nat. Bk. of North America v. Bangs, 106 Mass. 441. (*Inquiry from Miss., May, 1913, Jl.*)

1494. A deposited with bank B a check supposed to have been signed by C, another of the bank's customers. Immediately after paid vouchers were returned to C he declared check a forgery. The bank asks if it should not at once charge amount back to A's account. *Opinion:* If the check was made payable to A and was not received by him through indorsement, the rule that a bank is bound to know the signature of its customer, and if it pays a check upon which such signature is forged it cannot recover the money from a bona fide holder, would not apply, because he should know the party from whom he is taking the check. But if the check was received by him through indorsement, he would probably be under no liability to refund unless he was guilty of taking the check from a stranger without inquiry or identification, in which event the authorities are in conflict as to the drawee's right of recovery. (*Inquiry from N. C., Sept., 1919.*)

Recovery where holder has not parted with funds but issued pass book against forged check

1495. A deposited in a New York sav-

ings bank, B, a forged check drawn to his order on a Pennsylvania bank, C, and received a savings bank pass book. C paid the check and shortly afterwards, when the forgery was discovered, notified B not to pay out money on the pass book and requested reimbursement. B claimed its pass book was negotiable and was frequently used as a collateral for loans, and refused to pay over the money unless C furnished a bond of indemnity to hold it harmless in case the pass book turn up in the hands of an innocent third party. It is asked if such procedure is necessary. *Opinion:* It is held by the courts that a savings bank pass book is not negotiable but is only a receipt for the money. As the savings bank has not paid over the money, nor issued a negotiable instrument to A, but simply an ordinary savings bank pass book, it could safely pay back the money to bank C without indemnity, for it would be difficult to see how anybody to whom A might pledge or sell the book could acquire any greater right than his. (*Inquiry from Pa., May, 1916.*)

Right of recovery from payee in South Carolina

1496. A bank paid, at different times, several small checks drawn upon it, and later ascertained that they were forged. The checks were payable to a retail merchant and were forged by his customer. Can the bank recover from the merchant? *Opinion:* As has been stated in other opinions, the general rule is that a bank is bound to know its depositor's signature and cannot recover money paid to a bona fide holder on a forgery thereof. But the Supreme Court of South Carolina has considerably modified this general rule in the two cases of *Ford v. Peoples Bank*, 54 S. E. 204, and *Newberry Sav. Bk. v. Bank of Columbia*, 74 S. E. 615. In the latter case the payee took a check from a person representing himself to be a depositor in the drawee bank without requiring any identification. The check was paid by the drawee who subsequently discovered the signature was a forgery. The court held that the drawee could recover the amount, and said: "The rule that a bank should know the signature of its customers is not available to one who represents to the bank that he holds in his hand the check of the customer, without having taken precautions to ascertain the identity of the person with whom he was dealing." In the instant case a forged check was made payable to a retail merchant who received payment from the payor bank. He took the

check directly from the forger. It appears, therefore, the bank can recover from the merchant the amount paid on the forged checks. (*Inquiry from S. C., Aug., 1914.*)

Recourse of drawee against indorser in South Dakota

1497. An employee of a farmer forged the latter's name to three small checks, making them payable to himself. The employee had these checks cashed by a saloon keeper who deposited them with a bank and the inquiring bank accepted same in the clearing. *Opinion:* According to the general rule prevailing in the majority of states a bank which pays a forged check cannot charge the amount to its depositor nor recover the money back from a bona fide holder to whom payment has been made. But the Supreme Court of South Dakota held in *Greenwald v. Ford*, 21 S. D. 28, that a bank paying such check has a right to measurably rely on the indorsements thereon and to claim that such indorsement misled it into supposing the signature was genuine. This is contrary to what is generally held elsewhere, that the indorsement does not guarantee the genuineness of the drawer's signature to the drawee. While, of course, the bank cannot charge the amount of these small checks to its customer, it may be under the *Greenwald* case the bank would be entitled to recover the money from the bank receiving payment, in which case the latter could recover from the saloon keeper. (*Inquiry from S. D., Feb., 1913.*)

1498. A bank in South Dakota paid a check drawn on it for \$8.50, bearing a forgery of the drawer's signature, said check having been indorsed and presented by another bank to whom the amount was paid. A month later, when the depositor had his bank book balanced, the forgery was discovered, and the presenting bank immediately notified. The holder of the check disclaims responsibility. *Opinion:* The general rule is that drawee cannot recover money paid on forged check to bona fide holder who is free from negligence. In South Dakota exceptional rule exists that money is recoverable on theory that drawee has right to rely on holder's indorsement as vouching for genuineness of signature. *Young v. Lehman*, 63 Ala. 519. *Greenwald v. Ford*, 21 S. D. 28. (*Inquiry from S. D., Sept., 1917, Jl.*)

Recovery of money paid on forged bearer check

1499. The Y Trust Company cashed

and received payment of a forged check drawn on the X Bank, made payable to cash or bearer. The check bore the signature and indorsement of R. G. W., both of which were forgeries. It developed that the handwriting of R. G. W. as drawer and on the back of the check was that of a former customer of the Y Trust Company, whose signature they had on file, and that this person had disappeared immediately after the check was cashed. *Opinion:* The general rule is that money paid upon a forged check to a bona fide holder is not recoverable, but the special circumstances in this case, that the loss was incurred before payment was received from the drawee, and that the signature and indorsement were made by a former customer of the Trust Company, which should have known the identity of the person receiving the cash, and that he was not R. G. W., would probably be held to modify the general rule and permit recovery. (*Inquiry from Miss., Jan., 1912, Jl.*)

1500. A customer presents a forged bearer check to the drawee, indorses it, and receives the money. The forgery is discovered the same day. The question arises as to the drawee's right of recovery. *Opinion:* Under the general rule, money paid upon a forged check is not recoverable. A lower New York court has held that where a forged bearer check is indorsed by the person receiving payment, this constitutes an exception to the rule, as the indorsement is unnecessary and tends to divert the drawee from scrutiny of the drawer's signature; but this decision has not been taken to the highest court and has been criticised. *Williamsburg Tr. Co. v. Tum Suden*, 120 App. Div. (N. Y.) 518. *Title Guarantee & Tr. Co. v. Haven*, 89 N. E. (N. Y.) 1082. (*Inquiry from N. Y., Sept., 1911, Jl.*)

Forgery of signature by mark

Drawee can require guaranty before payment and has right of recovery

1501. A customer left his written signature at a bank and two years later his check was presented, signed by a mark with two witnesses unknown to the bank. The check had been cashed by another bank which refused to guarantee the signature. *Opinion:* The drawee before paying the check is entitled to require a guaranty or satisfactory evidence of the genuineness of the signature. In the event the drawee should pay the check and it should prove to be a forgery, the

rule that a bank is bound to know its customer's signature and cannot recover money paid a bona fide holder on a forgery thereof has never been applied where the check was signed by mark with witnesses, and in such case the bank receiving payment is equally bound with the drawee to know the genuineness of the signature and the credibility of the witnesses. *Hankowska v. Buffalo Sav. Bk.*, 140 N. Y. S. (*Inquiry from Cal., June, 1913, Jl.*)

Recovery by drawee from witness to signature

1502. Sam Smith has an account with a bank, and being unable to write, signs checks with a mark, having some one to witness the same. Henry Jones, representing himself to a merchant as Sam Smith, fills out a check on the bank to his own order, which bears the forged signature

his
"Sam x Smith"
mark

and the signature of the merchant as a witness. The bank paid Henry Jones the cash on this check, and seeks to hold the merchant liable. *Opinion:* When a person signs his name as witness to a signature by mark upon a check, which signature is a forgery, the witness is liable to the drawee bank which pays the check in reliance upon such signature as witness. *State Nat. Bk. v. Freedmen's Sav. & Tr. Co.*, 2 Dill. (U. S.) 11. *Second Nat. Bk. v. Curtiss*, 153 N. Y. 681. (*Inquiry from Ga., May, 1918, Jl.*)

Recovery by drawee from holder and from witness

1503. A check of a depositor who could not sign his name was given to a bank. It was properly drawn and the mark was made and properly witnessed by an official of the bank, and when presented to the drawee bank was paid. The bank cashing the check admits that the depositor is not the man who made the mark and received the money. Another check signed by mark was witnessed by the payee and cashed by a merchant. This check too was forged. The drawee bank paid this check also. What is the liability of the drawee bank and against whom may recovery be had, if anyone? *Opinion:* The rule that a bank is bound to know the signature of its depositors does not apply to a signature by mark with witnesses. In such a case the bank receiving payment is equally bound with the drawee to know the genuineness of the signature, and is in a better position to test the credibility of the

witnesses. *Hankowska v. Buffalo Sav. Bank*, 140 N. Y. Supp. 891. Second Nat. Bank v. Curtiss, 2 N. Y. App. Div. 508 (aff'd 153 N. Y. 681). State Nat. Bank v. Freedmen's Sav. & Tr. Co., 2 Dill. (U.S.) 11. A witness to a forged signature is liable to one paying money in reliance thereon.

The bank cashing the first check would probably be liable, because of negligence in not requiring a proper identification, and for much the same reason the merchant would seem to be liable to the drawee. In the first stated case, assuming the act of witnessing was an official act of the cashing bank, it would also be liable as witness to the forged signature; if unofficial, the officer would be personally liable to the drawee, if it was necessary to have recourse upon him. (*Inquiry from Ga., Jan., 1921.*)

Recovery of money paid on forged payee's signature by mark to certificate of deposit

1504. Bank A issued a time certificate of deposit to Mr. and Mrs. John Doe, who are illiterate and give their signature by mark. Dick Smith, having forged the signatures of the payees by mark, deposited the certificate in Bank C, which in turn forwarded it to Bank B and received a remittance, although before maturity. Bank B held the instrument for three months until the date of maturity and upon presentment the amount was paid by Bank A. The payees claimed that their purported indorsement was forged and sue Bank A for payment. *Opinion:* A bank which pays a certificate of deposit upon forgery of the payee's signature, made by mark and witness, remains liable to the payee for the money but has right of recovery from the bank which collected the certificate upon forged indorsement. Bank C, therefore, must bear the loss. The rule which has been held in one or two cases that a bank is bound to know the payee's indorsement upon its certificate of deposit has no application where the indorsement is by mark and witness. The fact that Bank B remitted to Bank C before maturity of the certificate and held the same until maturity before collecting from Bank A would have no bearing on the question of liability. (*Inquiry from Wis., July, 1918, Jl.*)

Special statutory rule in Pennsylvania

Forgery where signatures of drawer and payee are the same

1505. A bank paid a forged check upon which the signatures of the drawer and

payee were the same. Two months later the forgery was discovered. The bank receiving payment guaranteed prior indorsements. *Opinion:* The drawee bank may have a fair chance of recovery from the bank receiving payment. The Act of 1849, still in force in Pennsylvania, favors the drawee's recovery provided it gives prompt notice "according to the circumstances and the usage of the business;" and the date of notice is immaterial if the one receiving it can recoup himself without loss. *Iron City Bank v. Fort Pitt Nat. Bank*, 159 Pa. 46. See citations in Opinion No. 1509. *Levy v. Bk., 1 Binney 27. Act April 5, 1849, Sec. 10 Pa., Laws 426. Price v. Neal, 3 Burrows 1355. Neg. Inst. A., Sec. 62 (Comsr's. dft.). (Inquiry from Pa., Oct., 1912, Jl.)*

Prompt notice of forgery necessary

1506. A check drawn on bank A was taken by a merchant in a distant city in payment for merchandise. It was paid by drawee to bank C through the clearing house, and, at the end of the month when A's customer's account was balanced, discovered to be forged, when prompt notice was given to bank C which refused to reimburse A because of delay in notification. *Opinion:* Under the law of Pennsylvania a bank which mistakes its customer's signature has a right of recovery from a person receiving payment (*Iron City Bank v. Fort Pitt Nat. Bank*, 159 Pa. 46, 28 Atl. 195, 23 L. R. A. 615) provided notice of forgery is given promptly. In the present case there does not appear to be unreasonable delay in discovery of the forgery, for it was discovered immediately by the customer when his account was balanced at the end of the month and thereupon prompt notice was given. If there had been any delay after the discovery in giving notice, the case would be different. (*Inquiry from Pa., April, 1915.*)

1507. On August 19th a check bearing the forged signature of the drawer was deposited by a merchant, a bona fide holder, and was paid by the drawee. On October 11th the forgery was discovered and the drawee notified. *Opinion:* In Pennsylvania the drawee can recover from the holder receiving payment under the Act of 1849, provided prompt notice of the forgery is given. The question of what is prompt notice is somewhat uncertain under the Pennsylvania decisions. Delay in giving notice will relieve the person receiving payment from liability unless he is not prejudiced by such delay.

Union Nat. Bk. v. Franklin Nat. Bk., 94 Atl. (Pa.) 1085. Iron City Nat. Bk. v. Fort Pitt Nat. Bk., 159 Pa. 46. (*Inquiry from Pa., Nov., 1915, Jl.*)

Where bank notified of blank check stolen

1508. A, a customer of bank B, notified it that one of its blank checks had been stolen from him and asked that payment be stopped. Later, bank C cashed a check payable to D upon which A's signature was forged and it was paid by B, the drawee. D claimed that his indorsement was forged also but there was no one connected with bank C where he was known who remembered from whom it received the check. As C guaranteed indorsement, the question is—Is it not responsible? *Opinion:* It was held in Second Nat. Bank v. Guaranty Trust Co., 206 Pa. 616, that a bank which paid a check on a forgery of the payee's indorsement could recover the money from the bank which guaranteed prior indorsements, and in Pennsylvania there is a statute which enables the bank to recover money paid notwithstanding forgery of the drawer's signature, provided there is no other negligence on the part of the bank and prompt notice is given. As to the notice to stop payment, this must have been simply a warning to look out for a check without describing a particular check as to amount, payee, etc. This would probably be held not such effective notice as would estop B from recovery and deprive it of its right to look to C for reimbursement. (*Inquiry from Pa., Feb., 1919.*)

Delay of thirty days between payment and notification

1509. A check bearing the fictitious name of a payee was cashed by a bank for the payee and paid by the drawee. One month later the drawee discovered the forgery of the drawer's signature. Upon whom should the loss fall? *Opinion:* In Pennsylvania, under the Act of 1849, a bank which pays money upon a forged check, purporting to be drawn upon it, is not precluded from recovering the money paid, provided it gives notice with reasonable diligence. What is reasonable diligence, and whether a delay of thirty days between payment and notification, notice being given immediately upon discovery, would be unreasonable, is not clearly defined by Pennsylvania decisions. Colonial Tr. Co. v. Nat. Bk. of Western Pa., 50 Pa. Super. Ct. Rep. 510. Iron City Nat. Bk. v. Fort Pitt Nat. Bk., 159 Pa. 46. Mc-

Neely Co. v. Bk. of North America, 221 Pa. 588. (*Inquiry from Pa., April, 1919, Jl.*)

Notice seven days after payment

1510. A filled out a check payable to his own order and forged B's signature to it. He cashed it at bank C which through its correspondent D collected from the drawee bank E. The latter, seven days later, discovered the forgery and immediately notified both C and D. The inquiry is as to E's right of recovery. *Opinion:* Under the Pennsylvania Act of 1849 payment by a drawee of a forged check is recoverable provided prompt notice of the forgery is given to the prior holder. If the one receiving the money can recoup himself without loss, the date of the the notice is immaterial. In Iron City Bank v. Fort Pitt Nat. Bank, 159 Pa. 46, 28 Atl. 195, 23 L. R. A. 615, the court held that where the drawee allowed five days to elapse during which the party receiving the money had paid it out in reliance upon the drawee's act in making payment, the latter was held not to have acted with due diligence and barred from recovery. In the present case the delay was seven days, but the money was paid out by bank C before it was collected, and this fact might have a bearing, for, if bank E had refused payment of the check, the money might have been lost to C. In the case of Union Nat. Bank v. Franklin Nat. Bank, 249 Pa. 375, 94 Atl. 1085, the drawee bank did not sue the bank which cashed the forged check, but sued the bank which collected. Fifteen days later the forgery was discovered, and the drawee was held entitled to recover because it was held that at the time of the notice of the forgery the collecting bank had not remitted the funds. In the present case if D had not accounted to C at the time it received notice of the forgery, E would have a right of recovery against it under the decision in the Union Bank case, and, if it had accounted, and E's suit was against bank C, the question would be whether the seven days' notice was sufficiently prompt. (*Inquiry from Pa., Oct., 1919.*)

Drawee can sue collecting bank or prior indorser

1511. Bank A cashed a check drawn on bank B for a payee who was unknown to it. After passing through three banks the drawee honored the check, and twenty-three days later notified A that drawer's signature was forged. As it claimed reimbursement from

A, the latter asks whether or not, if any one is liable to drawee, that bank should not look first to the bank from which it received the check? *Opinion:* The general rule is that the drawee which pays a check on a forgery of a drawer's signature is bound by the payment and cannot recover the money back. This rule was abrogated by statute in Pennsylvania in 1849, and the rule in that state is that money paid upon a forgery is recoverable provided prompt notice of the forgery is given. In construing the Act of 1849, the court held, in the case of *Union Nat. Bank v. Franklin Nat. Bank*, 249 Pa. 375, 94 Atl. 1085, that prompt notice of the forgery by the drawee is necessary unless delay in giving notice works no injury, as in a case where demand has been made upon the bank collecting the check while it still has the funds in its possession and before it has remitted them to the holder. It would appear also from the case that the drawee bank can sue either the bank collecting the check or any of the prior indorsers, and the test is whether the notice of the forgery has been given with reasonable diligence. In the present case twenty three days elapsed, and the question would be whether this was too long a time. (*Inquiry from Pa., Nov., 1919.*)

Statutory rule not repealed by N. I. Act

1512. On June 17 a customer deposited a check drawn on the Scranton bank payable to the order of "cash" and signed and indorsed with the name of A. B., Jr., which proved to be forged. On July 1 the bank receiving payment was notified and asked to refund. *Opinion:* The rule that the drawee is bound to know the drawer's signature and cannot recover money paid on the forgery thereof has been changed by a statute in Pennsylvania, passed in 1849, permitting recovery where there has been due diligence in the discovery and notice of the forgery. In this case the drawee probably would be held to have used due diligence. The Negotiable Instruments Act has been held in a recent case not to have repealed the Act of 1849. *Iron City Nat. Bk. v. Fort Pitt Nat. Bk.* 159 Pa. 46. *Levy v. Bk.*, 1 Binney 27. *Colonial Tr. Co. v. Nat. Bk. of Western Pa.*, 50 Pa. Super. Ct. Rep. 510. (*Inquiry from Pa., Aug., 1914, Jl.*)

Non-recovery by Pennsylvania from Ohio bank

1513. A check drawn on a Pennsylvania bank with forged signature and counter-signature, and with the name of the payee

altered, was deposited for collection January 4, 1921, with an Ohio bank, which refused to allow the depositor to draw against the item until it received advice of credit, including this item, together with a statement that the amount would be available as a reserve January 6th, because of its having been received too late for clearing on the 5th. On the 11th and 12th the Ohio bank permitted the withdrawal of the amount of the check. The drawee bank did not discover that the check was forged, but had its attention called to it by the drawer after he had received his January statement. The Ohio bank refuses to take responsibility on the ground that the drawee bank should have known the signature of the depositor and that had it discovered the forgery upon presentation of the voucher, no loss would have occurred. Is it justified in doing so? *Opinion:* Ohio follows the general rule that a drawee bank paying upon a forged signature of the drawer cannot recover the money from a bona fide holder who has received payment. *Belmont First Nat. Bank v. Barnesville First Nat. Bank*, 58 Ohio St. 207, 50 N. E. 723. *Ellis v. Ohio L. Ins., etc., Co.*, 4 Ohio St. 628. In Pennsylvania, however, by Act of April 5, 1849, the right is given to a drawee bank to recover money paid by it on the forged signature of its depositor. *Union Nat. Bank, v. Franklin Nat. Bank*, 249 Pa. St. 375 (holding that the act was not repealed by Sec. 137 of the Neg. Insts. Law, as amended by the Act of 1909, as there was no inconsistency between the acts). *Colonial Trust Co. v. Western Pa. Nat. Bank*, 50 Pa. Super. Ct. 510. See also *Judge v. West Phila. Title & Trust Co.*, 68 Pa. Super. Ct. 310. However, due diligence in giving notice of the forgery is a condition of recovery. *Iron City Nat. Bank of Pittsburgh v. Fort Pitt Nat. Bank*, 28 Atl. (Pa.) 195, stating that the drawee is not "absolutely bound, as at common law, to discover and give notice of the forgery on the very day of payment. All that he need do, in any case, is to give notice promptly according to the circumstances and the usage of the business and, unless the position of the party receiving the money has been altered for the worse in the meantime, it would seem that the date of the notice is not material. But, on the other hand, the statute does not dispense with the necessity of care and diligence on the part of the payor, nor exempt him from the consequences of his own negligence, if thereby loss would accrue to the other party." In that case where the

drawee bank discovered the forgery five days after payment it was held that its lack of diligence barred it from recovering when in the meantime the bank receiving the money had paid it out in reliance upon the action of the drawee bank. The rule of this case would seem to preclude recovery in the case submitted, even should it be held the law of Pennsylvania and not of Ohio governed the liability of the Ohio bank, a point which has not been decided. (*Inquiry from Ohio, March, 1921.*)

Recovery where holder negligent

Recourse of Iowa drawee upon prior negligent indorser

1514. A customer deposited for collection a check drawn on a local bank which was duly paid through the clearings. Thirty days later the drawee bank discovered that the drawer's signature had been forged and seeks to hold the collecting bank liable as indorser. *Opinion:* In Iowa a drawee which pays to a bona fide holder a check upon which the drawer's signature is forged cannot recover the money, but if the holder has been negligent in acquiring the check without due inquiry, recovery is allowed. Where payment is made to a bona fide indorsee of a negligent holder, the latter is not liable but the drawee has recourse upon the prior indorser who is guilty of negligence. *First Nat. Bk. v. Marshalltown St. Bk., 107 Iowa 327. (Inquiry from Iowa, Dec., 1917, Jl.)*

Rule in Tennessee

1515. A customer cashed a forged check at his bank, which in turn received payment from the drawee bank. A month later the drawee discovered the forgery of its depositor's signature. *Opinion:* Recovery of payment by the drawee, under the law of Tennessee, depends on whether or not the customer was negligent in taking the check from the forger. *Bank v. Bank, 88 Tenn. 299. (Inquiry from Tenn., Jan., 1910, Jl.)*

Recovery by drawee where check cashed for stranger

Majority of courts, including Illinois, allow recovery

1516. A merchant cashed a forged check for a stranger, without inquiry as to his identity, and the check, in due course, was paid by the drawee. Can the latter recover from the merchant? The collecting bank guaranteed prior indorsements. What effect

would this have? *Opinion:* The general rule is that the drawee cannot recover money paid upon a forged check to a bona fide holder, and some courts hold the fact that a purchaser takes a forged check from a stranger without inquiry as to his identity and without disclosing the fact to the drawee bank is not negligence sufficient to deprive him of the status of a bona fide holder, so as to make him liable to refund to the drawee. Supporting decisions will be found in N. Y., Md., Minn., and Vermont. But more courts hold that a bank or person cashing a check for a stranger should make reasonable inquiry as to his identity and by indorsing the check impliedly represents it has performed that duty, and where inquiry is not made, the rule that the drawee is bound does not apply. Decisions to this effect will be found in Iowa, Ga., Mass., Ky., Neb., North Dakota, Oregon, Tennessee, Tex., S. C., W. Va., and Washington. The Ill. case of *First Nat. Bank of Quincy v. Ricker, 71 Ill. 439*, also tends to support this view. The drawee bank in this case might, therefore, recover from the merchant upon this ground. No liability is created by the bank guaranty of prior indorsements, for that does not include the signature of the drawer. (*Inquiry from Ill., Jan., 1921.*)

1517. A drawee bank paid six forged checks to banks which cashed them for strangers without identification. *Opinion:* The drawee cannot charge them to drawer's account, but would probably have a right of recovery against the bank under the Illinois decisions, unless the Negotiable Instruments Law is construed as precluding recovery. *Bk. v. Ricker, 71 Ill. 439. First Nat. Bk. v. Northwestern Nat. Bk., 152 Ill. 296. Price v. Neal, 3 Burrows 1355. Neg. Inst. A., Sec. 16 (Comsr's dft.) Inquiry from Ill., Oct., 1913, Jl.)*

Rule not declared in California

1518. Bank A cashes a forged check drawn on bank B without inquiry or identification and receives payment. It asks if B has any recourse against it? *Opinion:* "The drawee of a check is bound at his peril to know the handwriting of the drawer and if he pays the check to which the signature of the drawer was forged he must suffer the loss as between himself and the drawer or an innocent holder to whom he has made payment." This is the rule in California as laid down in *Redington v. Woods, 45 Cal. 406*. Under this general rule B cannot recover unless the California courts follow

the cases which hold that such a rule does not apply where a bank cashes a check for a stranger and fails to make reasonable inquiry as to his identity. See *First Nat. Bank v. Marshalltown State Bank*, 107 Iowa, 327, 77 N. W. 1045, 44 L. R. A. 131. *Woods v. Colony Bank*, 114 Ga. 683, 40 S. E. 720, 56 L. R. A. 929. To the contrary some cases hold that the fact that a bank receives a check from a stranger and does not communicate that fact to the drawee does not render it liable where the latter pays the check and afterwards discovers it to be a forgery. See *Commercial and Farmers Nat. Bank v. First Nat. Bank*, 30 Md. 11. *Pennington County Bank v. First State Bank*, 110 Minn. 263, 125 N. W. 119. The point has not been decided in California (*Inquiry from Cal., Feb., 1916.*)

Not decided in Colorado

1519. A merchant cashed a forged check for an unidentified stranger. He deposited it with his bank and it was cleared in the regular way. Should the drawee bank, which paid the check, or the merchant stand the loss? *Opinion:* The general rule is that a drawee bank which pays on a forged signature of the drawer is bound by the payment when made to a bona fide holder and cannot recover the money back. Several states, however, recognize an exception where an indorsee has acquired the check from a stranger without inquiring as to his identity and hold that this constitutes such negligence as will allow recovery by the drawee. Other states do not recognize this exception. No Colorado cases have been found on this question, and it will require a judicial decision to establish the rule for that state. (*Inquiry from Colo., Jan., 1921.*)

The law in Indiana

1520. A customer of a bank lost a blank check; his name was forged to it and it was presented to a bank by a stranger who desired to open an account. The stranger took most of the proceeds in cash and the small balance was credited to him as a deposit. The stranger gave an address, which on investigation proved to be false, and this was the only means of identification the bank had. In due course of the clearings the check was paid by the drawee bank. Has the bank any defense against its liability to the depositor on the ground that he was negligent in losing his check? May it recover from the bank cashing the check? *Opinion:* The customer is not responsible

for the result of the losing of his blank check, and the bank has no defense on this score. As to the recovery by the drawee the general rule is that he is bound to know the signature and cannot recover; but some courts make (while others disallow) an exception where the purchaser acquires the check from a stranger without inquiry. In *Indiana (Commercial & Sav. Bank v. Citizens Nat. Bank*, 120 N. E. 670) the court says: "The weight of authority is to the effect that responsibility of the bank or drawee who pays such forged check is absolute only in favor of one who has not by his own fault or negligence contributed to the success of the fraud, or by his conduct misled the bank or in some sense induced a sense of safety which reasonably may have caused such bank to have lessened its vigilance by reliance upon such conduct. This court has heretofore recognized this principle. *First Nat. Bank of Crawfordsville v. First Nat. Bank of Lafayette*, 4 Ind. App. 355. *Indiana Nat. Bk. v. First Nat. Bank*, 9 Ind. App. 185." But the court holds that where the parties are both at fault, the law will leave the loss where the parties have placed it and will not come to the assistance of either. It is to be gathered from this case (which did not involve the taking of a forged check from a stranger) that the cashing bank would be at fault and liable to refund, unless there was some special negligence of the drawee, beyond the mere mistaking of its customer's signature. (*Inquiry from Ind., Jan., 1921.*)

Nebraska drawee may recover from holder taking from stranger

1521. Where the drawee paid a forged check, it can under the law of Nebraska recover the money paid from the party who cashed the same, but who failed to require proof of the identity of the person presenting the check. *St. Bk. of Alma v. First Nat. Bk. of Orleans*, 22 Neb. 769. *Canadian Bk. of Commerce v. Bingham*, 30 Wash. 484. *First Nat. Bk. of Lisbon v. Wyndmere*, 15 N. Dak. 299. (*Inquiry from Neb., Nov., 1908, Jl.*)

Rule not declared in Kansas

1522. Within the period of a month three checks purporting to be drawn by A on bank B were cashed at a local bank C and paid by the drawee bank. It was soon discovered that they had been cleverly forged and, on being questioned, neither the paying teller of bank C nor anyone else in

the bank was able to give any information as to who the indorsers were or anything about them. The checks seemingly had been cashed at the bank without anyone connected with it ever knowing the parties. Upon being requested to assist in locating them, the officials of bank C absolutely refused to give any aid, and made no effort whatever in the matter. The drawee bank asks if under these circumstances it must suffer the loss? *Opinion:* Where a bank cashes for a person with whom it is unacquainted a check drawn upon another bank, without taking the trouble of ascertaining the holder's identity, or looking into the validity of the check, there is a conflict of authority as to the right of the drawee bank to recover the payment upon discovering that the signature is a forgery. There appears to be no decision by the Kansas courts upon the subject. Some authorities hold that the cashing bank is bound to make reasonable inquiry as to the identity of the stranger and reasonable attempt to ascertain whether or not the instrument is valid, and that, by indorsing it or presenting it, it impliedly represents that it has performed this duty. In these cases it is held that the rule requiring the bank to know the drawer's signature does not apply and that the drawee may recover the money paid on the forged check. Some of the cases so holding are *First Nat. Bank v. Marshalltown State Bank*, 107 Iowa 327, 77 N. W. Rep. 1045, 44 L. R. A. 131. *Woods v. Colony Bank*, 114 Ga. 683, 40 S. E. Rep. 720. *First Nat. Bank v. First Nat. Bank*, 151 Mass. 280, 24 N. E. 44, 21 Am. St. Rep. 450. *National Bank of North America v. Bangs*, 106 Mass. 441. *First Nat. Bank v. State Bank*, 22 Neb. 769, 36 N. W. 289. *First Nat. Bank v. Bank of Wyndmere*, 15 N. D. 299, 108 N. W. 546. *Newberry Savings Bank v. Bank of Columbia*, 91 S. C. 299, 74 S. E. 615. *Peoples Bank v. Franklin Bank*, 88 Tenn. 299, 12 S. W. 716, 6 L. R. A. 724, 17 Am. St. Rep. 884. *Texas State Bank v. First Nat. Bank*, Tex. Civ. App. 168 S. W. 504. Cases which hold to the contrary are *Commercial & Farmers Nat. Bank v. First Nat. Bank*, 30 Md. 11. *Pennington County Bank v. First State Bank*, 110 Minn. 263, 125 N. W. 119. *Bank of St. Albans v. Farmers Bank*, 10 Vt. 141. (*Inquiry from Kan., Jan., 1917.*)

Minnesota drawee cannot recover from holder although check taken from stranger

1523. A drawee bank paid two checks upon which the drawer's signature was

forged. The checks had been cashed at saloons in the town and the saloonkeepers were unable to identify the indorsements. The bank admits its liability to the drawer but seeks to hold the indorsers responsible for cashing the checks for strangers. *Opinion:* Drawee cannot recover money paid upon check bearing forgery of drawer's signature from bona fide holder, but may recover when payment is made to one not a bona fide holder. If the holder takes the check under circumstances which would put an ordinarily prudent man upon inquiry and makes no attempt to ascertain the truth, he is not a bona fide holder, but in Minnesota the one circumstance that holder takes check from an entire stranger without inquiry is not sufficient to deprive him of status of bona fide holder. If payee's indorsement is also forged, the drawee, under Minnesota rule, may recover from subsequent indorser as warrantor of genuineness, notwithstanding forgery of drawer's signature. *Germania Bk. of Minneapolis v. Boutell, et al.*, 60 Minn. 189, 62 N. W. 327. *Pennington Co. Bk. v. First St. Bk. of Moorehead*, 125 N. W. (Minn.) 118. (*Inquiry from Minn., Sept., 1917, Jl.*)

Not decided in Missouri

1524. A check with forged signature was cashed by a bank for a stranger, no effort being made to identify the forger. It was cleared through the clearing house, accepted and paid. As between the cashing bank and the drawee bank, which stands the loss? *Opinion:* It has been held in Missouri that where a drawee bank pays a check on another bank, which is a bona fide holder, such drawee cannot recover the money back on discovering such check to be a forgery in the absence of any negligence by the bank to which the check has been paid. *National Bank of Rolla v. First Nat. Bank of Salem*, 125 S. W. (Mo.) 513.

There is a conflict of authority among courts of different states upon the question whether a bank which purchases a check from a stranger without taking the trouble of ascertaining his identity is guilty of such negligence thereby as will bar recovery. See, for the negative, *Commercial and Farmers Nat. Bank v. First Nat. Bank*, 30 Md. 11. For the affirmative, see *Bank of Williamson v. McDowell County Bank*, 66 S. E. (W. Va.) 761, which contains a full review of the authorities. The Missouri courts have apparently not passed upon the question. (*Inquiry from Mo., Feb., 1921.*)

New York drawee may recover notwithstanding check taken from stranger

1525. Bank A cashed a check for a stranger without inquiry as to his identity and character and collected amount from the drawee bank B. The check was later discovered to be forged, and the claim is made that A is liable because of negligence. *Opinion:* The general rule prevailing in New York is that a bank is bound to know the signature of its depositor, and if it pays a check to a bona fide holder upon which such signature is a forgery it cannot recover the money paid. In a number of states the above rule is held not to apply if the party receiving the money has contributed by his own negligence to the success of the fraud, as by taking the check from a stranger without inquiry, but in New York the rule probably is that this is not negligence. See *Salt Springs Bank v. Syracuse Sav. Inst.*, 62 Barb. (N. Y.) 101. (*Inquiry from N. Y., April, 1919.*)

Present rule in Oklahoma doubtful

1526. In Oklahoma, drawee who pays forged check to a bona fide holder free from negligence cannot recover money paid. Since the passage of the Negotiable Instruments Act, in 1912, the question is an open one in the state, whether holder taking check from stranger without inquiry as to identity is negligent and responsible to the drawee. *Cherokee Nat. Bk. v. Union Tr. Co.*, 125 Pac. (Okla.) 464. *Am. Exp. Co. v. St. Nat. Bk.*, 113 Pac. (Okla.) 711. *Title Guaranty & Tr. Co. v. Haven*, 126 App. Div. (N. Y.) 802. *First Nat. Bk. v. Northwestern Bk.*, 152 Ill. 296. *McCall v. Croning*, 3 La. Ann. 409. *First Nat. Bk. v. Marshalltown St. Bk.*, 107 Ia. 327. *St. Bk. v. Cumberland Sav. & Tr. Co.*, 85 S. E. (N. C.) 5. *Tr. Co. of America v. Hamilton Bk.*, 112 N. Y. S. 84. *Bk. of Williamson v. McDowell Co. Bk.*, 66 S. E. (W. Va.) 761. *Farmers Nat. Bk. v. Farmers & Traders Bk.*, 166 S. W. (Ky.) 986. (*Inquiry from Feb., 1917, Jl.*)

Former Oklahoma decision allowing recovery overruled but question yet in doubt

1527. A check upon which the drawer's signature was forged was cashed by a bank in Oklahoma, which took it from a stranger without identification. Relying upon the express guarantee of the bank that the payee's indorsement was genuine, the drawee paid the check. *Opinion:* The drawee can recover the money. *Am. Exp. Co. v.*

St. Nat. Bk., 113 Pac. (Okla.) 711. (*Inquiry from Okla., April, 1911, Jl.*)

Note: The above digest of opinion is based on the decision of the Supreme Court of Oklahoma rendered in January, 1911, in the case of *American Express Co. v. State Nat. Bank*, 27 Okla. 824, 113 Pac. 711, 33 L. R. A. (U. S.) 188, which allowed a drawee to recover money paid on a forged check where the payee was negligent in receiving the check or where he would be in a worse position if the mistake were corrected than before the payment. This case was practically overruled by the court in a later decision handed down in July, 1912, *Cherokee Nat. Bank v. Union Trust Co.*, 33 Okla. 342, 125 Pac. 464, which contains the present law of Oklahoma on the subject and holds that under the Negotiable Instruments Act where a bank in good faith and for value purchases from an indorser a check upon another bank and thereupon indorses and forwards the same to its collection agency for collection, and the same is presented by the collection bank to the drawee bank, and is paid by the drawee bank, the drawee bank, upon thereafter discovering the check to be a forgery, cannot recover the money back from the bank to which it was paid; holding that a drawee who pays to a bona fide holder a check to which the drawer's name has been forged cannot recover the amount of such payment. The guaranty of an indorsement on a check applies only to the indorser, and does not protect the drawee against the risk of cashing a check to which the maker's name is forged. This decision, however, leaves the question somewhat in doubt whether a purchaser requiring a check from a stranger without inquiry or identification is a negligent or a good faith holder. *March, 1921.*

Rule uncertain in Virginia

1528. A check upon which the drawer's signature and the payee's indorsement were forged was cashed by a bank in Virginia, which took it from a stranger without identification. The drawee bank paid the same and three months later the forgeries were discovered. Is the drawee entitled to recover? *Opinion:* The rule is well established that the drawee which pays a forged check to a bona fide holder who is without fault cannot recover the money from the person to whom payment is made. *De Voss v. City of Richmond*, 18 Grat. (Va.) 359. *Johnston v. Bank*, 27 W. Va. 343. *Bk. of*

Williamson v. McDowell County Bank, 66 S. E. (W. Va.) 761. But there is a conflict of authority upon the proposition whether, if the person or bank which cashes the check takes same from a stranger without inquiry, this is such negligence as will prevent him from claiming protection of the rule holding the drawee bound. If the same rule laid down by the Supreme Court of Appeals of West Virginia in the *Bank of Williamson* case cited, *supra*, should be applied to the present case by the Virginia courts, there would be a right of recovery because the bank cashed the check for a stranger without inquiry as to his identity. But some courts hold the contrary, namely, that the fact that the presenter of the check is a stranger does not take from the cashing bank the character of a bona fide holder and it is not liable to the drawee for the money collected upon a forged check. The decisions upholding this rule are referred to by Brannon, J., in his dissenting opinion in the *Williamson* case above referred to, and which decision fully gives the law upon the subject. (*Inquiry from Va., May, 1920.*)

Drawer's signature and payee's indorsement both forged

1529. (Note) Some courts hold that a bank may recover money paid on a check bearing a forged indorsement notwithstanding the fact that the drawer's signature is also forged: *First National Bank v. Northwestern National Bank*, 152 Ill. 296. *Farmers National Bank v. Farmers & Traders Bank*, 166 S. W. (Ky.) 986. *McCall v. Corning*, 3 La. Ann. 409. *Germania Bank v. Boutelle*, 60 Minn. 189 (dictum). *State Bank of Chicago v. First National Bank of Omaha*, 127 N. W. (Neb.) 244. Other courts deny the right of recovery in such case: *First National Bank v. Marshalltown State Bank*, 107 Iowa 327. *State Bank v. Cumberland Savings & Trust Co.*, 85 S. E. (N. C.) 5. *Commercial & Savings Bank v. Citizens Nat. Bank*, 120 N. E. (Ind.) 670. *National Bank of Commerce v. Seattle Nat. Bank*, 187 Pac. (Wash.) 342.

In *New York, in Trust Co. of America v. Hamilton Bank*, 127 App. Div. 515, where both drawer's signature and payee's indorsement were forged, the court referred to the Illinois case above cited but said that under the Negotiable Instruments Act an instrument is payable to bearer where it is payable to the order of a fictitious or non-existing person and such fact is known to the person making it so payable, and that whoever forged the signature knew that the

person named as payee would never have any interest in the instrument; therefore, the court reasoned that the instrument could be treated as payable to bearer and having been paid on a forgery of the drawer's signature the drawee cannot recover the money paid.

The Supreme Court of the United States has now declared in favor of the non-recovery rule in *United States v. Chase National Bank*, 252 U. S. 485. In that case a check purporting to be drawn by one S, made payable to the order of S, was a forgery both as to signature of the drawer and indorsement of the payee. The court applied the rule that drawee is bound to know the signature of drawer and cannot recover money paid an innocent holder on a forgery thereof and refused to permit the fact that previous indorsement was also forged to constitute an exception. The court said: "The drawee failed to detect the forged signature of the drawer. The forged indorsement puts him in no worse position than he would occupy if that were genuine." (*13 A. B. A. Journal, Sept., 1920.*)

Recovery by drawee where cashing bank attests payee's signature by mark

1530. On September 10, 1919, a bank paid a check upon which its customer's name was forged. The person who forged the signature also forged the name of another person as payee. The check was presented to a bank who (supposedly) knew the payee, and the assistant cashier made the indorsement for the supposititious payee by mark and attested same, giving deposit for \$150 and cash for \$400. Before cashing the check the other bank called up the drawee bank on the phone, and they "O.K.'d" the check. Drawee bank wishes to know if they have a right of recovery against the bank cashing the check. *Opinion:* Where the signature of the drawer and of the person named as payee are forged upon a check which is cashed by a bank and the money collected from the drawee, and the cashing bank makes the indorsement for the payee by mark and attests same, it would probably be held that the drawee has a right of recovery, notwithstanding the general rule that money paid upon a forged check cannot be recovered from a bona fide holder (*Young v. Lehman*, 63 Ala. 519), for in this case the payee's name was also forged, and its genuineness expressly warranted by the cashing bank which attested the payee's signature by mark. (*Inquiry from Ala., Dec., 1918, Jl.*)

Rule uncertain in Alabama

1531. Drawee bank A paid to collecting bank B a check upon which the signatures of both drawer and payee had been forged. A now seeks to hold B as last indorser, claiming that bank liable because of having guaranteed previous indorsements. *Opinion:* The general rule is that a drawee bank which pays a check under the forgery of the drawer's signature cannot recover the amount from the person to whom paid. The fact that the indorsement is also a forgery has been held to lead to a different result in some states, while in others the drawee cannot recover money paid upon a forged indorsement where the drawer's signature is also forged. The point has not been decided in Alabama. (*Inquiry from Ala., Feb., 1914.*)

Amount not chargeable to drawer and right of recovery by drawee unsettled in Arkansas

1532. A drawee bank paid a check that some three months afterwards was discovered to be forged. Subsequent investigation showed payee's indorsement also to be forged. The check was cashed by a merchant B who deposited it with bank A, and the latter sent it on, indorsing "All prior indorsements guaranteed." Drawee asks if it can hold any or all indorsers, or charge amount to drawee. *Opinion:* The general rule is that a bank paying a check upon a forged signature cannot recover the money from a bona fide holder who has received payment; but where the indorsement of payee is also forged it has been held by some courts that a bank may recover money paid on a check bearing a forged indorsement notwithstanding the fact that the drawer's signature is also a forgery; but other courts hold to the contrary. As to whether a merchant who cashes a forged check for a stranger without inquiry as to his identity is negligent to such a degree as will make him liable to refund the money to the payor bank is a question where there is also much conflicting decision. The Arkansas courts do not seem to have settled either question involved, so there would be a fair chance for drawee to recover from prior indorsers under the decisions stated. It could not charge the amount back to customer. (*Inquiry from Ark., June, 1918.*)

Liability of indorser who vouches for presenter

1533. A bank paid a check upon which the signatures of both drawer and payee were forged, and payment was made to the supposed payee upon the indorsement of

one T, a customer of the bank, below the forged indorsement of the payee. The bank had first refused to pay the check, which was payable to H and presented by a stranger, without a good indorsement and the presenter thereupon went to T and requested him to indorse the check, saying that he brought the check in to get it cashed for his friend H and that he had indorsed it for H who could not write. T, thereupon, indorsed the check and upon the second presentation the bank paid it. *Opinion:* It would seem in a case of this kind, where the right of the presenter to the money was especially vouched for by the bank's customer who indorsed to enable him to obtain payment, that the bank could recover from T on his breach of warranty of the genuineness of the forged indorsement. *Redington v. Woods*, 49 Cal. 406. *Bk. of Lisbon v. Bk. of Wyndmere*, 15 N. D. 299. *Canadian Bk. of Commerce v. Bingham*, 30 Wash. 484. *First Nat. Bk. v. Marshalltown St. Bk.*, 107 Iowa, 327. *First Nat. Bk. v. Northwestern Nat. Bk.*, 152 Ill. 296. (*Inquiry from Cal., Nov., 1909, Jl.*)

Not decided in Connecticut

1534. A bank paid several forged checks, upon which the indorsement of the payee, a fictitious person, was also forged. *Opinion:* The decisions are in conflict upon the drawee's right of recovery from the bank to which the checks were paid. In Connecticut the question has not been passed upon. *First Nat. Bk. v. Northwestern Nat. Bk.*, 152 Ill. 296. *Farmers Nat. Bk. v. Farmers & Traders Bk.*, 166 S. W. (Ky.) 986. Contrary cases, *First Nat. Bk. v. Marshalltown*, 107 Iowa 327. *St. Bk. v. Cumberland Sav. & Tr. Co.*, 85 S. E. (N. C.) 5. *Tr. Co. v. Hamilton Bk.*, 127 App. Div. (N. Y.) 515. (*Inquiry from Conn., May, 1916, Jl.*)

Right of recovery uncertain in Idaho

1535. Bank A received a check on deposit from a customer and collected from the drawee B. Within a few weeks the check was found to be forged. A's depositor refused to refund and there are circumstances which make it quite probable that the name of the payee was a fictitious one and that the indorsement was made by the same person who forged the name of the drawer. The inquiry is as to A's status and whether B could recover amount from it. *Opinion:* The general rule is that a bank is bound to know the drawer's signature and cannot recover money paid to a bona fide holder upon

a forgery thereof. In this case should the drawer's signature only prove to be forged, B could not recover. Where the payee's indorsement is also a forgery, the decisions are in conflict upon the right of the drawee to recover. In Idaho the point has never been decided. A, it would seem, would be considered a bona fide holder, but if the Idaho courts should hold with those cases which favor the drawee's right of recovery where the indorsement is also forged, this would not relieve that bank from liability. (*Inquiry from Idaho, June, 1917.*)

Recovery by Illinois drawee where signature and indorsement both forged

1536. A check purporting to be signed by A in favor of B, drawn on bank C, is cashed by bank D which indorses it "Pay to bank E or order." The latter bank, indorsing "Pay any bank or banker. Previous indorsements guaranteed," sent check to bank F which collected from C. Shortly afterwards the check was found to be forged and payee denied all knowledge of the check. The question is, can C recover? *Opinion:* Ordinarily a bank which mistakes a depositor's signature and pays on a forgery thereof, is bound by the payment and cannot recover the money back where paid to a bona fide holder. But it has been expressly held in Illinois that where the payee's indorsement is forged as well as the drawer's signature, the drawee, while estopped to deny the drawer's signature, is not estopped to deny the genuineness of the payee's indorsement which the subsequent indorser warrants. See *First Nat. Bank of Chicago v. The Northwestern National Bank*, 152 Ill. 296, 38 N. E. 739, 26 L. R. A. 289, 43 Am. St. Rep. 247. Upon the authority of this case C would have a right of recovery from D who would be responsible for the genuineness of payee's indorsement. (*Inquiry from Ill., May, 1914.*)

Depositor not liable for blank checks carelessly left around and drawee cannot recover in Indiana

1537. A check drawn on bank A was cashed by bank B, and a few weeks later the latter was advised that the signature and also the indorsement on the check were forged and was asked to make good. The check used was a printed form with the name and business of A's depositor at the top. Investigation showed that a number of these blanks had been stolen out of the depositor's check book which he had carelessly left lying

around in his office. The inquiry is as to whether or not B is liable. *Opinion:* The drawee cannot recover from a bona fide holder money paid on a forged check unless the Indiana courts should take the view that there was a right of recovery where the indorsement as well as the signature proved a forgery, which point does not seem to have been passed upon by them as yet. There is a conflict of authority in other states on this point. The carelessness of the depositor in leaving blank checks around would not be such responsible negligence as to charge him with the payment. In *Leff v. Security Bank*, 157 N. Y. Supp. 92, the fact that a depositor who was informed that blank checks were missing from his check book did not notify the bank thereof was held insufficient to raise the issue of his negligence in an action by him against the bank to recover the amount paid upon a forged check. (*Inquiry from Ind., March, 1917.*)

Note: In *Commercial & Savings Bank Co. v. Citizens Nat. Bank*, 120 N. E. (Ind.) 670, decided in 1918, where the names of the drawer and indorser of a check were both forged, recovery by the drawee was denied.

Recovery by drawee in Iowa where signature and indorsement both forged

1538. A merchant inquired by telephone of bank as to whether a certain depositor's check was good for a stated amount, and, receiving satisfactory answer, cashed a check purporting to be drawn by such depositor, and deposited it in a local bank which received payment from drawee. Within a day or so it was discovered that both signature and indorsement were forged, and the question is who must stand the loss? *Opinion:* It has been held in the case of the *First Nat. Bank v. Marshalltown State Bank*, 107 Ia. 327, 77 N. W. 1075, 44 L. R. A. 131, that as between drawee and good faith holder of check, the payment on forged signature is final, except when the holder has been negligent in not making due inquiry. If the circumstances were such as to demand inquiry when he took the check, the drawee may recover. But the negligence of the first holder is not imputable to a subsequent good faith holder, so as to make him liable to the drawee, nor can the drawee paying a check bearing a forged signature recover from the indorser as warrantor of a prior forged indorsement, since the forgery of the indorsement is not the cause of the loss. Unless there was some negligence on the part of the merchant who cashed the check for the

forger, the drawee would have no right of recovery against him under this decision, nor from the bank which received payment. (*Inquiry from Iowa, April, 1916.*)

Rule not declared in Kansas

1539. A check upon which both the maker's signature and the payee's indorsement were forged was cashed by A at the store of a merchant B who deposited it in bank C which collected from the drawee and the latter asks if it has recourse on bank C or the merchant B? *Opinion:* The general rule is that the drawee which pays a forged check to a bona fide holder cannot recover the money from the latter. Where the indorsement of the payee is also a forgery, some courts hold (and others deny) that the bank may recover the money on the ground that the case does not come within the rule which precludes a drawee from recovering the money it has paid on a check bearing a forged signature, but within the rule which permits the recovery of money paid on a forged indorsement. The point has not yet been decided in Kansas. (*Inquiry from Kan., Oct., 1917.*)

Kentucky drawee can recover money paid on forged indorsement although drawer's signature also forged

1540. Where a check, made payable to J. P. H., bore the forged signature of the drawer, and the indorsement of the payee, J. P. H., was likewise forged, can the drawee bank recover from the collecting bank? *Opinion:* It has been decided by the Court of Appeals in Kentucky in the case of Farmers' Nat. Bank of Augusta v. Farmers' & Traders' Bank of Maysville, 159 Ky. 141, 166 S. W. 986 (1914), that, while a bank is bound to know the signature of its depositor and cannot recover the money from a bona fide holder to whom a check bearing a forgery of such signature has been paid, nevertheless, where a bank cashes a forged check on another bank, the indorsement also being a forgery, without inquiry or question, and without any identification of the holder, and indorses it and sends it for payment to the drawee bank, the latter bank, upon discovering the forgery after having paid the check, can recover the amount from the former, under the general rule which permits a recovery of money paid under a mistake of fact, such case not coming within the exception to such rule which does not permit the drawee to recover money paid under a forged check, but within the rule as to forged

indorsements. (*Inquiry from Ky., Oct., 1919.*)

1541. Two neighbor banks of the bank of B cashed two checks forged on a customer of the B bank. These checks were indorsed by the payee, who may have been the forger or another person. The checks were cleared through the mails without detection by the drawee bank, and charged to its customer's account. Sixty days thereafter, when the customer had his bank book balanced, he discovered the forgeries and immediately reported them to the bank. The question is whether the drawee bank or the cashing bank [who guaranteed the indorsements] is liable. *Opinion:* Under the law of Kentucky a drawee bank which pays a check upon the forgery of the drawer's signature can recover from the holder receiving payment if the indorsement of the payee was also forged. Furthermore, if such indorsement was genuine, there probably would be a right of recovery if the holder receiving payment acquired the check from the payee without inquiry or proof as to his identity. Farmers Nat. Bank v. Farmers & Traders Nat. Bank [Ky.] 166 S. W. 986. But see Deposit Bank v. Fayette Nat. Bank [Ky.] 13 S. W. 339. (*Inquiry from Ky., March, 1920, Jl.*)

Recovery by Louisiana drawee where both signature and indorsement forged

1542. A presented a check signed by B and indorsed in blank by the payee. The check was paid by the drawee, and upon faith of such payment A paid over the proceeds. Later it was discovered that B's signature was forged. *Opinion:* The drawee cannot recover from the bona fide holder. If payee's indorsement was also forged, authorities conflict as to drawee's right of recovery; but in Louisiana recovery would be allowed. McCall v. Corning, 3 La. Am. 409. McKleroy v. Bk., 14 La. Ann. 458. Howard v. Bk., 28 La. Ann. 727. Nat. Bk., of Commerce v. Mech. Amer. Nat. Bk., 127 S. W. 429. Title Guarantee & Tr. Co. v. Haven, 111 N. Y. S. 305. First Nat. Bk. v. Marshalltown St. Bk., 107 Iowa 327. First Nat. Bk. v. Northwestern Nat. Bk., 152 Ill. 296. St. Bk. v. First Nat. Bk., 127 N. W. (Neb.) 244. (*Inquiry from La., July, 1911, Jl.*)

1543. A check purporting to be drawn by A to the order of B was deposited with bank C for collection. The latter, before cashing it, received word from the drawee

bank that it had remitted on the collection, and later the check was found to be forged both as to signature and indorsement, and the question is—Who bears the loss? *Opinion*: The rule established in Louisiana, in accord with the great weight of authority elsewhere, is that a bank which has paid a forged check to a bona fide holder is bound by the payment and cannot recover the money from the person who received it. See *Howard v. Mississippi Valley Bank*, 26 La. Ann. 727. Accordingly, the loss in this case would fall upon the drawee bank which paid the forged check, mistaking the signature of its customer, unless the fact that the indorsement, being also a forgery, would permit recovery under the rule that payment of a check bearing a forged indorsement, is recoverable by the payor bank. Some courts have held that in such a case the drawee may recover; but other courts have held that the forgery of the indorsement is not the primary cause of loss and that the rule holding the drawee bound and precluded from recovering applies. In Louisiana the drawee in such case has been held entitled to recover. *McCall v. Corning*, 3 La. Ann. 409. (*Inquiry from La., April, 1919.*)

Law in Michigan uncertain

1544. A farm hand filled out a blank check, forging his employer's name as maker, using a fictitious name for payee, and indorsing with that name. The check was drawn on bank A where the employer had an account, and was cashed at the store of a merchant who did not require identification. The latter deposited it in bank A where he also dealt, and was given credit for same. The forgery was discovered a few weeks later, and the merchant refused to stand the loss. *Opinion*: The general rule supported by numerous authorities is that a drawee which pays a forged check to a bona fide holder is bound by the payment and cannot recover the money back. Where in addition to the signature the indorsement is also forged there are conflicting decisions as to the right of the drawee to recover. There are also conflicting decisions as to such right, where the check is acquired from a stranger without identification. The law of Michigan is uncertain on both these questions. (*Inquiry from Mich., Oct., 1915.*)

Recourse of Illinois bank drawee upon Illinois bank collecting for Missouri bank

1545. A Missouri bank, A, received from a depositor who had cashed it a draft

drawn on an Illinois bank, B. It was sent to bank C in Illinois, which collected from the drawee bank, and later the check was discovered to be forged, but, as the indorsement also turned out to be a forgery, the drawee bank B claims it is not responsible. *Opinion*: It has been held by the Supreme Court of Illinois in the case of *First National Bank v. Northwestern National Bank*, 152 Ill. 296, 38 N. E. 739, that a bank which pays a supposed check on which both drawer's signature and payee's indorsement are forged cannot deny the forged signature but, assuming it to be genuine, has a right to recover because of the forgery of the indorsement. This decision would probably govern this case as the bank which collected from the drawee as well as the drawee bank itself are both located in Illinois. It seems that, under the decision referred to, which is directly in point, bank B would be entitled to recover from the bank in Illinois which received payment and that bank, in turn, would have recourse on the Missouri bank which, in turn, would have recourse on its depositor. (*Inquiry from Mo., June, 1914.*)

Conflict of law between Nebraska and Iowa

1546. Two checks were drawn on a Nebraska bank on which the signatures of both the drawer and of the payee were forged. These checks were cashed for the forger by two banks in Nebraska and indorsed over to two banks in Iowa, which banks received payment from the drawee bank. *Opinion*: Under the law of Nebraska the drawee can recover from the last endorser as warrantor of a prior forged indorsement. Under the law of Iowa the drawee could not recover. *St. Bk. of Chicago v. First Nat. Bk. of Omaha*, 127 N. W. 244. *First Nat. Bk. of Chicago v. Northwestern Nat. Bk.*, 152 Ill. 296. Contrary case, *First Nat. Bk. v. Marshalltown St. Bk.*, 107 Iowa 327. (*Inquiry from Neb., April, 1911, Jl.*)

New York drawee cannot recover

1547. A bank in New York, a bona fide holder, cashed a check upon which the drawer's signature and the payee's indorsement were forged. *Opinion*: Under the New York law the drawee bank which paid the check is the loser, and cannot recover from the New York bank. *Title Guarantee & Tr. Co. v. Haven*, 126 App. Div. (N. Y.) 802. *Tr. Co. of America v. Hamilton Bk.*, 127 App. Div. (N. Y.) 515. *First Nat. Bk. v. Northwestern Nat. Bk.*,

152 Ill. 296. (*Inquiry from N. Y., Jan., 1913, Jl.*)

1548. A made out a check to a fictitious payee and forged the signature of B as drawer. Using the fictitious name he indorsed the check and cashed it at a store. It was deposited in bank C which indorsed "Prior indorsements guaranteed," and collected from the drawee bank. The latter makes inquiry as to its liability. *Opinion:* The rule in this state is well established that a bank which pays a check on a forgery of the drawer's signature to a bona fide holder cannot recover the money, and the fact that the forger inserts the name of a fictitious person as payee and indorser does not entitle the payor bank to recover from a bank which guarantees the prior indorsements. See *Trust Co. of America v. Hamilton Bank*, 127 App. Div. 515, 112 N. Y. Supp. 84, in which it was so held. See also *United States v. Chase Nat. Bank*, 241 Fed. 535. In the present case the drawee bank under the law will be the loser, without the right to charge the amount to its customer's account and without the right of recovery from bank C. (*Inquiry from N. Y., Jan., 1918.*)

Rule in Ohio uncertain

1549. A person, representing himself to be A, opened an account with bank B by depositing cash and a check which purported to be signed by C drawn to A's order on bank D. The check was sent through the clearing house and D paid it, but discovered a few days afterwards that the check was forged, and requested reimbursement from B which had in the meanwhile paid out most of the money represented by the deposit to the person who, it was learned, had impersonated A and indorsed his name as payee of the bogus check. *Opinion:* The general rule is that a drawee which pays a forged check to a bona fide holder is bound by the payment and cannot recover the money back. But where in addition to the signature the indorsement is also forged, the authorities are in conflict as to drawee's right of recovery. In some states it has been held that, while the drawee is estopped to deny the genuineness of the drawer's signature, he is not estopped as to the payee and can recover where the indorsement of the payee is forged. In some other states it has been held that the drawee cannot recover in such a case, as forgery of the indorsement is not the cause of the loss. It does not appear that the Ohio courts have passed upon the question, and bank B's right of recovery

will depend upon whether its courts adopt the one or the other rule above set forth. (*Inquiry from Ohio, July, 1919.*)

1550-1559 Transferred to other sections.

Point not decided in Oklahoma

1560. A drawee bank paid a check upon which the drawer's signature and the payee's indorsement were forged. The bank receiving payment stamped the check "Prior indorsements guaranteed." *Opinion:* The question of drawee's right of recovery has never been passed upon in Oklahoma. The decisions of other states on this proposition are conflicting. *Cherokee Nat. Bk. v. Union Tr. Co.*, 125 Pac. (Okla.) 464. See also citations in Opinion No. 1534. (*Inquiry from Okla., July, 1915, Jl.*)

Recourse of South Carolina drawee

1561. A drawee bank cashed a check for a merchant which bore the forged names of both maker and indorser, the same having been originally cashed by the merchant at the request of the forger. About 30 days thereafter when the forgery was discovered, the paying bank made demand on the merchant for reimbursement. The question is asked upon whom the loss falls. *Opinion:* The general rule is that the drawee which pays money to a bona fide holder upon a forgery of its depositor's signature to a check is bound by the payment and cannot recover back the money. Where, however, the indorsement is also a forgery, some cases hold that there is a right of recovery. In *South Carolina (Ford v. Peoples Bank, etc., 54 S. E. 204)* the court held that the rule which precludes recovery of money paid on a forged check does not apply in favor of a holder who by his own negligence has contributed to the success of the fraud and whose conduct has had a tendency to mislead the bank, the latter being free from actual fault. If the merchant in the present case cashed the check for a stranger without due inquiry and identification, he would probably be liable under this rule; and should the South Carolina courts adopt the rule that money paid on a forged indorsement is recoverable, notwithstanding forgery of the drawer's signature, the merchant would be required to refund. (*Inquiry from S. C., Feb., 1919.*)

Non-recovery by drawee in Washington

1562. A forged check bearing a forged indorsement was deposited in a bank by its

customer and paid through the clearing house by the drawee. The drawee returned the check to the collecting bank with notation "Forged indorsement." Before charging the customer with the amount, it was discovered that the drawer's signature was also forged, and the collecting bank seeks to hold the drawee liable. *Opinion:* Where the drawer's signature and payee's indorsement are both forged, the decisions conflict as to the drawee's right to recover money paid on check to a bona fide holder. In Washington the drawee paying the forged check is held entitled to recover unless the holder receiving payment would be in a worse position if compelled to refund than before he received payment. Canadian Bk. of Commerce v. Bingham, 71 Pac. (Wash.) 43. Farmers Nat. Bk. v. Farmers & Traders Bk., 160 S. W. (Ky.) 986. First Nat. Bk. v. Northwestern Nat. Bk., 152 Ill. 296. First Nat. Bk. v. Marshalltown St. Bk., 107 Iowa 327. St. Bk. v. Cumberland Sav. & Tr. Co., 85 S. E. (N. C.) 5. U. S. v. Chase Nat. Bk., 241 Fed. 535. (*Inquiry from Wash., Aug., 1918, Jl.*)

Note: But in National Bank of Commerce v. Seattle National Bank, 187 Pac. 342, decided 1920, where drawee's signature and payee's indorsement were both forged, the court denied recovery under the N. I. Act and held that Canadian Bank of Commerce v. Bingham was decided under the common law without reference to that Act.

Where money refunded drawee

Holder voluntarily refunding to drawee money collected on forged check cannot hold prior indorser

1563. A check drawn on a Tennessee bank, A, in favor of D, was deposited by the C Hotel Company in a Georgia bank, B. Three weeks later the check, having been found to be forged, was returned to B with a request from drawee that it voluntarily refund the money and look to the hotel for reimbursement. The hotel declined to redeem the check, and the inquiry is whether it can be held liable, and also as to B's status. *Opinion:* The majority of courts have recognized the rule that the drawee is bound to know the signature of the drawer and cannot recover money paid to an innocent holder of a forged check. But some courts have made exceptions where the holder to whom payment has been made has been negligent in acquiring the check from a stranger without identification, or where the holder would be in no worse position if

compelled to refund than before receiving the money. B would not be liable to A for return of money, as it is reasonably clear that a drawee who pays a forged check to a holder free from negligence, as was bank B, would not be awarded recovery from that bank, either by the Georgia or Tennessee Courts. See Farmers & Merchants Bank v. Bank of Rutherford, 115 Tenn. 64, 88 S. W. 939. Wood v. Colony Bank, 114 Ga. 683, 40 S. E. 720. The hotel company, by its indorsement, has warranted bank B the genuineness of the check, and if A had refused payment of it, bank B could have recovered from C on its warranty. But the check, having been paid and the drawee being precluded from disputing its genuineness, it would seem that, if B voluntarily paid back the money to A and then sought to recover from C on its warranty, the latter would have a good defense on the ground that the check had been paid and settled, and, therefore, there was no loss to B for which C as indorser would be liable. See Van Wert Nat. Bank v. First Nat. Bank, 6 Ohio Cir. Ct. Rep. 130, 3 O. C. D. 380. (*Inquiry from Ga., Dec., 1913.*)

Holder voluntarily refunding to drawee money paid on forged check cannot recover it back

1564. A took a check in payment of merchandise and deposited it with bank B which collected from the drawee bank. The latter bank, six weeks later, notified A that the check was forged, and requested him to reimburse it, which he did. The inquiry is as to whether or not the drawee bank could have held A liable. *Opinion:* It is a general rule that payment by a drawee of a check upon which the drawer's signature has been forged is non-recoverable from a bona fide holder to whom paid. The bank is presumed to know its depositor's signature, and is bound by the payment. In Pennsylvania, however, an exception to this rule is made by statute, and the drawee can recover if prompt notice of the forgery is given. But this is an uncertain question under the decisions of the state courts just what length of time will be held prompt notice. In the present case A reimbursed the drawee and took the forged check back and even if the law was that he need not return the money, it is doubtful if he would be successful in getting it back as he voluntarily paid it in belief that he was liable to refund, and it is a general rule that a voluntary payment under a mistake of law is non-recoverable. Real estate Sav. Inst'n v. Linder, 74 Pa. St. 371. (*Inquiry from Pa., Aug., 1916.*)

Liability of drawee after money refunded

1565. A forged check was deposited in bank and in due course of collection was paid by the drawee bank. A dispute arose between the drawee bank and the last collecting bank with respect to liability, and, in view of the inconvenience caused to such collecting bank, the bank in which the check was first deposited directed its correspondent to have the item returned to it. The last collecting bank gave credit to the drawee bank and was reimbursed by its transferee, which was given credit by the bank accepting the deposit. May the latter bank recover from the drawee bank? *Opinion:* Under a well settled rule, a drawee bank, which pays a check on the forged signature of the drawer, cannot recover the money from a bona fide holder receiving payment. Hence the drawee had no right to charge the check back to the last collecting bank. But when the last collecting bank voluntarily refunded the money to drawee by crediting its account, the rule would probably operate that payment under a mistake of law, with full knowledge of facts, cannot be recovered back unless the refund would be regarded as made under mistake of mixed law and fact, in which case recovery might be allowed. See *Ward v. Ward*, 12 Ohio Cir. Dec. 59. (*Inquiry from Wash., Dec., 1920.*)

When is forged check paid*Credit by teller in depositor's pass book as payment*

1566. The questions are asked: If a bank teller receives a number of checks from a depositor and, without examining them, enters the amount which he finds on the deposit slip in the pass book and later in the day finds one of the checks is drawn on his own bank and is forged, is the bank allowed to charge that up to the depositor? Or, if a single check is brought in with a forged signature, and the teller examines it and enters it on the pass book and later, before having it entered on the ledger, he discovers the forgery, is the bank responsible? *Opinion:* Where a check drawn by one depositor is presented over the counter by another depositor of the same bank and credited by the teller in the latter's pass book, the courts quite generally hold such credit is equivalent to payment and irrevocable. Amongst a number of cases where credit by the teller in the pass book of one depositor of the overdrawn check of another depositor has been held to constitute payment, the same as if the cash was

drawn out and redeposited, see *City Nat. Bank v. Burns*, 68 Ala. 267. *Bryan v. Bank*, 205 Pa. 7, 54 Atl. 480. *Oddie v. Nat. City Bank*, 45 N. Y. 735, 6 Am. Rep. 660. It would seem the same rule would equally apply to credit of the amount of a forged check on the bank in the pass book of the depositor. It was so held in the early case of *Levy v. Bank*, 1 Binney 27, decided by the Supreme Court of Pennsylvania in 1802. The rule is pretty well established that credit in pass book is a payment and the fact of non-eximaintion before credit would not make any difference. (*Inquiry from Conn., March, 1920.*)

Forged check on same bank received on deposit

1567. A bank receives on deposit a check, drawn on the depositing bank, on which the name of the maker was forged. The forgery was not detected until later on the same day, when it was returned to depositor. Has the bank a right to charge back the amount on the ground that the check had not been paid? *Opinion:* The weight of authority is to the effect that, when the credit is duly given, it is final and irrevocable, but some courts, as in California, hold that the check is simply received for collection and that the bank has until the close of the day to determine whether the check is good and, if not, can charge it back. This question seems not to have been decided in South Dakota but, according to the weight of authority, the check was paid and the rule holding the drawee bound would apply. (*Inquiry from S. D., March, 1917.*)

Recovery of money paid on forged indorsement*Fact that payee whose name forged is also customer of drawee does not affect recovery*

1568. M, a customer of A bank, sent to P, another customer of A bank, a check for \$100 through the mail, drawn on A bank. A son of P obtained possession of the check, indorsed the name of P thereto, together with his own name, and took same to bank B, which cashed it for him. Bank B then sent the check through the usual channels, indorsed "All prior indorsements guaranteed," and bank A honored same, failing to discover the forged indorsement of P. Bank A wishes to know what recourse it has against bank B. The son of P is now in the navy, and the bank also wishes to know if

it can take steps to get him out of navy for purpose of prosecution. *Opinion:* A bank which pays a check upon which the indorsement of the payee is a forgery has a right of recovery from the bank receiving payment (Wellington Nat. Bank v. Robbins, 71 Kan. 748. Corn Exch. Bank v. Nassau Bank, 91 N. Y. 74. Met. Nat. Bank v. Loyd, 90 N. Y. 530. Produce Exch. Bank v. Twelfth Ward Bank, 119 N. Y. S. 988), and the fact that the payee, whose name was forged, is also a customer of the drawee bank does not affect its right of recovery, for a bank is only bound to know its customer's signature as drawer of a check, and is not chargeable with knowledge of the genuineness of a customer's signature where it appears as indorser on a check. (First Nat. Bank v. Northwestern Nat. Bank, 152 Ill. 296. Mo. Lincoln Trust Co. v. Third Nat. Bank, 154 Mo. App. 89). As to the forger, the first step to take is to have him indicted for the crime of forgery; then have the prosecuting attorney, or other proper authority, apply to the Navy Department for his surrender to the civil authorities for trial. (*Inquiry from Ala., March, 1920, Jl.*)

Recovery where lost check paid on forged indorsement after receipt of stop order which misdescribed check

1569. The payee of a check drawn by a corporation X on bank A lost it and notified the drawer; he also notified A to stop payment, but misdescribed the check, stating it was drawn by a concern affiliated with X that also had an account with bank A. The payee's indorsement was forged and the check was cashed for a stranger by a business firm Z, and deposited with bank B which collected from A several days after latter had been notified of loss. X received the cancelled check a month after its payment, but did not notify drawee of forgery until three months later. A asks reimbursement. *Opinion:* Z having cashed the check for a stranger upon the forged indorsement of payee's name and collected the money from A, the drawee, through B, would be liable to refund under the general rule that a drawee bank may recover money paid upon a forged indorsement, unless there was some negligence or delay on the part of the drawee or drawer which would preclude such recovery. The payee does not seem to be guilty of any responsible negligence in so far as it would affect Z's liability, although he misled bank A in misdescribing the check which would probably relieve that

bank from the charge of negligence. If there was any neglect of duty on the part of X, by reason of the three months' delay in notification, this would probably not be available as a defense to Z which cashed the check for a stranger on a forged indorsement. Z probably would be held liable to refund the money and the payee would be entitled to receive it from the drawer X. (*Inquiry from Ariz., May, 1918.*)

Procedure where check never received by payee paid on forged indorsement

1570. A sent a check to B who claims he did not receive it. The check indorsed with B's name came in due course through clearings to drawee which charged amount to A's account and remitted to bank C. The indorsement of B later on was shown to be forged, and he is anxious to clear himself from accusation of having received the check. Drawee desires to know what would be the right procedure. *Opinion:* The indorsement of B having been shown to be forged, the drawee would have no right to charge amount to A's account. It would be well for drawee to get the check from A, attach thereto an affidavit by B that he never indorsed the check, and then make demand for return of money from C. If that bank refused to make good, drawee could sue C for return of money and prove the check was collected under forged indorsement. B's testimony that the signature was not his would establish a prima facie case, and unless C could prove the contrary, and that the person who cashed the check was B, himself, the drawee would recover. If the check was given by A for money owing B, then B, not having received same, would, have a right of action against A. (*Inquiry from Ariz., Jan., 1920.*)

Unauthorized indorsement of check payable to corporation

1571. A, a promoter of the H Company, sold a block of the proposed stock to B who gave him his check for it payable to the H Company drawn on bank C, with the understanding that it should not be presented until the company was organized and had conferred authority on some officer to cash the check and issue stock in lieu thereof. Before this was done A indorsed the check "H Company by A vice president," and cashed it at bank D, an officer of which knew the circumstances. D indorsed "Pay to any bank or banker. All prior indorsements guaranteed," and received payment

from C, the latter charging amount to B's account. The organization of the company was never completed and B within a month after receiving paid vouchers discovered the indorsement made by A was void. Through bank C he immediately asked reimbursement from D, and the question is as to its liability. *Opinion:* Where a bank acquires a check upon which the indorsement is unauthorized it is obliged to refund the money the same as if the indorsement were a forgery. The Negotiable Instruments Act provides that "Where a signature is forged or made without the authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority." As the H Company never completed its organization, and never authorized any one to indorse for it, it would seem to be a clear case of liability of bank D which cashed the check for A and collected the money thereon and it should refund the money. The fact that an officer of bank D knew that A had no authority would be cumulative evidence of want of authority but even if this were not so, as the corporation had never completed its organization, there was nobody who could confer authority to indorse, and even though bank D might have believed A had authority, this would not relieve it from liability. (*Inquiry from Ida., Feb., 1917.*)

Recovery where check paid before receipt of stop order

1572. A business concern drew a pay check to the order of an employe which the latter did not receive, and the next day notified the drawee bank A to stop payment. The check in the meanwhile had been cashed at bank B by C and paid by the drawee which later returned it to B with request for reimbursement. *Opinion:* A bank is obliged to obey the stop-payment order of its customer and if it pays in defiance of such order it cannot charge the amount to its customer's account where he is prejudiced by the payment. This is so, although there is no question of forgery involved. Had A received the stop-payment before it had paid the check, it, of course, would not have paid it, and B would have been the loser unless it could recover

the amount from C. In this case the indorsement was forged. A, therefore, has recourse upon B, as a bank which acquires a check upon a forged indorsement takes no title and where it collects the amount from the drawee it must refund. (*Inquiry from Iowa, Oct., 1913.*)

Check cashed by merchant on forged indorsement and collected through bank

1573. A check drawn by A to B's order was cashed by an impostor at C's store. C deposited it with bank D which collected from the drawee bank. B denies ever having seen the check and claims the indorsement purporting to be his a forgery. The question is—who bears the loss? *Opinion:* The payor bank has a right of recovery of the money paid on a forged indorsement from the person to whom paid. D would be compelled to refund the money received on the check, but in turn has the right to charge the amount back to C's account. The latter by indorsing the check warranted to bank D that the prior indorsement was genuine and is liable to it for a breach of this warranty, and is, therefore, the loser. (*Inquiry from Md., Jan., 1917.*)

Recovery by drawee from holder receiving payment under forged indorsement

1574. A drew a check payable to B. A person, who was supposed to be B, indorsed it and gave it to C who, after indorsing it, took it to the drawee bank D, where he received cash for it. When A's account was balanced he declared the first indorsement a forgery. The bank desires to know where it stands as to payment. *Opinion:* It is the well-settled rule that, where a bank pays a check upon which the indorsement of the payee is forged, there is a right of recovery from the person receiving payment. In this case bank D would have a right of action against C, and, if the latter was irresponsible the bank would be the loser. If C was in collusion with the forger he would be criminally liable. (*Inquiry from N. J., March, 1918.*)

Forgery of indorsee's name on foreign draft

1575. A foreign draft drawn on bank A, payable to Doe & Co., was indorsed by latter to B. It was paid by A to bank C which presented it for payment, but did not guarantee indorsements. A month afterward B informed bank A that the indorsement purporting to be his was a forgery. The question is, has A recourse

upon bank C? *Opinion:* A bank which pays a check or draft upon which an indorsement is a forgery has a right to recover from the holder receiving payment. *Muller v. National Bank of Cortland*, 96 N. Y. App. Div. 71. (*Inquiry from N. Y., Feb., 1913.*)

Forgery of indorsement "John Doe, Treasurer"

1576. A draws a check payable to the order of "John Doe, Treas." and mails it so addressed. The check bearing the indorsements "John Doe, Treas." and "Peter Doe" was cashed for the latter person by bank B which collected from drawee. Afterwards one Joseph Doe claimed that the check was intended for him and that the indorsement "John Doe, Treas." on the check was a forgery. Is B liable? *Opinion:* If it is proved that the indorsement "John Doe, Treas." is a forgery, bank B, having received payment of a check to which it had no title, would, of course, be liable for the amount. (*Inquiry from N. D., Aug., 1919.*)

Unauthorized indorsement of corporation's name by treasurer

1577. C drew a check on bank E, payable to a corporation A, and gave it to B, the latter's agent, who fraudulently indorsed the corporation's name, per himself as treasurer, and received cash for check from bank D which bank collected from E. The inquiry is as to the status of the parties. *Opinion:* The check having been paid upon an unauthorized indorsement, the drawee, bank E, cannot charge the same to the drawer C. The ultimate loser will be bank D which cashed the check for the fraudulent agent. (*Inquiry from Ohio, May, 1916.*)

Drawee cannot charge drawer but may recover from holder

1578. Where a check on which the payee's indorsement is forged is cashed by a merchant, is deposited in a bank and collected of the drawee, the latter cannot charge payment to the drawer, but has the right of recovery from the bank receiving payment which in turn has recourse upon the merchant. The elapsing of several days before discovery of the forgery would not affect the right of recovery where prompt notice was given. *Russell v. First Nat. Bk.*, 56 So. (Ala.) 868. *Jordan Marsh Co. v. Nat. Shawmut Bk.*, 87 N. E. (Mass.) 740. *Wellington Nat. Bk. v. Robbins*, 71 Kan. 748. *Second Nat. Bk. v. Guarantee T. & S. D. Co.*, 206 Pa. 616. (*Inquiry from Okla., Oct., 1913, Jl.*)

Collecting bank must refund

1579. A check drawn by A to the order of B on bank C was sent to the latter by an out-of-town bank D which indorsed "For collection only." As the payee is unknown to the drawee bank it inquires as to whether bank D's indorsement would be a guarantee of B's indorsement. *Opinion:* As bank C knows the signature of the maker, it could safely pay the check, for, if the indorsement of the payee was a forgery, the sending bank would be bound to refund the money. Although it had made no special guarantee of genuineness of the prior indorsement, still, if it had collected money upon an instrument bearing a forged indorsement, it would be bound to refund. (*Inquiry from Okla., Jan., 1919.*)

Charge to customer's account of check cashed for him on forged indorsement

1580. A bank which cashes for the second indorser, who is its customer, a check upon which the payee's indorsement is forged has the right to charge the amount to the customer's account. (*Inquiry from Pa., Oct., 1909, Jl.*)

Recovery of payment made after stop order received describing another check

1581. A drew a check on bank B in favor of C who lost it. It was cashed at D's store and deposited with bank E. The latter collected from drawee which had been notified by A to stop payment on a check issued to F. Ten days after payment A notified bank B that the check to C had been negotiated by an unauthorized person and demanded reimbursement. The question is—upon whom does the responsibility rest? *Opinion:* The payment of the check in question was not stopped, and if C's indorsement was forged and B gave notice to bank E as soon as notified by its depositor, which was ten days after payment, this would probably be held reasonable time and bank B would have recourse upon bank E which, in turn, would have recourse upon its own customer D. But if it should be the fact that C's name was not forged, but that he had indorsed the check in blank and then lost it, and it was cashed for the finder by a bona fide holder, then payment would be chargeable to B's depositor A, and not recoverable by it from bank E, and C would be the loser. (*Inquiry from Pa., June, 1916.*)

Recovery from express company

1582. A check payable to a firm whose indorsement was forged was paid to an express company by a bank after it had telephoned the maker. *Opinion:* The bank cannot charge the amount to the drawer's account unless the latter was negligent in giving notice after the discovery of the forgery. The bank has a right of recovery against the express company, provided the indorsement to the latter was in unrestricted form. *Cunningham v. First Nat. Bk.*, 219 Pa. 310. *Second Nat. Bk. v. Guarantee T. & S. D. Co.*, 206 Pa. 616. *First Nat. Bk. v. Northwestern Nat. Bk.*, 152 Ill. 296. *Wellington Nat. Bk. v. Robbins*, 71 Kan. 748. *Nat. Park Bk. v. Seaboard Bk.*, 114 N. Y. 28. (*Inquiry from Pa.*, Nov., 1916, *Jl.*)

Dispute as to authority for indorsement

1583. A bank has received payment of a check indorsed with the payee's name by another and has guaranteed the indorsement. There is a dispute as to the authority for the indorsement. *Opinion:* If the indorsement was authorized, the bank would not be responsible to any one. If unauthorized, it would be liable to the payor bank which, having paid the check to one not authorized by the payee, could not charge the amount to the drawer's account and would have a right of action against the bank for having received its money without consideration. If, however, the indorsement was authorized, as the bank's customer claims, there is no liability. Furthermore, if the contrary should prove the case and the bank was held liable, it would be entitled to reimbursement from its customer. (*Inquiry from S. C.*, May, 1914.)

Recovery by drawee

1584. A bank which cashes a check bearing the forgery of the payee's indorsement acquires no title, and where it receives payment from the drawee must refund. (*Inquiry from Tenn.*, July, 1913, *Jl.*)

Grounds upon which drawee may recover money paid on forged indorsement

1585. A bank received from a Texas bank for collection a check drawn on it and the amount was immediately remitted. A few weeks later it was discovered that the payee's indorsement had been forged and an affidavit to that effect was immediately sent to the sending bank with request for refund, which was refused. *Opinion:* The

law is clear that a bank or person acquiring a check upon which the payee's indorsement is forged takes no title and where payment has been received from the drawee is liable to refund. It is not a case of forgery of the drawer's signature as to which the drawee might be responsible but a case of forgery of the payee's indorsement concerning which the drawee knows no more than the holder. Different courts adjudge recovery upon two grounds: (1) that the bank receiving payment warrants the genuineness of the prior indorsement, (2) that the bank receiving payment has received money under mistake of fact without consideration which the law implies a contract to repay. (*Inquiry from Tenn.*, Sept., 1913.)

Recovery of money paid on unauthorized indorsement

1586. John Doe gives his check to Richard Roe. It was indorsed as follows: "Richard Roe, by S. E. T.", "Pay to the order of any bank, banker or trust company, Bank of Smallville, Washington," "Pay to any bank, banker or trust company, Bank of Oregon, Portland, Oregon," and mailed by the latter to the drawee for collection and credit. It developed later that "S. E. T." had no authority to indorse. On whom does the loss fall? *Opinion:* The drawee paying the check upon which the payee's indorsement was unauthorized may recover the money from the party receiving payment, unless there was unreasonable delay in giving notice after discovery of the forged or unauthorized indorsement. There is conflict of authority whether indorsement "Pay any bank or banker" is general or restrictive. There is a line of cases to the effect that said form of indorsement is not title-conveying but restrictive and agent-creating, and does not of itself guarantee prior indorsements. The courts in Massachusetts, Georgia and Missouri hold this view. A Nebraska case held such form of indorsement not a restrictive but a general indorsement, or title-conveying form, and this rule is supported by the better reason. Under either rule the Bank of Smallville is the ultimate loser, provided it received prompt notice of the error. *Nat. Bk. of Commerce v. Bossemeyer*, 162 N. W. (Neb.) 503. *Corn Exch. Bk. v. Nassau Bk.*, 91 N. Y. 74. *Nat. Exch. Bk. v. U. S.*, 151 Fed. 402. *Cunningham v. First Nat. Bk.*, 68 Atl. (Pa.) 731. *McNeeley Co. v. Bk. of North America*, 70 Atl. (Pa.) 891. *First Nat. Bk. of Minneapolis v. City Nat. Bk. of Holyoke*, 182 Mass. 130. *Bk.*

of Ind. Ter. v. First Nat. Bk., 109 Mo. App. 665. First Nat. Bk. v. Savannah Bk. & Tr. Co., 68 S. E. (Ga.) 872. (*Inquiry from Wash., Aug., 1917, Jl.*)

Forgery of indorsement of railway pay check

1587. In March a bank customer cashed a railway pay check on which the indorsement was forged. It was deposited and in due course paid by the drawee. In July the check was returned by the drawee, with affidavit by the payee that he never received the check and that indorsement of his name was a forgery. The customer refunded the money. Would not delay in giving notice of forgery make either the railway company or the drawee liable here? *Opinion:* The customer, having cashed the check on a forged indorsement, and collected same through his bank, would be the loser in such case, unless there was some responsible negligence on the part of the payor bank, or the railway company, which would work an estoppel. The check was cashed in March and returned in July. The bank which paid the check in March would have a right of recovery, provided that after the discovery of the forgery, and notice to them by the railway company, they gave prompt notice thereof. There is no known rule of law which would make it the duty of the railway to immediately discover that an indorsement was forged. Upon the whole case stated the customer is undoubtedly responsible and having already refunded the money, there is nothing further that he could do in the matter beyond effecting the apprehension of the forger. (*Inquiry from Wis., Aug., 1919.*)

Non-recovery of money paid on forged indorsement

Liability of drawer to payee of lost draft on German bank paid on forged indorsement

1588. An Ohio bank drew its draft upon a German bank, payable to A. The draft was paid by the drawee upon a forged indorsement. A claims that neither the draft nor its proceeds were ever received by her, and demands refund of the purchase money from the Ohio bank. *Opinion:* Under the German law the paying drawee is not responsible for the genuineness of indorsements. Had the payee received this draft over the counter of the Ohio bank, she would be the loser. Assuming the draft was forwarded by mail to and never received by the payee, the question of responsibility would depend upon whether the method of forwarding was by her authority. If author-

ized, the risk of miscarriage would rest with the purchaser; but if forwarded at the risk of the bank, it would remain liable for a consideration never delivered. German Law on Bills of Exch., 7 Art. 36. German Check Law of 1908, Art. 14. English Bills of Exch. Act, Sec. 60. Roth v. Travellers' Prot. Assn., 115 S. W. (Tex.) 31. Gaar v. Taylor, 128 Iowa 636. 30 Cyc. 1186. (*Inquiry from Ohio, Feb., 1913, Jl.*)

Non-recovery from agent bank after payment of proceeds to principal

1589. A drew a check in favor of B on bank C and mailed it to B's agent, D. The latter forged the payee's indorsement and indorsed his own name underneath. Bank E took the check from him for collection and made the notation after its indorsement, "This item is taken for collection by us from parties who are strangers to us." The drawee bank paid the check, and bank E then paid the amount to D. As between C and E, which must suffer the loss? *Opinion:* Bank E, although it indorsed its name on the check, coupled that indorsement with a plain statement that the item was taken for collection from strangers. This was plain notice to the drawee that bank E was agent and not owner. Under the Negotiable Instruments Act an indorser warrants genuineness only to subsequent holders in due course, and the definition of a holder in due course provided by that Act excludes the drawee. Therefore, bank C would not have the status of a holder in due course. The remedy of a drawee bank which pays a check upon which the payee's indorsement has been forged is against the owner receiving payment for money paid without consideration. If bank E appeared as the actual or apparent owner, it would be liable to the drawee bank to refund the money, but appearing as agent by its own plain notice on the paper, the drawee bank, it would seem, must look beyond it to its principal. (*Inquiry from Ohio, Aug., 1913.*)

Non-recovery by drawee of money paid on forged indorsement of stopped check

1590. A received a check from C, drawn on a bank of S, which check was lost, and found by an unknown person who forged the indorsement of A and had it cashed by B. In due course the check was presented to bank of S and honored. In the interim a stop-payment order had been issued by the drawer and a duplicate check issued to A. The drawee bank overlooked the stop-pay-

ment order, and likewise honored the duplicate check. Bank wishes to know if B is liable on the original check on which the name of A had been forged; also if failure of drawee bank to obey stop-payment order would change the status of the case. *Opinion:* The general rule is that where a check has been lost and is paid by the drawee bank on a forged indorsement, the latter has a right of recovery from the person receiving payment; but where, before making payment, the drawee has received a stop-payment order, which is disregarded, this, according to decisions in Oklahoma precludes the drawee from recovering. (*Nat. Bank of Commerce v. First Nat. Bank of Coweta [Okla. 1915] 152 Pac. 596.*) (*Inquiry from Okla., May, 1920, Jl.*)

Statute of limitations as applied to forged indorsement

California statute of limitations of actions upon "forged or raised checks"

1591. A bank paid a check which bore a forged indorsement. A year and two months later it was notified of such forgery. A statute in California provides a one year limitation for the commencement of an action "by a depositor against a bank for the payment of a forged or raised check." The bank is uncertain as to whether said statute covers forged indorsements. *Opinion:* A New Jersey case holds that such a statute applies to forged indorsements, but it is doubtful whether the courts will construe the statute in California to cover forged indorsements. It is probable that it was the intention that the statute should apply to a check bearing forgery of drawer's signature, or to a raised check, and that the limitation applies to depositors who are negligent in failing to discover the forgery or alteration and notify the bank. *Cal. Code of Civ. Proc., Sec. 340 (3). Ore. Laws (1911), Sec. 4575 a. N. Y. Consol. Laws (1909), Sec. 326, p. 5528. Pratt v. Union Nat. Bk., 75 Atl. (N. J.) 313. Dowling v. U. S., 41 App. D. C. 11. N. J. Neg. Inst. A., Sec. 189 a. Kirby v. State, 1 Ohio St. 185. (Inquiry from Cal., Feb., 1919, Jl.)*

New Jersey statute of limitations of actions upon "forged or raised checks"

1592. A bank paid a check with a forged indorsement. The question is asked—how long after such payment, or the return of the check to the maker, has the maker a right of action for the recovery from the paying bank? *Opinion:* Where a bank pays

a check upon a forged indorsement and returns the item to the depositor as a paid voucher, the latter's right of action for the deposit, in the absence of specific statute upon the subject, does not accrue until demand is made, and the statute of limitations does not begin to run until the bank is in default, unless the bank has disclaimed liability so as to make demand unnecessary, in which case right of action would accrue at time bank is in default by such denial and would be barred within six years. New Jersey and a large number of other states have passed the following statute: "No bank shall be liable to a depositor for the payment by it of a forged or raised check, unless within one year after the return to the depositor of the voucher of such payment such depositor shall notify the bank that the check so paid was forged or raised." It is doubtful whether this statute will be held to apply to actions by a depositor against his banker for money paid on checks bearing forged indorsements. (*Inquiry from N. J., April, 1918, Jl.*)

1593. There is a statute in New Jersey which limits the liability of a bank to its depositor for the payment of forged or raised checks to one year after the return of the voucher, unless notice is given the bank. A certain New Jersey decision seems to take the view that this statute covers the payment of a check upon a forged indorsement, but the point was not positively decided and such statute has not been generally understood to cover forged indorsements as distinguished from forged or raised checks. *N. J. Neg. Inst. A., Sec. 189 a. Pratt v. Union Nat. Bk., 75 Atl. (N. J.) 312. (Inquiry from N. J., Oct., 1911, Jl.)*

Recovery where indorsement guaranteed

Recovery by drawee from guaranteeing bank

1594. A drawee bank paid a check bearing forgery of the payee's signature to the collecting bank, which had guaranteed all prior indorsements. Thirty days elapsed before the drawer notified the drawee of the forgery and the drawee in turn promptly notified the bank receiving payment, which bank refused to refund. *Opinion:* The drawee bank has a right of recovery from the collecting bank and the fact that 30 days elapsed before notice of the forgery was given to the collecting bank, such bank having been notified as soon as the forgery was discovered, does not bar the right of recovery. The rule is that notice should be given within a reasonable time after the

forgery has been discovered. First Nat. Bk. v. Northwestern Nat. Bk., 152 Ill. 296. Wellington Nat. Bk. v. Robbins, 71 Kan. 748. Second Nat. Bk. v. Guarantee T. & S. D. Co., 56 Atl. (Pa.) 72. Corn Exch. Bk. v. Nassau Bk., 91 N. Y. 74. Nat. Exch. Bk. v. U. S., 151 Fed. 402. (*Inquiry from Ark., April, 1918, Jl.*)

Guarantee of indorsement does not warrant genuineness of drawer's signature

1595. A check on A bank, payable to and indorsed in blank by D, followed by indorsement of R, to order of Bank of B, and indorsed by latter "Previous indorsements guaranteed," was paid to B bank. Drawer pronounces check a forgery. *Opinion:* The drawee cannot hold B bank. Money paid upon forged check cannot be recovered from a bona fide holder who received payment. The guaranty of prior indorsements does not warrant genuineness of drawer's signature. Woods v. Colony Bk., 114 Ga. 683. (*Inquiry from Fla., June, 1911, Jl.*)

Drawee liable to drawer but may recover on guaranty

1596. Where C bank draws its draft on G bank in favor of D. F. Co., and the indorsement of the payee is forged and the draft deposited in H bank, which guarantees the indorsement and collects from the drawee through I bank, C bank, on learning of the forgery six months later, has the right of recovery against drawee G, which in turn has remedy against I and H banks, the latter being the ultimate loser. Murphy v. Metropolitan Nat. Bk., 191 Mass. 159. Critten v. Chemical Nat. Bk., 171 N. Y. 219. (*Inquiry from Ky. Sept., 1908, Jl.*)

Liability of bank upon guaranty

1597. A check payable to the order of A was indorsed by B under payee's name and cashed for him by a merchant C who indorsed and deposited it with bank D. From there it was sent to bank E which sent it to bank F, the latter collecting from the drawee bank, all the banks guaranteeing prior indorsements. The payee subsequently made affidavit that the indorsement was not his or authorized by him, and F credited the drawer bank with the amount. Bank D refused to refund, stating, as a reason, that its depositor C stood ready to defend any action brought upon the check. The inquiry is as to whether bank D's position is tenable. *Opinion:* If the indorsement of A is forged, or made without his authority, C, who

cashed the check, would be the loser. Banks D and E having guaranteed prior indorsements, E should allow F to charge the amount back to it and in turn should be allowed to charge back to D which should charge the amount back to its depositor C. Under the circumstances the proper procedure would seem to be to bring suit against bank D upon its guaranty. If the indorsement is not authorized or is a forgery, recovery is certain. (*Inquiry from Mass., June, 1917.*)

Recourse of drawee upon remote guarantor

1598. A check drawn on the T—— Trust Company, with the forged indorsement of the payee, was deposited for collection with the C—— Trust Company. This trust company indorsed the check to the U—— Bank of Boston, using the regular form of indorsement stamp with the words "Prior indorsements guaranteed." The U—— Bank of Boston collected the amount of the check from the T—— Trust Company and later discovered the forgery. May the T—— Trust Company recover from the C—— Trust Company on its guaranty? *Opinion:* Whether or not the T—— Trust Company has recourse upon the C—— Trust Company upon its guaranty, involving the question whether a special guaranty of indorsement operates in favor of another than the immediate indorsee, the T—— Trust Company would have a right of recovery from the C—— Trust Company on the ground that the latter collected, through an agent, namely, the U bank, money of the T—— Trust Company upon a check to which it had no title which money it is bound to refund. Or if, the U bank still holds the proceeds there would be a direct action against it and in such case the U bank would have recourse upon C—— Trust Company upon its guaranty. (*Inquiry from Mass., Feb., 1921.*)

Recovery upon guaranty where payee's indorsement irregular

1599. A check drawn on bank A to the order of John Doe is indorsed "John A. Doe" with the initials C. D. written under Doe. The check was paid by A to bank B which had indorsed "Prior indorsements guaranteed." The drawer claims that John Doe did not get the money or credit. The question is—Can A collect from B? *Opinion:* A would have a right of recovery from B in case the indorsement of the payee was unauthorized. The fact that the in-

dorsement was irregular or faulty would not estop it from recovering, as such indorsement was expressly guaranteed by B and A has a right to rely on such guaranty. (*Inquiry from N. H., March, 1920.*)

Agent bank not liable after proceeds paid principal unless bank has specially guaranteed forged indorsement

1600. The payee's indorsement on a check drawn on bank A was forged by B who gave it to C. Bank D took it for collection, indorsed "All prior indorsements guaranteed" and sent it to bank E which collected from A, and, under instructions from bank D, paid the money to C. Bank E repaid A and looked to D for reimbursement. The question is—Are all the indorsers held for any length of time, and would bank D have been relieved from liability if it had placed on the check a qualified indorsement instead of the one it did? *Opinion:* Bank E can recover from Bank D. By expressly guaranteeing the indorsement, D made itself liable as warrantor of the genuineness of the payee's signature. If D had not put on this special guaranty it still would have been liable, except if C had indorsed it for collection, so as to show that D was agent and not owner, it would not have been liable after payment over of the proceeds to the principal, in the absence of special guaranty. In other words, where the owner, real or apparent, of a check upon which the payee's indorsement is forged, collects the check from the drawee, whether directly or through an agent, the owner is responsible to the drawee to return the money. But the law is that an agent who collects the check is not responsible, unless he specially guarantees, after the proceeds have been turned over to his principal. Mere delay in discovering the forgery does not affect the drawee's right of recovery. But if after discovery there is delay in notification of the parties from whom redress is sought, this will prejudice the right of recovery. (*Inquiry from Okla., Aug., 1913.*)

Recourse of drawee upon guaranteeing bank

1601. A bank as drawee received a check of \$15,000, payable to James Smith. It was indorsed "James Smith, by Florence Smith" and had the regular stamp indorsements of several banks, reciting "All previous indorsements guaranteed." Would drawee be protected in paying check in event James Smith claimed he never received the money? *Opinion:* Where the payee's indorsement is

forged and such indorsement is followed by the indorsement of a bank guaranteeing prior indorsements, the drawee bank is protected in making payment, for, while liable for the amount to the drawer, the drawee has full recourse upon the guaranteeing bank. (*Inquiry from Okla., Dec., 1918, Jl.*)

Right of recovery on special guaranty of money paid on forged indorsement of stopped check

1602. A drawee bank paid a check upon the forged indorsement of the payee in violation of the maker's stop payment order. The indorsement was expressly guaranteed. *Opinion:* Until the courts have passed upon the question the right of recovery is somewhat problematical. In this particular case the drawee might recover upon the special guaranty of genuineness of the payee's indorsement on the ground that it relieved the drawee of any duty of inquiry as to that particular fact. In a given case where there is no such guaranty there might be ground for a contention that a stop payment notice puts the drawee on inquiry as to equities which would estop it from recovering from a bona fide holder. Public Grain & Stock Exch. App. 137. (*Inquiry from Pa., Jan., 1914, Jl.*)

Note: It was held in 1915 in *National Bank of Commerce v. First National Bank of Coweta*, 152 Pac. (Okla.) 596, that where, after the check is stopped, the drawee negligently pays the same, it is precluded from setting up the forgery, and cannot recover money so paid as against an innocent holder for value.

Guaranty of wife's indorsement

1603. A bank's customer sent a check to his wife in care of some relatives living in Kansas. The letter was delivered to a wrong party who, after forging the wife's indorsement thereon, took the check to a Kansas bank which evidently received same for collection and afterwards forwarded it to the payor bank for collection, guaranteeing indorsement. *Opinion:* Where a bank pays a check on a forged indorsement, it pays its own money to one who has no title to the check and has a right of action for the recovery of money paid without consideration. In the present case there is an express warranty of the genuineness of the indorsement for the breach of which the payor bank would have right of action against the bank receiving the money. (*Inquiry from S. D., April, 1914.*)

*Indorsement by owner "For Collection";
"Pay any bank" not a guaranty*

1604. A check is made payable to B who indorses same in blank to his bank which indorses same, "For collection—pay to the order of any bank, banker or trust company," and the question is asked whether this indorsement guarantees the genuineness of this blank indorsement; also if there is any guaranty contained in this restrictive indorsement for collection in case the payee's indorsement proves a forgery. *Opinion:* Where a check is payable to an individual who indorses same in blank to his bank, the latter becomes the apparent owner of the check. When the bank, indorses "For collection—pay any banker" it does not indorse the check for value but appoints an agent to collect it. There does not seem to be any guaranty contained in the restrictive indorsement for collection, but the indorsing bank, being owner, if the indorsement of the payee proved a forgery, would be liable to the payor bank upon the ground of receiving money without consideration upon an instrument to which it had no title, which it must refund. In other words, there is a liability of the bank in such case, but the courts do not generally place it upon the ground of guaranty, but more frequently upon the ground of receiving money without consideration. (*Inquiry from Tex., March, 1917.*)

Right of true payee to recover from purchaser

Liability of purchasing bank to payee corporation for check acquired under unauthorized indorsement of president

1605. An incorporated concern received from a customer a check payable to its order which the treasurer of the company only was authorized to indorse. The president of the company without any authority indorsed the corporate name on the check and his own underneath and deposited it to his personal credit with bank A which collected from the drawee bank and allowed him to draw the proceeds on his personal check. The question is—can the corporation hold the bank in any way responsible? *Opinion:* In the present case bank A would probably be held liable to the corporation, for, in a very similar case decided in 1917, the Appellate Division of the New York Supreme Court held, where the president of a corporation without authority indorsed checks in the name of his company and deposited them to his personal credit, that

the bank was liable to the company. *E. Moch Co. v. Security Bank*, 176 App. Div. 842, 163 N. Y. Supp. 277, Aff'd 225 N. Y. 723, 122 N. E. 879, without opinion. The Appellate Division in its opinion said the president "had no authority to indorse the checks for the corporation, and the bank was chargeable with notice that the indorsements were in his handwriting and was bound at its peril to inquire with respect to his authority to indorse the checks, and to deposit them to his credit individually, and having failed to do so, it is chargeable with knowledge of the facts which presumably would have been disclosed on proper inquiry." According to the above a bank has no right to assume that, because a man is a president of a corporation, he has the authority to indorse and negotiate checks payable to it, but is bound at its peril to inquire with respect to his authority. If the bank acquires the check upon the unauthorized indorsement it is liable for proceeds to the true payee. (*Inquiry from N. Y., Nov., 1919.*)

Bank cashing checks for employee under unauthorized indorsement

1606. An employee of a business opened the mail and withheld several checks payable to the company, which he indorsed with the name of the company, per his own name. These checks were cashed by one of the local banks with which the company had never had an account; nor were signature cards on file showing authority to sign or indorse checks, nor had the employee any authority whatever to sign. Can the owner of the business recover the amount of the checks from the bank cashing the checks for the employee? *Opinion:* Recovery may be had. The signature without authority was a forgery; the bank derived no title and would be liable to the owner of the business for the conversion of the checks. *A. Blum, Jr.'s Sons v. Whipple*, 80 N. E. (Mass.) 501. *Rosenberg v. Germania Bank*, 88 N. Y. Supp. 952. *U. S. Portland Cement Co. v. U. S. Nat. Bank*, 157 Pac. (Colo.) 202. *Buckley v. Second National Bank*, 35 N. J. Law, 400. *Knoxville Water Co. v. East Tennessee Nat. Bank*, 131 S. W. (Tenn.) 447. *Schaap v. State Nat. Bank*, 208 S. W. (Ark.) 309. *Hope Vacuum Cleaner Co. v. Commercial Nat. Bank*, 168 Pac. (Kan.) 870. *Kaufman v. State Sav. Bank*, 114 N. W. (Mich.) 863. *Meyer v. Rosenheim & Co.* 73 S. W. (Ky.) 1129. (*Inquiry from Ohio, Feb., 1921.*)

Liability for conversion continues until outlawed by statute of limitations

1607. Checks with indorsements forged by an agent of the payee were cashed by various banks and in due course of collection paid under such circumstances that the forgeries were not discovered for four or five years after the practice of forging began. Are the banks cashing the checks liable to the payee? *Opinion:* The courts have held that where the payee's indorsement to a check is forged and the money collected by an innocent purchaser, the latter is liable to the true owner for the money collected on the ground that he has converted the property of another. The banks cashing the checks would be liable to the payee until an action for conversion would be outlawed by the statute of limitations, unless in some way the payee, by acquiescence, could be held to have ratified the indorsement of its name by its agent, or facts could be shown that it held him out to the public as authorized not only to receive payment but also to indorse checks received, sufficient to make out a case of implied authority. In this case there was no delay, after discovery, in giving notice. In *A. Blum, Jr., & Sons v. Whipple*, 194 Mass. 253, where the payee sued the purchaser and there was more than two years' delay between discovery and notification of the forgery, the court said: "Nor was plaintiff guilty of such negligence or laches as to take away its right of recovery. *** It did not appear that any loss was caused to the defendants or that their position was in any way changed by failure of the plaintiff to notify them earlier than it did." (*Inquiry from S. C., Feb., 1921.*)

Recourse of payee upon bank cashing check for building material on forged indorsement

1608. T sold building material to C, which went into a building belonging to R. Apparently C is not solvent, and when R came to settle, he drew a check payable to T on the X bank. C indorsed the name of T and had it cashed by the Y bank. Is there any question as to the liability of Y, who cashed the check on the forged indorsement? *Opinion:* Assuming that C had no authority from T to indorse his name as payee, the indorsement was a forgery and the bank that cashed the check would be liable. It has been held in several cases that a bank receiving and collecting a check on a forged indorsement of the payee's name is liable to the payee for its proceeds. This on the ground that the bank has converted the

payee's property and is liable in damages to the true owner. The better procedure for the payee would probably be directly against the bank cashing and collecting the check for converting his property, rather than looking to the drawer for another check since T did not give the consideration directly to R, the drawer, and there might be difficulty in obtaining another check, if R should take the stand that, although he made the check payable to T, he in reality owed C, and should have made the check payable to him. (*Inquiry from Wis., Feb., 1913.*)

Right of true payee to recover from drawee*Decisions conflict but majority hold, under N. I. Act, drawee not liable to payee*

1609. A gave his check to John Doe drawn on the X bank. The check was stolen from John Doe and paid by the X bank to a person representing himself to be the payee. Two weeks later the real John Doe demanded the money from the X bank. Is the X bank answerable for the money to the real John Doe, or only to the drawer of the check? *Opinion:* Upon the question whether the drawee is liable to the payee, prior to the Negotiable Instruments Act it was held in a number of cases that the drawee who had paid a check upon a forged indorsement was liable thereon to the true payee. (The following are some but not all of the cases to this effect: *Commercial National Bank v. Lincoln Fuel Co.* 67 Ill. 166. *Pickle v. Muse*, 88 Tenn. 380. *Graham v. U. S. Sav. Inst.* 46 Mo. 186.) In some cases the decision went on the theory that the drawee by paying had accepted the check, and was liable as acceptor. Other cases were decided under the rule, now abolished by the Negotiable Instruments Act, that a check is an assignment and the payee can sue the drawee thereon before acceptance. Some courts, however, held that the payee could not sue the drawee, not recognizing that the check was an assignment and holding that payment upon forged indorsement was not an acceptance in favor of the true payee. See, for example, *First Nat. Bank v. Whitman*, 94 U. S. 343.

Since the Negotiable Instruments Act, the weight of authority is to the effect that where a check is paid on forged indorsement and charged to the account of the drawer, this is not an acceptance of the check within meaning of the N. I. Act and does not create a liability against the bank in favor of the true holder or payee. *Elyria Sav. & Bkg.*

Co. v. Walker Bin Co. 111 N. E. (Ohio) 147. B & O. R. Co. v. First Nat. Bank, 47 S. E. (Va.) 837. State Bank of Chicago v. Mid-City Trust & Sav. Bank, 129 N. E. (Ill.) 498. Lonier v. State Sav. Bank, 112 N. W. (Mich.) 1119. State v. Bank of Commerce, 202 S. W. (Ark.) 834. But, contra, in Louisville & N. R. Co. v. Citizens & Peoples Nat. Bank, 77 So. (Fla.) 104, it was held the payee may bring an action of trover against the drawee, the court saying: "The section in the Negotiable Instruments Act providing that a check of itself does not operate as an assignment of any part of the funds to the credit of the drawer and that the bank is not liable to the holder unless and until it accepts or certifies the check does not apply. The plaintiff (payee) is not suing the bank for breach of a contract in not paying the check. It is suing the bank because the latter has undertaken to exercise ownership over a check which belonged to the plaintiff without its authority—because the bank had in its possession funds, the proceeds of the check, which it should have paid to the plaintiff, but negligently failed to do so. * * * The defendant (bank) has undertaken to dispose of the check as its own by charging it to the drawers' account and returning it to them." And it has recently been held, in Kansas, that the retention by the drawee of a check bearing an unauthorized indorsement and charging it to the drawer's account is an acceptance under the Negotiable Instruments Act which makes the drawee liable to the payee as an acceptor. Chamberlain Metal Weather Strip Co. v. Bank of Pleasanton, 160 Pac. (Kan.) 1138.

The point does not appear to have been decided in Alabama. According to the weight of authority, the drawee in the case submitted is not liable to the payee but only to its depositor. (*Inquiry from Alabama, May, 1921.*)

Liability of Indiana drawee, paying check on forged indorsement, to true payee

1610. A purchased a draft to his own order and sent it to a creditor in payment of a bill, but neglected to indorse it. A clerk of the creditor forged A's indorsement on the draft and cashed it at the drawee bank which refused to reimburse on the ground that A was negligent in not making proper indorsement. Can A hold the drawee liable or must he look to the drawer? *Opinion:* In this case the payment was made directly to the forger so that the drawee bank is doubtless the loser. The fact that the payee

forwarded the draft, payable to his order, to his creditor without indorsing same would not be held such negligence as to deprive him of title to the draft. Upon the question whether the drawee is liable to the payee, A, it was held in Indiana in 1884 (Indiana Nat. Bank v. Holtsclaw, 98 Ind. 85) that the fact that a check has been paid on a forged indorsement does not prevent the payee from bringing suit thereon against the drawee precisely as though there had been no indorsement and payment, but since the N. I. Act, the Indiana courts may take a different view. (*Inquiry from Ind., March, 1918.*)

1611. An arrangement was made with a loan company to take up a mortgage then being foreclosed, and a check covering the amount due, drawn to the order of C, the holder of the past due mortgage was delivered to his attorney, appearing in the action, who indorsed it in the name of payee per himself and cashed it at bank A. It was paid by drawee bank B. The attorney defaulted, and C claims that bank B is liable to him for amount of check. *Opinion:* An authority to an agent or attorney to collect an account does not include authority to indorse the principal's name as payee on a check payable to his order received in collection and unless C gave express authority to the attorney to indorse his name to the check, such indorsement was unauthorized and a forgery. There is a conflict of authority whether in such case the payee can maintain an action against the drawee bank which paid the check. In Indiana Nat. Bank v. Holtsclaw, 98 Ind. 85, the payee was held entitled to sue the drawee, but since the N. I. Act the Indiana courts may take a different view if the question is again presented. (*Inquiry from Ind., May, 1919.*)

1612. A traveling salesman for a wholesale house, authorized to collect for goods sold, received in payment checks payable to his firm, which he indorses in the firm name, collects from the drawee and absconds. Is the drawee bank liable to the firm? *Opinion:* Authority in an agent to sell goods and to collect does not constitute authority to indorse the principal's name to checks taken in payment. Hamilton Nat. Bk. v. Nye, 37 Ind. App. 464. However, if an agent has been permitted to indorse checks payable to his principal, this constitutes implied authority, and the principal cannot recover from one who cashes such a check for the agent where the agent appropriates the pro-

ceeds. *Best v. Krey*, 85 N. W. (Minn.) 822. Applying these principles to the case submitted, in the absence of express authority to indorse or permission to indorse with knowledge, the payment by the drawee bank would be on a forged indorsement of the firm's name. The drawee bank can not charge such payment to the drawer, and the sole recourse of the bank would be upon the person for whom it cashed the checks.

Upon the question whether the drawee bank is liable to the firm, the weight of authority, since the Negotiable Instruments Act, is to the effect that the payee has no right of action against the drawee, but must look to the drawer who, of course, can hold the drawee responsible; but a minority of courts hold that the drawee has converted the check and its proceeds and is liable to the payee. In an early case in Indiana (*Indiana National Bank v. Holtscaw*, 98 Ind. 85) it was held that the payee can recover from the drawee. But whether, since the Negotiable Instruments Act, this rule will be adhered to by the courts of Indiana, or the weight of authority, which is to the contrary, followed, is uncertain. If, in any case, the payee cannot sue the drawee, he has a right of action against the drawer because of non-payment to him of the check and the drawer, in such case, could hold the drawee responsible. (*Inquiry from Ind., April, 1921, Jl.*)

Drawee not liable to payee in Georgia

1613. A check drawn in favor of C on bank A was cashed by that bank for B, a stranger, after identification. The next day A received word from C that the check had been lost or stolen and not to pay it. B was arrested, and sentenced for robbery, but the question of forgery was not brought up. Now C claims that B forged his indorsement and sues the bank for amount of check. *Opinion:* Although the indorsement be actually forged, C cannot recover against A, the drawee, but only from the drawer of the check. See *Freeman v. Savannah Bank*, 88 Ga. 252, 14 S. E. 577, in which it was held that the payee of a check, whose indorsement has been forged, has no right of action against the drawee which has paid it upon forged indorsement, since the check has neither been paid nor accepted by the bank. (*Inquiry from Ga., Aug., 1911.*)

1614. A check drawn on bank A by B, payable to C, is cashed by the drawee bank for D who is known by that bank to have no connection with payee whose indorsement

turns out to be forged. The question is—Is bank A liable to C? *Opinion:* Bank A is not liable to C, under the Georgia rule, but is liable to the drawer of the check and C's recourse is upon the drawer. (*Inquiry from Ga., April, 1913.*)

Purchaser acquires no title

Bank purchasing draft under forged indorsement

1615. A bank cashed a draft drawn by a bank in South Dakota upon a bank in Minneapolis, payable to A. M. U — upon forged indorsement of the payee's name by one S—. The person presenting the draft was accompanied by a well known resident of the town. The bank inquires as to its rights in the matter. *Opinion:* Upon the facts presented, the law is clear that the bank took no title to the draft so acquired under a forged indorsement and must lose the amount. The person presenting the draft being a stranger, the bank should have taken the precaution to have the resident who accompanied him indorse the draft with a guarantee of the payee's indorsement. This would have given the bank recourse upon him where the guarantee was broken. (*Inquiry from Va., March, 1920.*)

Bank purchasing forged draft

1616. A bank purchasing a forged draft against a lost letter of credit is the loser unless the draft is paid by the drawee, in which case the latter would probably be bound by payment. (*Inquiry from Wyo., June, 1914, Jl.*)

Indorser's liability to subsequent purchaser

Indorser of forged check warrants genuineness to indorsee

1617. A bank cashed a check, payment of which was refused on the ground that the drawer's signature was a forgery. The bank sought to recover the amount from the indorser. *Opinion:* The indorser of the check warrants the genuineness of the check to a subsequent purchaser and, if the check is forged, is liable upon breach of such warranty. Neg. Inst. A., Secs. 65, 66 (Ill. & Comsr's. dft.) *Farmers & Merchants Bk. v. Bk. of Rutherford*, 88 S. W. (Tenn.) 939. (*Inquiry from Ill., Feb., 1917, Jl.*)

Delay in notification

1618. On October 21, 1916, a bank cashed a check dated October 20, 1916,

signed by E. S. P., payable to C. H. F., indorsed C. H. F. and also by A and M. On the front and left hand corner was the notation "Room rent for negroes Sept. 3 to Nov. 3." This check was deposited by the bank's customer M, on October 21, and was paid by the drawee on the same day. C. H. F. has made affidavit that his indorsement was forged, and asks that the money be refunded. M claims that E. S. P. has a receipt from C. H. F. showing he received the money on the check, but C. H. F. claims he gave the receipt to A upon the understanding he would procure a check for him from E. S. P. A delivered the receipt to E. S. P. who then delivered the check to A, but C. H. F. claims A never delivered the check to him. Eight months have expired since cashing the check and notification that the indorsement was forged. The bank asks who is liable. *Opinion:* Assuming the indorsement of the payee of this check was forged, there would be a liability of the cashing bank to the payee, and recourse by that bank against its customer. The fact that A was an agent authorized to procure the check and deliver the receipt did not give him authority to indorse the payee's name and negotiate the check, and such indorsement was a forgery. It appears there was eight months' delay after discovery of the forgery in giving notice of it. According to some courts, where a drawee pays a check on forged indorsement, and unreasonably delays to give notice, after discovery of the forgery, such delay is fatal to recovery. See *Cunningham v. First Nat. Bk.*, 68 Atl. (Pa.) 731, where there was six weeks' delay after making discovery of a forged instrument before giving notice thereof. This was held fatal to recovery. See also *McNeely v. Bank of N. A.*, 70 Atl. (Pa.) 891, in which it is held to be the duty of a depositor whose check has been paid on a forged indorsement to promptly notify the bank when he discovers same. But the above cited cases are those where the depositor whose check has been paid, and who has discovered that an indorsement thereon is a forgery, has failed to promptly notify the bank. It is doubtful if the same rule would apply to prevent recovery by the payee where he discovers a forgery of his indorsement and fails to give prompt notice. The action by the payee would be for conversion of the check and the right of action would continue until the expiration of the statute of limitations unless he was estopped by some

laches. In *A. Blum Jr.'s Sons v. Whipple*, 194 Mass. 253, where the payee sued the purchaser and there was more than two years' delay between discovery and notification, the court said: "Nor was plaintiff guilty of such negligence or laches as to take away its right of recovery * * * It did not appear that any loss was caused to the defendants or that their position was in any way changed by failure of the plaintiff to notify them earlier than it did." It would seem there would be liability of the cashing bank in this case unless it can prove that the eight months' delay of the payee after discovery in giving notice of the forgery worked an injury to it which an earlier notice would have prevented. (*Inquiry from Iowa, June, 1917.*)

Right of drawee to recover money paid on forged indorsement not discovered for eleven months where notice promptly given

1619. A check drawn on bank A to the order of B was indorsed by bank C's customer D. Payment was made by drawee to C, and eleven months afterwards payee's indorsement was found to be a forgery. Notice was at once given by A to C. Inquiry is made as to whether Bank C and its customer are liable. *Opinion:* The rule is well settled that when a bank pays a check drawn upon it by one of its customers and it is afterwards discovered that the payee's indorsement is a forgery, it may recover the money back from the party to whom the payment is made. *First Nat. Bank v. Northwestern Nat. Bank*, 152 Ill. 296, 38 N. E. 739, 26 L. R. A. 289, 43 Am. St. Rep. 247. It has been held that a drawee bank is under no obligation, as far as the holder is concerned, to discover promptly a forgery of the indorsement, but, upon discovery, should give prompt notice, as was done by *A. Corn Exchange Bank v. Nassau Bank*, 91 N. Y. 74. *Schroeder v. Harvey*, 75 Ill. 638. Bank A has the right under the law to recover amount paid from bank C, and the latter bank in turn has the right to look to its customer D who by his indorsement has warranted to it the genuineness of the payee's indorsement. (*Inquiry from Fla., Jan., 1917.*)

Discovery by drawee of forged indorsement more than year after payment and prompt notice to collecting bank

1620. Bank A paid a check through the clearings to bank B. A little over a year

afterwards it was discovered that the payee's indorsement was a forgery, and B was promptly notified, but refused to refund because, as it claimed, the right to return the item and recover the amount was barred at the end of one year. *Opinion:* Section 326 of the New York Negotiable Instruments Act provides that "No bank shall be liable to a depositor for the payment by it of a forged or raised check, unless within one year after the return to the depositor of the voucher of such payment, such depositor shall notify the bank that the check so paid was forged or raised." But this section simply applies as between depositor and bank, and it is doubtful whether it covers forged indorsements as distinguished from forged or raised checks, although there is a New Jersey case which indicates that it applies to forged indorsements. In this case the general rule that money paid upon a forgery of an indorsement is recoverable would in all probability apply, and A would not be estopped by the delay and could recover from B. See *Oriental Bank v. Gullo*, 112 App. Div. 360, 98 N. Y. Supp. 561. Affmd. 188 N. Y. 610, 81 N. E. 1170. *Corn Exchange Bank v. Nassau Bank*, 91 N. Y. 74, 43 Am. Rep. 655. But while the drawee bank is not bound to discover a forged indorsement, it should give prompt notice when it has in fact ascertained that it has made payment on such a forgery. If there is negligence after discovery, in giving notification, and this works to the injury of the bank which has received payment, the payor bank might be estopped from recovering. See *Bank of Commerce v. Union Bank*, 3 N. Y. 230. (*Inquiry from N. Y., March, 1920.*)

Pennsylvania rule as to effect of delay of drawee in giving notice after discovery of forgery

1621. A check issued by a railroad company to an employee was cashed at a store and deposited with bank A which collected through its correspondent bank B from the drawee bank C. The latter, six months after payment, notified B that the payee's indorsement was forged, the payee making affidavit to this effect, and demanded reimbursement. *Opinion:* The general rule is that money paid by the drawee bank upon a forged indorsement is recoverable, and the only question in the present case is whether the six months' delay in notification of the forgery is a defense to repayment. In *McNeely Co. v. Bank of North*

America, 221 Pa. 588, 70 Atl. 891, it was held that a bank which has paid and charged to the account of a depositor checks bearing forged signatures or indorsements is not liable to the depositor where he fails to notify the bank promptly upon discovering the forgeries, regardless of whether such notification would have enabled the bank to protect itself. In *Connors v. Old Forge Discount Bank*, 245 Pa. 97, 91 Atl. 210, where the drawer neglected to notify the drawee bank for forty-two days after he had discovered the indorsement forged, it was held that he could not hold that bank liable, and, of course, subsequent indorsers were under no liability to refund. And in the case of *Cunningham v. First Nat. Bank*, 219 Pa. 310, 68 Atl. 731, it was held the delay of six weeks on drawer's part before notifying bank after discovery that indorsement was forged, released drawee from liability. If the facts in the present case show that the railroad company which drew the check was guilty of delay after it discovered that payee's indorsement was forged before giving notice, this delay would be a good defense. If the forgery was not discovered for six months and then notice was promptly given, the general rule would probably apply that money paid on a forged indorsement is recoverable, in which event the customer of bank A would be the one ultimately liable. (*Inquiry from Pa., March, 1920.*)

Payee's right of recovery from purchasing bank unaffected by delay unless latter prejudiced

1622. A bank received for collection several checks from C, its depositor, who was acting as collector of B, a French Fund for Orphans, which was named as payee and to whom the checks were donated. The checks bore the indorsements of the payee and of C, and were paid by the drawee bank. After two years had elapsed, B claims that his indorsement was a forgery and demands restitution. *Opinion:* Where the payee's indorsement on certain checks is forged and the forger deposits the checks in a bank which collects them from the drawee, the payee has a right of action against the indorsee bank for the proceeds of such checks and a delay of two years before giving notice will not affect his right of recovery unless the indorsee bank has been prejudiced by such delay or suffered a loss, which an earlier notice might have prevented. *Laws of Mass. 1912, Chap. 277. Meyer v. Rosen-*

heim, 73 S. W. (Ky.) 1129. A. Blum, Jr.'s Sons v. Whipple, 194 Mass. 253. Murphy v. Metropolitan Nat. Bk., 191 Mass. 159. Hamlin v. Sears, 82 N. Y. 327. (*Inquiry from Mass., March, 1919, Jl.*)

Conflict between federal and state rules as to effect of unreasonable delay in giving notice after discovery

1623. A drawee bank paid a draft, upon which the payee's indorsement was forged, and eight months later discovered the forgery. Three and one-half months after said discovery the drawee notified the bank which cashed the draft and demanded a return of the money. *Opinion:* According to the rule adopted in a number of States, the drawee's delay in giving notice after discovery bars its recovery, provided the bank receiving payment was damaged by such delay; but under the theory of the United States Supreme Court, the drawee can recover upon breach of warranty, irrespective of the unreasonable delay in giving notice. The right of recovery would, therefore, seem to depend upon the jurisdiction in which the action is brought. Yatesville Banking Co. v. Fourth Nat. Bk., 72 S. E. (Ga.) 528. Canal Bk. v. Bk. of Albany, 1 Hill (N. Y.) 291. Corn Exch. Bk. v. Nassau Bk., 91 N. Y. 74. Continental Nat. Bk. v. Metropolitan Nat. Bk., 107 Ill. App. 455. (Contrary case—U. S. v. Nat. Exch. Bk., 214 U. S. 319.) Wellington Nat. Bk. v. Robbins, 71 Kan. 748. Muller v. Nat. Bk. of Cortland, 96 App. Div. (N. Y.) 71. Second Nat. Bk. v. Guarantee T. & S. D. Co., 206 Pa. 616. (*Inquiry from Miss., Jan., 1914, Jl.*)

Notice of forged indorsement given by drawee four months after payment

1624. A check payable to A, drawn by B on bank C, was cashed by bank D which collected through its correspondent E from drawee bank C. The latter bank, over four months afterwards, requested reimbursement from bank D, on the ground that payee's indorsement was forged, and it is asked if this delay in notification does not release D from liability. *Opinion:* It has been held in a number of cases that the drawer of a check, when it is returned to him as a paid voucher, is not charged with the duty of detecting and reporting within a reasonable time a forgery of the payee's indorsement, and that the case is different from one where the drawer's signature has been forged or the amount raised. If the

forgery of the indorsement of this payee had been discovered immediately and there was three or four months' delay after discovery, before notification, and it could be proved that the holder who received payment was prejudiced by this delay in obtaining redress, there might be a chance for successfully defending against liability, but many cases hold that delay in discovery does not affect the right of recovery provided reasonable notice is given when discovery is made. It would seem in this case that bank D would be liable to refund notwithstanding the four months' delay. (*Inquiry from Mo., Sept., 1913.*)

Limitation of time of making claim upon forged indorsement in New Jersey

1625. Inquiry is made as to the length of time a bank has in which to make a claim for a forged indorsement on a check received from a corresponding bank with indorsement guaranteed. *Opinion:* As soon as a bank learns that an indorsement has been forged upon a check paid by it, it should give notice to its correspondent and make claim for reimbursement; otherwise, if it delays an unreasonable time and the correspondent is injured by the delay, the payor bank may be estopped from recovering. If reasonable notice has been given after discovery of the forgery, the bank would have the full period of the statute of limitations, namely, six years, in which to bring action to recover the money paid on a forged indorsement or for a breach of guarantee. The New Jersey Act of April 13, 1908, providing that no bank shall be liable to a depositor for payment by it of a forged or raised check, unless within one year after the return to the depositor of the voucher, the depositor shall notify the bank that the check was forged or raised, has been held not directly, but by implication, in the case of Pratt v. Union Nat. Bank, 79 N. J. L. 117, 75 Atl. 313, to apply to forged indorsements. If this ruling be adhered to, then, if a bank paid a check upon a forged indorsement and returned same to its depositor as a paid voucher and the latter failed to notify the bank of the forgery within a year, the amount charged to the depositor's account could not be questioned by him, and the bank in such case would have no right of action against the correspondent. (*Inquiry from N. J., June, 1919.*)

Two months' delay by drawee after discovery in giving notice

1626. Where the drawee bank delayed

the giving of notice for more than two months after the discovery of the forgery of the payee's indorsement, it cannot recover under the rule adopted in a number of States, provided the bank receiving payment can show that the delay caused it a loss. Under the rule laid down by the United States Supreme Court, the drawee can recover, regardless of the unreasonable delay in giving notice of the forgery. See citations in Opinion No. 1623. (*Inquiry from S. D., Jan., 1914, Jl.*)

Notice by drawee of forgery four months after payment

1627. On February 6th a bank cashed a check upon which the payee's indorsement was forged, the forger having been introduced to the bank as the payee by one of its depositors who left the city in April and cannot be located. On June 27th the bank was notified of the forgery by the payor of the check. *Opinion:* If there was unreasonable delay after discovery of the forgery in giving notice thereof, accompanied by loss sustained by the bank, the drawee of the check could not recover. Mere delay, however, in discovering the forgery is no defense. If the forgery was discovered soon after the check was paid, the delay in giving notice to the bank might be a good defense, assuming there was recourse, which was lost, upon the depositor who misrepresented the forger as the payee. Under the federal rule, however, the money is recoverable by the drawee, notwithstanding unreasonable delay, on the ground of breach of implied warranty of genuineness. *Brixen v. Nat. Bk., 5 Utah 504. Lahay v. City Nat. Bk., 15 Colo. 339. (Inquiry from Utah, Aug., 1912, Jl.)*

Indorsement by person of same name

Indorsement a forgery and purchasing bank takes no title

1628. An indorsement of a draft by a person of the same name but not the payee intended is a forgery, and the bank cashing the draft is responsible for the loss, in the absence of any negligence on the part of the drawer. *Cockran v. Atchinson, 27 Kan. 728. Rossi v. Nat. Bk. of Commerce, 71 Mo. App. 570. Graves v. Amer. Exch. Bk., 17 N. Y. 205. Beattie v. Nat. Bk. of Ill., 174 Ill. 571. Exception to Rule in Weisberger v. Barberton Sav. Bk. Co., 95 N. E. (Ohio) 379. (Inquiry from Fla., Sept., 1911, Jl.)*

Mailing draft to payee without street address not negligent

1629. The purchaser of a draft mailed it to himself at his home city with no particular street address, and draft was delivered to a person of the same name, who cashed it at the bank upon his forged indorsement. The bank collected the draft. *Opinion:* The indorsement was a forgery and the purchasing bank derived no title and is liable to the drawee. It is doubtful if a defense of negligence can be successfully maintained. *Weisberger v. Barberton Sav. Bk. Co., 95 N. E. (Ohio) 397. See also citations in Opinion No. 1628. (Inquiry from Ind., Jan., 1910, Jl.)*

Check addressed to payee at one city re-addressed to another city

1630. A check payable to the order of John Smith was sent by letter directed to Denver, and upon a forwarding order sent to the town of B, where letter was received by one John Smith who cashed the check. It was subsequently claimed that the party who indorsed and cashed the check was not the real payee. *Opinion:* An indorsement of a check by a person of the same name, but not the real payee intended by the drawer, is not a valid indorsement but a forgery and no title is acquired by a purchaser under such indorsement and where there is no fault of the drawer he cannot be held on the check. (*Inquiry from Kan., Oct., 1915.*)

Purchaser acquires no rights

1631. A bank purchased a draft payable to "G. Smith." The draft was indorsed by a person of the same name, not the real payee. *Opinion:* The indorsement is a forgery and purchaser derived no title. See citations in Opinion No. 1628. (*Inquiry from La., March, 1913, Jl.*)

Recovery by drawee

1632. Two checks fell into the hands of a person of the same name as the payee. One of these checks was paid by the drawee bank. Payment was stopped upon the other check, but not before the same had been cashed by a bank for the purported payee upon the identification of a responsible person, who, however, did not indorse the check. Who stands the loss? *Opinion:* Where a bank pays a check upon the indorsement of a person of the same name, but not the true payee, the bank cannot charge the amount to the drawer's account, unless the latter

is negligent, for the indorsement of the purported payee is a forgery and confers no authority on the bank to make payment. The payor bank, however, has a right of action against the person receiving payment to recover the money as paid by mistake. A bank purchasing a check upon which the payee's indorsement is forged as above indicated acquires no enforceable rights. *Weisberger v. Barberton Sav. Bk.*, 84 Ohio St. 21. *Hartford v. Greenwich Bk.*, 142 N. Y. S. 287. (*Inquiry from N. C., March, 1918, Jl.*)

*Check mailed to payee addressed
"Rome, N. Y."*

1633. A check was made payable and mailed to A, Rome, N. Y. There are in Rome two or more persons of the same name. and the letter containing the check was delivered to the wrong A, who indorsed and cashed same at the bank where made payable. *Opinion:* The courts take the view that indorsement of a check by a person of the same name, but not the real payee intended by the drawer, is not a valid indorsement and that the bank which purchases a check upon such indorsement is not protected nor can the drawee bank which pays such a check charge the amount to the drawer. See *Graves v. American Exch. Bk.*, 17 N. Y. 205. The mailing to A at Rome without street address would probably be held not sufficient negligence of the drawer to charge him with the amount. (*Inquiry from N. Y., Oct., 1915.*)

*Purchaser acquires no title but could hold
indorser*

1634. A check was sent by mail to payee's proper post office address and received by another person of the same name, who indorsed the same and, after being identified, obtained cash for it from bank A. The latter was unable to collect from drawee bank, because the drawer of the check had stopped payment. It inquires as to its status. *Opinion:* The courts in several cases have held that an indorsement of a person of the same name as the payee, but not the true payee, is a forgery, and that the purchaser of a check under such an indorsement acquires no title. In this case, as the maker mailed the check to payee at his correct address, he would not be held negligent because there happened to be another person of the same name who received his mail at the post office. Bank A's sole recourse, as it cannot hold the

drawer liable, would be against the person from whom it received the check, unless the person who identified the holder indorsed the check, in which case it could look to him also. (*Inquiry from N. Y., March, 1920.*)

*Drawee liable although person of same name
as payee personally known to it*

1635. A check payable to John Smith was mailed by the drawer to the payee, but was delivered to another person of the same name, who was personally known to the drawee, and who received payment on his indorsement. *Opinion:* The indorsement is a forgery and the drawee cannot charge the amount to the drawer, in the absence of drawer's negligence in mailing the check, but can recover from the person receiving payment. (*Inquiry from Okla., June, 1916, Jl.*)

Purchasing bank liable to drawee

1636. M. S. & Co., of New York City, mailed a check to Samuel Jackson, and the P. O. department delivered the letter to another person having same name. Person receiving check presented same at local bank for deposit, and, being known to teller who waited upon him, as Samuel Jackson, check was accepted and placed to his credit. In course of month he withdrew these funds from his account. The correct Samuel Jackson, not receiving the check from M. S. & Co., advised them, and they issued duplicate check and forwarded same to correct party, and it was duly delivered to him. This transaction occurred about a month after the original check had been presented to drawee bank and charged to account of M. S. & Co. The latter issued duplicate check without inquiry at their bank regarding fate of original check. Query—what is liability, if any, of collecting bank, which gave value for check without any knowledge or notice of any irregularity, or mistaken identity? *Opinion:* The rule is that an indorsement of a check by a person having the same name as the person to whom the check is payable, but not the true payee, is a forgery. One purchasing the check under such indorsement acquires no title thereto and the bank which pays the check upon such forged indorsement cannot ordinarily charge the amount to the drawer's account, in the absence of negligence on the part of the latter; and the bank which receives payment is liable to refund to the drawee bank. In this case the bank which received the

check on deposit is liable. *Russell v. First Nat. Bank* [Ala.] 56 So. 868. *Beattie v. Nat. Bank of Ill.* [Ill.] 501 N. E. 602. *Graves v. American Exch. Nat. Bank*, 17 N. Y. 205. But see *Weisberger Co. v. Barberton Sav. Bank Co.* [Ohio] 95 N. E. 379, where drawer was held guilty of negligence in mailing check to a wrong address, which made him responsible to the drawee bank for payment to the wrong payee of the same name. (*Inquiry from Pa., July, 1912, Jl.*)

Purchaser must refund

1637. Last June a bank cashed a Government bonus check for a person whose indorsement we recognized as that on several items handled through the bank. In December the Government charged the bank with the check, claiming forged indorsement, and sent affidavit supporting claim. The name of person cashing check is the same as that of the person verifying affidavit. *Opinion:* The courts have held in a number of cases that an indorsement by a person of the same name, but not the real payee, is a forgery, and that a bank or person acquiring the instrument under such indorsement takes no title, and if it has collected the money, it is liable to refund. The fact that six months elapsed before the Government charged the bank with the check, claiming forged indorsement, is not such delay as will prevent the Government's right of recovery. It is apparent that the bank is liable and must refund. (*Inquiry from Tex., March, 1920.*)

Question undecided whether drawer negligently mailing to wrong address estopped to deny purchaser's title

1638. A check was mailed to the payee and delivered to the wrong person of the same name who indorsed and negotiated it to a purchaser for value. *Opinion:* The indorsement was a forgery and the purchaser took no rights. Where the maker of the check is guilty of negligence in letting the check get into the hands of the wrong person it has been held as between drawer and drawee bank, the loss will fall upon the drawer; but whether mailing to a wrong address would be a responsible breach of duty to a purchaser has never yet been decided, and is doubtful. (*Inquiry from W. Va., June, 1910, Jl.*)

1639. The drawer of a check mailed it to one J. Smith, to whom payable, at No. 2701 A Street instead of No. 2701 B Street.

Another J. Smith, who happened to live at the former address, received the check and cashed it at a bank, which was an innocent purchaser for value. *Opinion:* The indorsement was a forgery and the purchaser took no title nor right to enforce against the maker. Where the drawer negligently mails a check to the wrong address, and it gets into the hands of a person of the same name, who forges the indorsement, an Ohio case holds that the drawer is liable to the drawee which pays the check; but it is doubtful that such liability would extend to the purchaser of the check from the forger. (*Inquiry from W. Va., Oct., 1914, Jl.*)

Where drawer misnames payee

1640. The drawer of a check, who owed "George P. Bent," by mistake drew and mailed his check to "George A. Bent." The latter received and cashed the check. *Opinion:* The general rule is that indorsement by a person of the same name, is a forgery and that the depositor is not liable for payment. But if the drawer is guilty of negligence, the loss will be his and not the banks. In this case, drawer will probably be held the loser, as payment was made by the bank as a result of his negligence in misnaming the payee. *Weisberger Co. v. Barberton Sav. Bk.* (Ohio) 95 N. E. 379. (*Inquiry from S. C., Nov., 1911, Jl.*)

Indorsement by precise person intended

Check payable to impostor impersonating owner of property

1641. An impostor F obtained a loan on real property he claimed to own, from A who gave him his check, requiring F, before so doing, to have his acknowledgment to a mortgage taken before a notary public where F claimed to reside and to be known. The deed to F turned out to be a forgery throughout, even the notary's seal having been stolen. In all the transactions the impostor used a fictitious name very similar to his real name. The check indorsed as drawn was cashed by bank B which indorsed, "All prior indorsements guaranteed," and forwarded to bank C which collected from drawee. A asks if he can hold bank B. *Opinion:* A would have no recourse against bank B. The courts have held that where a stranger, falsely representing himself to be another, obtains a loan for which the lender gives him his check payable to the person he represents himself to be, the check having been issued to the person to whom the drawer intended to make payment, its pay-

ment is chargeable by the drawee to the drawer; that the indorsement is not a forgery but by the precise person intended by the drawer to receive the money and neither a purchaser of the check upon such an indorsement nor the bank of payment is liable to the drawer. See, for example, *Land Title & Trust Co. v. North Western Nat. Bank*, 196 Pa. 230, 46 Atl. 420, 50 L. R. A. 75. (*Inquiry from Ark., Feb., 1918.*)

Railroad pay check delivered to impersonator of payee

1642. A railroad pay check payable to R. E. Jones was through a mistake delivered by an agent of the railroad to the wrong person, who impersonated Jones. The impersonator indorsed the check R. E. Jones and cashed it at a bank. The real payee seeks to hold the bank liable. *Opinion:* It might be held that under the circumstances the indorsement was not a forgery but by the precise person intended by the drawer to receive the money, in which case the railroad company would be liable. *Weisberger Co. v. Barberton Sav. Bk. Co.*, 95 N. E. (Ohio) 379. *Land Title & Tr. Co. v. Bk.*, 196 Pa., 230, 211 Pa. 211. *Emporia Nat. Bk. v. Shotwell*, 35 Kan. 360. *U. S. v. Bk.*, 45 Fed. 163. (*Inquiry from Idaho, Nov., 1911, Jl.*)

Rights of purchasing bank

1643. A check is drawn and delivered to an impostor, the drawer believing him to be the person named therein. The impostor indorsed in the name he had assumed, and, upon being properly identified, cashed the same for value at a bank. *Opinion:* The bank cashing the check is protected, as the indorsement is not a forgery, but by the precise person intended to receive the money. The majority rule is as above, but there are a few cases contra. *Burrows v. West. Union Tel. Co.*, 86 Minn. 499. See citations in *Opinion No. 1642*; also *Maloney v. Clark & Co.*, 6 Kan. 82. *Hoge v. First Nat. Bk.*, 18 Ill. App. 501. *Hoffman v. Amer. Exch. Nat. Bk.*, 2 Neb. 217. (*Inquiry from Minn., Sept., 1911, Jl.*)

Money forwarded by one bank to another in response to impostor's telephone request for funds

1644. A person telephoned a bank from another locality, representing himself to be W, a customer, and asked the bank to forward all his money to him. The bank sent a draft for the balance to a bank in the other

locality payable to that bank with instructions to pay the money. The receiving bank took a receipt from the supposed W, which later proved to be a forgery by his son. What rights has the bank drawing the draft against the payor bank? *Opinion:* An analogous situation has often come before the courts where an impostor impersonating a customer has wired the bank asking that it send him funds which have been forwarded by draft payable to the customer, and the impostor has indorsed the draft in the customer's name, and transferred it. Some cases hold that the indorsement is not a forgery, but is by the precise person intended by the bank to receive the money, namely, the impostor who wired for it. Other cases hold that the bank intended to pay the customer and the indorsement is a forgery. In the case submitted a court might hold that the drawer bank intended the payor bank to deliver to the person telephoning, the drawer bank supposing him to be the owner of the account, or it might be held that, although the drawer was deceived, it was the duty of the payor bank to identify the person asking for the money and to pay only to the customer. The equities, however, are seemingly with the payor bank and it would probably be held that, in paying the money, it was acting as agent of the forwarding bank; that it had exercised due care and was not responsible. (*Inquiry from Mo., Jan., 1921.*)

Check of savings bank forwarded to impostor mailing book

1645. A savings bank received by mail from an impostor, who impersonated a depositor, the depositor's pass book and a forged order with a letter requesting payment of the full amount due. A few days previous the pass book had been presented with an order for part of the funds, but payment was refused because the signatures did not correspond. The savings bank dealt with the impostor, believing him to be its depositor, and mailed to the impostor in another city its check payable to the depositor. The impostor indorsed the check in the name of the depositor to a bank, which collected it and then paid the proceeds of the check to the impostor. *Opinion:* The bank would have a fair ground of defending against liability to the savings bank (1) because the check was indorsed by the precise person intended by the drawer to receive payment, and (2) because the savings bank would probably be estopped in

setting up forgery by reason of negligence in mailing the check under such suspicious circumstances. As a further ground, if the bank could show that it appeared on the check as collecting agent, it could escape liability, after payment of the proceeds to the impostor. See citations in opinions Nos. 1642 and 1643; also *Meyer v. Ind. Nat. Bk.*, 27 Ind. App. 354. *Metzger v. Franklin Bk.*, 119 Ind. 359. (*Inquiry from Ohio, June, 1914, Jl.*)

Fictitious payees

Draft to fictitious payee procured by agent of drawer and indorsement forged

1646. A, the treasurer of a local lodge of an insurance order for a period covering two years, forged a number of death proofs showing deaths of various members, and received from the main lodge drafts on its treasury issued to the beneficiaries named in the different policies, sent to him in violation of one of its by-laws providing that such drafts should be sent to a different officer. In each instance A forged the indorsement of the beneficiary and cashed the draft at some bank, and it was eventually paid out of the funds of the order by one of its local depositories. The question is—would the banks that cashed the drafts for A and guaranteed the indorsements be liable to the lodge, or would the fact that the lodge was negligent in not discovering the fraud sooner be a defense? *Opinion:* The case is one, it appears, where the lodge would be held entitled to recover from its local depository and the latter in turn would have recourse upon the banks that originally cashed the drafts for A and guaranteed the indorsements. The depository bank would not be able to charge the money paid on these checks to the account of the lodge because of the fact that they were made payable to the order of persons having no existence and, therefore, in legal effect payable to bearer, as the Missouri Negotiable Instrument Law expressly provides that "The instrument is payable to bearer—when it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable and in this case the main lodge was ignorant of the non-existence of the beneficiaries named as payees." The only ground for reaching a different result would be to maintain that the lodge, by allowing itself to be duped in this manner, was guilty of negligence which would estop it from asserting that the drafts were paid without its au-

thority, but it is doubtful whether a case of estoppel by negligence could be made out, as in some leading cases, where the facts appeared much stronger against the depositor than in this, the courts have held the depositor not negligent. See *Shipman v. Bank of the State of New York*, 126 N.Y. 318, 27 N. E. 371, 12 L. R. A. 791, 22 Am. St. Rep. 821. *Seaboard Nat. Bank v. Bank of America*, 193 N. Y. 26, 85 N. E. 829. (*Inquiry from Mo., Jan., 1913.*)

Note: But in *Equitable Life Assur. Soc. v. National Bank of Commerce*, 181 S. W. (Mo.) 1176, decided in 1916, where the agent of an insurance company procured its check to a fictitious payee to be delivered by him supposedly to a real beneficiary and the agent forged the indorsement of the fictitious payee and negotiated the check for value, the court held the drawee bank which paid the check was not responsible to the insurance company. It held that the knowledge of the insurance agent that the payee of a check sent to him for delivery in settlement of a death claim which he had forged was a fictitious person when, acting within the scope of his actual or implied authority, he delivered the check and put it into circulation as a negotiable instrument was the knowledge of the insurance company, and that, under the Negotiable Instruments Act, which provides that where a negotiable instrument is payable to the order of a fictitious person and such fact is known to the person making it so payable, it shall be payable to bearer, the drawee upon which the insurance company drew the check payable to a fictitious person was entitled to the same protection as if the check had been payable to bearer and was not deprived of such protection by reason of its failure to proceed against the fraudulent agent or against the two banks through which the check had been presented, when the agent's fraud was not discovered until four years after payment.

Also in *Osborn, et al., v. Corn Exchange Bank of Chicago*, decided by the Appellate Court of Ill. in Chicago, in April, 1920, one D in the employ of plaintiffs procured them to sign checks drawn on the defendant bank to the order of an insurance company, the indorsements of which he forged, and they were paid by the drawee through other banks in which the checks were deposited and, when returned to the depositors as vouchers, they were destroyed or concealed by D. Plaintiffs in this case were denied recovery from the drawee bank (not on the

theory that the checks, being payable to fictitious payees with knowledge of the agent, were payable to bearer but) on the ground that plaintiffs were negligent in giving D unrestrained opportunity to commit the forgeries complained of and by failure to make any objection to the monthly statements rendered to them.

Conflict of decision whether check to fictitious person issued through fraud of agent is bearer instrument

1647. Bank A cashed a check for an agent of an insurance company who had obtained it from the company on his fraudulent representation that it was for a loan to a real policy holder to whom the check was made payable and whose indorsement was forged by such agent. The bank voluntarily returned the money to the drawer, and the question is—If it was not necessary for it to have done so, would it have any ground to recover the money back? *Opinion:* If bank A had not refunded the money, there might have been a chance for it to have retained same and deny liability in view of the decision in the Missouri case of Equitable Life v. National Bank of Commerce, 181 S. W. 1176. There the insurance company issued a check through fraud of its agent to a fictitious person, the agent forged the indorsement and the drawee bank paid the check. It was held that a check payable to a fictitious person is payable to bearer where the drawer has knowledge of the fiction, and that the knowledge of the agent was the knowledge of the company, and that the latter could not recover from the bank. The New York case of Shipman v. Bank, 126 N. Y. 318, 27 N. E. 371, 12 L. R. A. 791, 22 Am. St. Rep. 821, holds to the contrary, but a later New York decision, Trust Co. v. Hamilton Bank, 129 App. Div. 515, 112 N. Y. Supp. 84, would seem to support the proposition. As there are conflicting opinions, the result in this case would be doubtful even if the money had not been returned. But here the money has been voluntarily refunded. It is a general rule that money voluntarily paid under a mistake, or in ignorance of the law, but with full knowledge of all the facts, cannot be recovered back where there has been no fraud or misconduct on the part of the person receiving payment. If bank A's payment was without legal liability to refund, still, having voluntarily repaid the amount, this rule would seem to debar it from recovering it back. (*Inquiry from N. J., Sept., 1916.*)

Note: In a number of cases it has been held that where the drawer is induced upon representation of an impostor to make his check payable to a fictitious name which is negotiated with indorsement of such name by the impostor, the indorsement is a forgery and the drawer not liable. United Cigar Stores Co. v. American Raw Silk Co., 171 N. Y. Supp. 480. Mercantile National Bank v. Silverman, 132 N. Y. Supp. 1017, and National Surety Co. v. National City Bank, 172 N. Y. Supp. 413. Padgett v. Young County, 204 S. W. (Tex.) 1046. But in these cases the impostor had no relation of agency to the drawer.

Indorsement of fictitious payee forged by agent of drawer

1648. A bank cashed a check drawn by an insurance company upon an indorsement of a fictitious payee forged by its agent and cashed upon his identification. The agent was in the habit of identifying the payees of the company's checks, and of witnessing their indorsements. *Opinion:* The bank is responsible unless it could be shown that the agent was acting within the scope of his authority, in which case the company would be estopped from asserting that the indorsement was a forgery. First Nat. Bk. of Hastings v. Farmers & Merchants Bk., 56 Neb. 149. Shipman v. Bk. of St. of N. Y., 126 N. Y. 318. (*Inquiry from Md., May, 1910, Jl.*)

Check of principal signed by authorized agent to fictitious payee

1649. A was agent of an insurance company and authorized to make settlements for losses and draw drafts upon his company in payment of claims. It had been his custom for several years to secure the indorsements of different payees, and, indorsing the drafts himself, receive cash for them from bank B and settle with the payees. Such drafts were always honored by the principal. Finally he drew a number of them, using fictitious names for payees, and, after indorsing in such names, indorsed same himself and they were cashed by bank B for him in the belief that the indorsements were the genuine signatures of the payees named. The drafts were returned by the drawee bank with the notation, "Received no advice," and the question is—has bank B a valid claim against the insurance company? *Opinion:* Bank B would have a valid claim against the insurance company as drawer of the drafts on the ground that the agent

had authority to issue them and that, by making them payable to fictitious persons, they were in reality payable to bearer under the rule of the Negotiable Instruments Act that the instrument is payable to bearer "when it is payable to the order of a fictitious or non-existing person and such fact was known to the person making it so payable." (*Inquiry from Tex., April, 1917.*)

Purchaser of c/d issued to fictitious payee without knowledge of fiction acquires no title

1650. A customer, carrying an account under the name of M, deposited a forged check and a few days later obtained a demand certificate of deposit for a portion of the deposit payable to Dan Gibson whom he represented to be an actual person, residing in another city. The depositor signed the name of Dan Gibson to the certificate of deposit and cashed it. Was the bank issuing the certificate justified in refusing to pay it when it was presented through the clearing house? *Opinion:* The indorsement of this certificate was a forgery, hence the innocent purchaser acquired no title and cannot hold the issuing bank liable thereon. (1) If Dan Gibson were a real person, the indorsement of his name would be a forgery; (2) but Dan Gibson was doubtless a fictitious person and here, equally, the bank would not be liable, for the certificate would not be construed as payable to bearer under the N. I. Act which provides that the instrument is payable to bearer "when it is payable to the order of a fictitious or non-existing person and such fact was known to the person making it so payable." The bank did not know it was making the certificate payable to a fictitious or non-existing person. (*Shipman v. Bank*, 126 N. Y. 318. *United Cigar Stores Co. v. Am. Raw Silk Co.*, 171 N. Y. Supp. 480. *Mercantile Nat. Bank v. Silverman*, 132 N. Y. Supp. 1017. *Nat. Surety Co. v. National City Bank*, 172 N. Y. Supp. 413. *Padgett v. Young County*, 204 S. W. [Tex.] 1046). (3) There is a line of cases which hold that where an instrument is made payable and delivered to a person who assumes to be another person and the impersonator indorses the instrument in the name of the person he assumes to be, the maker is liable because the indorsement is not a forgery but by the precise person intended to receive the money. (*Hartford v. Greenwich Bank*, 142 N. Y. Supp. 387, *affd.* by court of appeals, 109 N. E. 1077. *P. & G., etc., Co. v. Fifth Nat. Bank*, 172 N. Y. Supp. 688). But in the

present case the depositor did not represent himself to be Dan Gibson and carried his account under another name, so that these cases have no application. It follows that the issuing bank was justified in refusing payment when presented through the clearing house. (*Inquiry from Utah, June, 1921, Jl.*)

Forgery of indorsement

Forgery of accommodation indorsement of collateral note

1651. A young man, B, dealing in horses, would sell a horse for, say, \$200, receive cash payment of \$50, and would take purchaser's note for balance, using a "retain title note," recording same in county clerk's office. He had these notes discounted at bank C. After several renewals of these notes an arrangement was made by which B gave the bank his collateral form note for an amount covering all the "horse" notes, payable in 90 days, which, according to agreement, was indorsed, purportedly, by the father of B (by his mark, and witnessed by the alleged signature of another brother, D). Upon dishonor of the collateral note, the father disclaimed his indorsement thereof, charging that the affixing of his signature was a forgery, the brother alleging, likewise, that his signature as witness to his father's signature was a forgery. It afterwards developed that the makers of the several "horse" notes had surrendered the horses to B, and that he had resold them. The bank desires to know if the makers of the notes are now liable thereon; if the father can be held on his alleged indorsement; and of what crime, if any, is B guilty. *Opinion:* As to the collateral note, the indorsement is either genuine or a forgery. If genuine, the father can be held liable thereon. If it is a forgery, and the signature of the brother, D, is genuine, then he is liable as witness to a forged signature. If the note is a forgery, then B could be prosecuted and convicted under the Virginia Forgery Statute (*Pollard's Va. Code*, Sec. 3737). Furthermore, it is probable that B is guilty of larceny for reselling the horses returned by the conditional vendees, since title to them vested in the bank upon the assignment of the purchase money notes to it. Lastly, if these latter notes were negotiable, and transferred to the bank before maturity, the makers would very likely be still liable thereon to the holder thereof, the bank. (See *Davis v. Miller*, 14 Gratt. [Va.] 1). (*Inquiry from Va., June, 1916.*)

Indorsement in trade name

1652. Checks payable to a trade name assumed by a depositor were indorsed in that name by a son of the depositor, credited to depositor's account in that name and collected. The depositor having defrauded the drawer of the checks, the latter seeks to hold the bank on the ground that the indorsement of the checks was unauthorized and a forgery. The bank inquires whether a check may be made payable to a person in a trade or assumed name and whether the indorsement of such trade or assumed name is valid to pass title to the bank. *Opinion:* Assuming that the trade name was adopted and used by the depositor in his business, the indorsement of the checks payable to such name by him, or under his authority, would be just as valid as if the checks were made payable to the depositor in his own name and indorsed by him. Assuming that the son had authority to indorse the father's name, then all indorsements of the checks were valid and there would be no right of action against the bank for acquiring these checks under forged indorsements and collecting the money thereon. (*Inquiry from Iowa, Dec., 1916.*)

Forged indorsement on check payable to A or bearer

1653. A check was issued to A or bearer. A lost same and the finder indorsed A's name and negotiated the check to B, who indorsed to C, guaranteeing prior indorsements, and drawee bank paid the check to C, overlooking a stop-payment order. Can drawee bank collect this amount from C, and can C in turn collect it from B? *Opinion:* The check was payable to bearer under the Negotiable Instruments Act, and, notwithstanding the forgery of the indorsement, continued negotiable by delivery; hence B was a holder in due course entitled to payment, and the money is not recoverable by the drawee from C, nor by C from B, but the payment is chargeable to the drawer, as the overlooking of the stop order resulted in no damage to him, and the loss falls upon A to whom the check was given. (Neg. Inst. Law, Secs. 9, 30, 40). (*Inquiry from Pa., Jan., 1921, Jl.*)

Estoppel to assert forgery of indorsement

Where person sees note containing forgery of his indorsement and fails to disclose forgery

1654. A, the maker, forges the indorse-

ments of B and C to his note, which is discounted for A by a bank. At maturity B and C are notified but pay no attention thereto, and afterwards B sees the note and, instead of disclosing the forgery, says he will endeavor to get A to renew with additional indorsers. Afterwards, upon A's death, leaving no estate, B and C assert forgery. *Opinion:* If C's silence when it was his duty to speak and B's affirmative representation of the genuineness of the indorsements were intended to and did prevent the bank from protecting itself from the loss, there would seem fair ground for holding B and perhaps C liable. Neg. Inst. A., Sec. 23 (Ill. & Comrs's. dft.). Beatty v. College, 177 Ill. 280. Chester v. Wabash, etc., R. Co., 182 Ill. 382. Maring v. Meeker, 263 Ill. 136. Richards v. Street, 31 App. D. C. 427. Tobias v. Morris, 126 Ala. 535. Harris v. Amer. Bldg., etc., Assoc., 122 Ala. 545. Buck v. Wood, 85 Me. 204. Rothschild v. Title Guar. & T. Co., 204 N. Y. 458. Sackett v. Fast, 39 Pa. Super. Ct. 431. (*Inquiry from Ill., June, 1916, Jl.*)

1655. The maker of a note upon which the indorser's name is forged lets it go to protest. The purported indorser, upon being notified and questioned, does not inform the bank of the forgery, but makes an evasive reply. After the dishonor of a second note likewise forged, the purported indorser for the first time notified the bank of both forgeries. The maker died insolvent. *Opinion:* The purported indorser is liable if he knew of the forgery of the first note and his failure to notify the bank caused a loss. Forbes v. Espy, 21 Ohio St. 474. Bk. v. Weston, 172 N. Y. 259. Morris v. Bethell, L. R. 5 C. P. 47, 21 L. T. Rep. U. S. 323. Barber v. Gingell, 3 Esp. 60. McKenzie v. British Linen Co., 6 App. Cas. 82. (*Inquiry from N. Y., Sept., 1913, Jl.*)

Pay-roll check cashed for stranger on forged indorsement

1656. A bank was in the habit of cashing for payees the pay-roll checks of a corporation drawn on another bank and, because such checks were cashed for strangers without identification, in order to afford better protection it requested the corporation to notify it of any stop order as soon as it was filed with such corporation. The corporation replied that it would be "glad to co-operate with you in the matter and do all we can to avoid fraud and swindling in connection with pay checks." May the bank recover from the corporation the

amount of a check cashed by it on forgery of indorsement four days after a stop order had been received by the corporation, notice of which it did not transmit to the bank? *Opinion:* The bank acquired the check under forged indorsement and took no title. It cannot recover from the corporation for, although the letter of the corporation might be reasonably interpreted as a promise to give prompt notice of stop orders, which was broken, such promise was not supported by a sufficient consideration to create a liability. (*Inquiry from Ill., May, 1921, Jl.*)

*Waiver of identification of payee by drawer
not available to purchaser*

1657. A customer cashed a stolen railway pay check upon a forged indorsement. The check was drawn on the same bank in which the customer kept his account and upon deposit the customer's account was credited. Two weeks later the payee who lost the check notified the bank. The makers of the check had sent the drawee a letter in which they stated: "We will waive identification of the person presenting check for payment." *Opinion:* The customer must refund to the bank. The two weeks delay will not affect the drawer's right of recovery nor the payee's claim against the company. The waiver is available as a protection only to the bank and not to the merchant cashing the check upon a forged indorsement. (*Inquiry from Mich., Feb., 1915, Jl.*)

*Drawer not estopped by opinion that sample
signature and payee's forged signature
agree*

1658. A forger impersonating A deposited for collection a draft payable to A. To make sure that the payee's indorsement was genuine, the bank holding the draft sent a sample of the supposed A's signature to the drawer (with whom A formerly had an account) for verification. The drawer, having compared the genuine and the forged signatures of A, returned the signature sent on for verification, also a sample signature of their customer, to the bank, with the statement that in its judgment the two signatures agreed. *Opinion:* The bank cashing the draft on the forgery and collecting from the drawee is obliged to refund. The drawer by its statement is not estopped from denying the genuineness of the payee's signature. (*Inquiry from Wyo., Aug., 1911, Jl.*)

Authority of agent to indorse

*Check given to company indorsed and
negotiated by agent*

1659. A merchant gave his check to A company for his share of a pony contest which the latter was promoting, as did several other merchants of the same city. The check was indorsed "A company by B agent" and delivered by B to a hotel-keeper in settlement of his account. After indorsing same, the hotel-keeper had the check cashed by the inquiring bank, the latter receiving payment from another bank. It is stated that B had no authority to indorse the name of A company to the check and negotiate it. *Opinion:* If the agent of A company had authority to indorse their name to the check and to negotiate it, then payment of the check was properly chargeable to the drawer's account and he must look to A company for the money. If on the other hand, the agent was without authority to indorse the A company's name to the check, then the bank which paid it cannot charge the amount to the drawer's account but has recourse upon the inquiring bank which collected the money and it in turn has recourse upon the hotel-keeper who, by his indorsement, warranted the genuineness of the payee's indorsement as well as the authority of the agent to indorse the name of the payee. In such event the hotel-keeper would have to look to B. The whole case turns upon the question of fact, whether or not the agent had authority to indorse. (*Inquiry from W. Va., Feb., 1916.*)

*Agent's authority to collect does not include
authority to indorse principal's name to
checks taken in collection*

1660. A salesman, A, who had authority to collect accounts, indorsed a check taken in collection payable to his employer B,—"B per A," and cashed it at bank C. A failed to turn over the money to B, and the latter claims that, as he had given no authority to A to indorse, the bank is liable. *Opinion:* The courts hold that the authority given one to collect a debt does not include authority to indorse his principal's name to check taken in collection. Consequently if the salesman A was without authority to indorse the payee's name, bank C, which cashed the check, took no title and is liable. *Deering v. Kelso*, 74 Minn. 41; *Thompson v. Bk. of British N. A.* 82 N. Y. 1. (*Inquiry from Ill., Nov., 1919.*)

Implied authority of agent succeeding agent who had express authority

1661. A firm, Doe & Co., shipped merchandise to a town where it had a salesman or representative, A, making an arrangement with A to deliver the merchandise to customers. It gave to A authority to indorse checks payable to the firm and given in payment for goods, to deposit them in bank, and to make remittances to the firm. A went out of business and Doe & Co. made arrangements with B to carry on the delivery work apparently on the same basis as was the arrangement with A. Business was carried on in the same manner as formerly for several months, Doe & Co. making no complaints or objection, until, claiming that it had given no authority to B to collect, or to indorse checks made out to it as payee, it sought to hold bank C liable for cashing certain checks so indorsed, the amount of which it claimed B had not remitted. The bank desires to know where it stands in the matter. *Opinion:* A collecting agent has no implied authority to indorse checks in the name of his principal merely because he has the power to collect accounts, receive money and checks payable to his principal,—but authority to do so may be implied from the latter's acts. It has been held that where an agent is permitted to indorse checks payable to his principal, authority to indorse will be implied, and the principal cannot recover from one who cashes a check for the agent where the agent appropriates the proceeds. *Best v. Krey*, 83 Minn. 32, 85 N. W. 822. Bank C's liability will depend upon whether or not it can make out a case of implied authority on the part of B to indorse checks payable to Doe & Co. His predecessor had express authority so to do, and the custom was continued by B. If Doe & Co. knew of this practice and made no objection, even if they gave no express authority to B as they had to A, it would probably be held, against an innocent purchaser such as bank C, that B had implied authority, and that bank C would not be responsible. (*Inquiry from Kan., Oct., 1919.*)

Liability of person identifying payee

Identifier not liable unless he indorses or makes a false statement of fact which is relied on

1662. A bank cashed a check payable to one L, on the verbal statement of D, a customer, that he knew L, knew his father, whose name was signed to the check, to be

very wealthy, and that he had no doubt but that the check would be paid. The signature of the drawer was a forgery and drawee bank refused payment of same. Is D liable? *Opinion:* If bank had obtained D's indorsement on the forged check, he could have been held liable as indorser. But not having obtained his indorsement, the facts would hardly seem to be sufficient to hold him liable in an action of deceit. To support such action there must be proof that a false statement or representation of fact was made by him to induce the bank to cash the check. (*Lahay v. City Nat. Bank*, 15 Colo. 339). D did not, it would seem, represent that he knew the signature of the drawer of the check to be genuine, but simply that he knew L, whose name was signed to the check, that he was the father of the payee, that he was wealthy, and that he had no doubt but that the check would be paid. Presumably what D stated as a matter of fact was true, namely, that he knew the father of the payee and that he was wealthy. His further statement, that he had no doubt but that the check would be paid, was not a statement of fact but a mere matter of opinion for which he could not be held responsible. (*Inquiry from W. Va., Dec., 1911.*)

Liability for false statement of fact

1663. A bank cashed a forged draft for a forger identified at the bank by A. *Opinion:* A is liable to the bank, provided he made a false statement of fact upon which the bank relied to its injury. See 1757-1758. (*Inquiry from Ark., Sept., 1914, Jl.*)

1664. The customer of a bank who identified the holder of a forged check as the payee is liable to the bank cashing the check because of a false representation, though innocently made. *Lahy v. City Nat. Bk.*, 15 Colo. 339. (*Inquiry from Colo., Oct., 1913, Jl.*)

Indorsement by identifier desirable

1665. The question is asked. If parties holding Government allotment checks are unable to give reliable indorsement, is there any way a bank can get their money for them without risk on bank's part? *Opinion:* Wherever there is suspicion concerning the identity of the payee, it would not be wise for a bank to cash such checks unless it could procure a responsible person who would vouch for the identity of the payee and the genuineness of the indorse-

ment, he also indorsing the instrument. (*Inquiry from Ga., Oct., 1918.*)

Liability of witness to forged signature

Indorser signing as witness to payee's signature

1666. A check drawn on Bank A is payable to John Doe who claims his indorsement has been forged; Bank B cashes it for John Smith who has signed his name underneath John Doe as witness to payee's signature. The word "witness" is scratched out by the paying teller at the time and the addition, "cash for J. S.," inserted. Smith denies that he received the cash, and asserts that he simply witnessed John Doe's signature, and refuses to make the amount good. *Opinion:* If Smith received cash and indorsed the check, he, of course, warranted to B the genuineness of John Doe's signature, which, being a forgery, B would be liable to refund to the paying Bank A, but could recover from Smith. Even if Smith did not receive the proceeds, but simply witnessed the signature of John Doe, he would be liable to Bank B, as witness of a forged signature. So that in either event Smith is liable to B, and B in turn is liable to Bank A which paid it the money upon forgery of the payee's indorsement. (*Inquiry from La., March, 1919.*)

Officers of benevolent society signing as witness

1667. A voucher check issued by a benevolent order to beneficiary under a benefit certificate, in form "Pay to Mary Doe" and directing where payable, having on its face a receipt purporting to be signed by the payee in the presence of two officers of a subordinate society, as required by the rules of the order, was deposited by a customer with bank A for collection and was accepted and paid by bank B which returned the check to A eight months later with a request for reimbursement on the ground that the signature of the beneficiary attached was a forgery. The question is asked—Does not the responsibility rest with the society? *Opinion:* The drawee bank which paid this voucher check on a forgery of the signature of the payee or beneficiary is entitled to recover the amount from bank A, and bank A in turn is entitled to recover the amount from its customer. But as the signature of the beneficiary was witnessed by the officers of the subordinate society, they probably would be liable and bank A's customer would have recourse upon them for the amount. It has been held that the wit-

ness to a forged signature is personally liable. The voucher in question is not negotiable, not being payable to order, but this does not affect the question of responsibility. (*Inquiry from N. Y., May, 1919.*)

Liability of bank witnessing signature by mark of drawer of check

1668. A check drawn on a bank in North Carolina, is signed by mark and the signature is witnessed by a Virginia bank to whom the check is paid. The check is a forgery. Can the drawee recover from the Virginia bank? *Opinion:* In the case stated, the rule does not apply that the bank is bound to know the signature of its depositor and cannot recover payment made on a forgery thereof. The reason underlying the rule is wanting in a case where the depositor signs by mark. In such case the bank witnessing the mark and receiving payment of the check would be responsible as warrantor of genuineness. The North Carolina bank would have a right of action against the Virginia bank as virtual warrantor of genuineness of the drawer's signature as well as because the latter has received money upon a forged instrument without consideration in a case where the drawee is not estopped to question the genuineness of the signature. (*Inquiry from Va., July, 1917.*)

Protest of forged check unnecessary

Indorser warrants genuineness to indorsee

1669. A swindler, named Smith, draws a check on U bank in the name of Cook, payable to Y, and, after indorsing the check in the name of Y, obtains the cash thereon from K, who indorses and deposits it in the S bank from which bank, through other banking channels, it comes to U bank, which does not pay same but delays two or three days before protesting, and K refuses to be responsible for the amount because of U bank's delay in protesting. *Opinion:* The check above referred to is a forged check and no protest thereof was necessary. It is not a genuine check drawn by a depositor in the U bank upon an account which is not good, but the whole instrument was manufactured by a swindler for the purpose of defrauding K. The check would be held a forged check under the decisions. An indorser of a genuine check which has been dishonored is relieved from liability by delay in protest and notice of dishonor; but the indorser of a forged check warrants its

genuineness to the indorsee and K is liable upon such a warranty to the S bank and there must be a refunding all along the line down to the last bank. In this case K is the loser. (*Inquiry from Tenn., April, 1917.*)

Indorsement by mistake

Liability of person indorsing by mistake where payee's indorsement subsequently forged

1670. A drew a check payable to B and gave it to C for delivery. The latter by mistake indorsed the check, thinking it his own, and lost it. It was cashed by a stranger at bank D where C was a depositor, on the strength of C's indorsement which was written under what purported to be the payee's. Bank D collected from the drawee bank which soon after returned the check to it when it was learned that payee's indorsement was forged, and charged amount to C's account. The latter questions its right to do so. *Opinion:* Bank D would, of course, be obliged to refund to the payor bank, but it is very doubtful if it had the right to charge the check to C's account. The latter put his signature on the back of the check by mistake, not for the purpose of indorsing it or guaranteeing the signature of the payee, but thinking it his own. Under these circumstances he would not seem to be responsible to bank D upon such an indorsement as a guarantor of the signature of the payee B. *Caulkins v. Whisler*, 29 Iowa, 495. (*Inquiry from Mich., Oct., 1913.*)

Forged entry in pass book

Bank not responsible for forged entries made by person entrusted with book

1671. A merchant was in the habit of sending by an employee his day's receipts late in the evening to bank where he deposited, the moneys so sent being left with the janitor of the bank and next day counted by a representative of depositor who made deposit. On an examination of customer's pass book it was discovered that he had much less to his credit in bank than his pass book called for and that several entries had been made in it by some one not connected with the bank. The question is—Is the bank in any way liable? *Opinion:* The bank received so much money and credited that amount in the pass book, and for that it is liable. The fact that, in addition, some one not connected with the bank makes false entries in the pass book to deceive the depositor, and "pockets," instead of depositing, the money cannot place any

liability on the bank for such amounts. (*Inquiry from Pa., Aug., 1911.*)

Forgery of notes

Maker paying interest on note ratifies forgery of his signature

1672. A husband claimed that the signing of his name as the maker of a note by his wife was unauthorized and a forgery. He thereafter paid interest on the note. Is he liable? *Opinion:* The payment of interest would indicate that the husband authorized his wife to sign it in his name and make it his note. Even assuming that she signed the note without his knowledge, the fact that he afterwards paid interest would constitute a ratification and render him liable. As indicating that a person whose name is forged may ratify his signature so as to make himself civilly liable on the contract see *Fay v. Slaughter*, 194 Ill. 157. See also *Chicago Edison Co. v. Fay*, 164 Ill. 323. *Hefner v. Vandolah*, 62 Ill. 483. *Living v. Wilher*, 32 Ill. 387. *Bulger v. Gleason*, 123 Ill. App. 42. (*Inquiry from Ill., Aug., 1916.*)

Surety on forged note

1673. What is the liability of a surety for the maker of a note, where the signature of the maker is forged? *Opinion:* There is no liability. *Selser v. Brock*, 3 Ohio St. 302. (*Inquiry from Ill., April, 1920.*)

Necessity for person whose name forged as maker to appear and defend

1674. A person signed a note payable to himself, and at the same time signed three other names thereto. The first the three others learned that their names had been put thereon was when they received notice from bank that the note was due. A suit was brought on the note, and the bank inquires whether these men will be obliged to appear in court and prove that they did not sign the note. *Opinion:* The persons whose names were signed to the note without authority, of course, are not liable thereon. As to them the note is a mere nullity. *Munroe v. Stanley*, 107 N. E. (Mass.) 1012. But having been sued on the note by a holder upon the presumption that their signatures are genuine, it will be necessary for them to make answer denying their signatures to avoid judgment being entered against them, unless the bank which holds the note is willing to discontinue the suit against them; for, otherwise, judgment might be entered against them. The loss, of course, will fall on the bank which purchased the note,

unless it can be collected from the person who executed it and forged the names of the other makers. (*Inquiry from Tex., June, 1917.*)

Burden of proof of forged indorsement

Mere allegation of forgery of indorsement does not justify repayment

1675. A person, introducing himself as F, opened an account with bank A, and a few days later deposited a certified check drawn to his order on bank B. The latter shortly after payment to A advised that bank that it had received information that the indorsement of F, the payee, was not genuine, and requested credit for amount of check. A takes the position that the indorsement of the payee is genuine unless B can produce evidence to the contrary. *Opinion:* Should it be the fact that the payee's signature is forged, A would be liable at suit of B to refund the amount; but before A would be held liable, the fact of the forgery would have to be established by proof. B should produce some proof of the forgery of the payee's signature before expecting A to give it credit for the amount; otherwise A would be refunding money upon B's mere hearsay without knowing or having reasonable ground to determine whether or not the payee's signature was forged. (*Inquiry from Fla., Feb., 1918.*)

Affidavit of forgery by payee sufficient to entitle charge of amount to customer

1676. A check, drawn by A to the order of B on bank C, bore the indorsements of B, D and E, the latter depositing it in bank F which later, receiving word from C that payment was made, credited E's account with the amount, a portion of which was turned over to D. About three months later bank C returned the check to F with an affidavit attached, made by B to the effect that the indorsement purporting to be made by him was a forgery. It is asked if bank F was justified in charging amount back to E who threatens suit because of that bank doing so. *Opinion:* The rule is well settled that a drawee bank which pays out money on a forged indorsement may recover the same from the person who receives the money. Pursuant to this rule, the drawee C returned the check to bank F, and the question is whether F can charge E's account with the amount. The affidavit of the payee that he had never indorsed the check, created a prima facie case of forgery, sufficient to entitle bank F to charge

the check back to its depositor and make refund to bank C. If E should sue bank F, the burden of proof would probably be on the bank to establish the forgery. This could be done by the testimony of the payee to the fact, and unless the depositor could contradict this, and prove that the indorsement of the check was genuine, he could not recover. (*Inquiry from Md., June, 1919.*)

Affidavit by "John Philip" that indorsement of check payable to "John Phillips" a forgery

1677. Bank A cashed a check drawn on bank B, payable to "John Phillips." Ten months thereafter the drawee bank returns the cancelled check, with notice that the payee's name has been forged, and accompanied by an affidavit signed by one "John Philip" to the effect that said check was made payable to "John Philip" and that he did not indorse the check or receive the money. In case of suit by the drawee, upon whom is the burden of proof as to forgery of the indorsement? Would delay of ten months in making affidavit and giving notice to Bank A release the latter from liability? *Opinion:* (1) Where the drawee bank alleges that the signature of the payee has been forged, under the common law system of pleading the burden of proof is on the party holding the affirmative of the issue to establish the substance of his contention by the required preponderance of evidence. (*Tillis v. McKinna*, 114 Ala. 311. *Chicago, etc., R. Co. v. Lambert*, 119 Ill. 255. *Loring v. Sleineman*, 1 Metc. [Mass.] 204. *Heinemann v. Heard*, 62 N. Y. 448.) It follows that where a defendant denies an allegation material to plaintiff's case, the burden is on plaintiff to establish its truth, whether the action be in contract or in tort. (*Nash v. Cooney*, 108 Ill. App. 211. *Star-ratt v. Mullen*, 148 Mass. 570. *Eastman v. Gould*, 63 N. H. 89. *Pares v. St. Louis, etc., R. Co.*, [Tex.] 57 S. W. 301.) Under statutory pleading the doctrine of constructive admission is rejected, and each allegation in the statement of a plaintiff's claim not distinctly admitted is regarded as denied, and the burden of proof is on plaintiff to establish such allegations, even though the denial is argumentative. (*Homire v. Rodgers*, 74 Iowa 395. *Chamberlain v. Woolsey*, 66 Neb. 516.) At the beginning of every trial the burden of proof and the burden of evidence are on the same party as to the existence of every fact essential to the affirmative

case. (Land Mort., etc., Co. v. Preston, 119 Ala. 290. Peck v. Scoville Mfg. Co., 43 Ill. App. 360. Wilder v. Coles, 100 Mass. 570). The burden of evidence as to any particular fact rests, generally speaking, upon him to whose case the fact is material. (Brandon v. Cabiness, 10 Ala. 155. Willett v. Rich, 142 Mass. 356. Whitney v. Morrow, 50 Wis. 197). Applying these rules in the instant case, the drawee bank, the plaintiff, would have the burden of proving the forgery of the indorsement of the payee of the check, the material allegation of its complaint, where put in issue. It would seem that the discrepancy between the name of the payee "John Phillips" and that of the affiant, "John Philip," is sufficient to warrant a demand on the part of the cashing bank of further proof of the identity of the payee with such affiant before making a settlement with the drawee bank. (2) It would not seem that the point of delay in giving notice of the alleged forgery could be successfully urged, in the absence of proof that the real payee or the drawee bank delayed unduly to give notice after the forgery was discovered, or that the cashing bank was injured by such delay. (*Inquiry from Wyo., May, 1920.*)

Forgery of indorsement of certificate of deposit

Liability of express company to refund money received by agent on certificate of deposit bearing forged indorsement

1678. A demand certificate of deposit issued by bank A was cashed by bank B for an express company's agent who issued express orders for amount of certificate. B held the certificate for a little over two months and presented to A for payment, which was refused on the ground that payment had been stopped by depositor who claimed that the certificate had been stolen and his indorsement forged. Can B recover from the agent or the express company, which claims that because of B's delay in presenting for payment it was deprived of the opportunity of stopping the payment of the express orders. *Opinion:* The imputed laches of bank B because of the delay in presenting the certificate would not affect its right of recovery. The certificate was payable on demand, and not due until demanded. The express company received value from B; by transferring and indorsing, it warranted the genuineness of the prior indorsements, and B could recover from it. This is on the assumption that what the

agent did was within the apparent scope of his authority. If it were not, the company would not be bound, but the agent could be held personally liable. If the agent's general course of dealing with the public and his position were such that he was held out to the world as having authority to accept checks, certificates of deposit, etc., in payment for express money orders and to negotiate same, then the express company would be bound by the acts of the agent within the apparent scope of his authority, including the indorsement of the certificate of deposit in question, whether he actually had such authority or not. (*Inquiry from Ill., Jan. 1917.*)

Issuing bank bound to know payee's signature where kept on file

1679. A bank is bound to know the indorsement of its depositor as payee of a certificate of deposit, similarly as in the case of a signature on a check, and cannot recover money paid to a bona fide holder on the forgery thereof. But this rule is based on and limited to cases where the bank keeps a file of the signatures of depositors to whom certificates are issued, and where such signatures are not kept the rule would not apply, and money paid on a forged indorsement would be recoverable. *Stout v. Benoist*, 39 Mo. 277. *St. Nat. Bk. v. Freedmen's Sav. & Tr. Co.*, 2 Dill. (U. S.) 11. *Yatesville Banking Co. v. Fourth Nat. Bk.*, 72 S. E. (Ga.) 528. *Am. & Eng. Encycl. Law* (2nd Ed.) Vol. 5, p. 810. *Honig v. Pac. Bk.*, 73 Cal. 464. *Fiore v. Ladd*, 29 Pac. (Ore.) 435. *Frankfort First Nat. Bk. v. Bremer*, 7 Ind. App. 685. *Devine v. Baldwin*, 91 Wis. 68. *Merchants Bk. v. Marine Bk.*, 3 Gill (Md.) 96. *Daniel on Neg. Inst.* (6th Ed.), Sec. 1700. (*Inquiry from Iowa, Jan., 1914, Jl.*)

1680. A bank is bound to know the indorsement of its depositor as payee of a certificate of deposit, similarly as in the case of the signature on a check. Where a bank paid a certificate of deposit upon the forged indorsement of its depositor as payee, it is liable. But this rule would seem to be limited to cases where the bank keeps the payee's signature on file. *Stout v. Benoist*, 39 Mo. 277. *St. Nat. Bk. Freedmen's Sav. & Tr. Co.*, 2 Dill. (U. S.) 11. *Price v. Neal*, 3 Burrows 1354. (*Inquiry from Ohio, Aug., 1913, Jl.*)

Issuing bank not bound to know payee's signature where no file kept

1681. A certificate of deposit issued by

bank A to B was cashed for a forger at bank C and paid by A. A month afterwards B notified bank A to stop payment on certificate as he had lost it. An examination of certificate showed B's indorsement to be forged. Can A look to C for reimbursement? *Opinion:* Few authorities exist on the subject, but it would appear that if bank A had B's signature on file it would be bound to know same and could not recover the money paid. But if it kept no file of signatures of depositors to whom it issued certificates, it would not be bound to know the payee's signature any more than the maker of an ordinary note would be bound to know the payee's signature and it could recover from C the money paid on the forged indorsement. A. B. A. Journal Jan. 1919, p. 501. (*Inquiry from Minn., May, 1916.*)

Holder notifying of loss after payment of certificate of deposit on forged indorsement

1682. A certificate of deposit issued by a Nebraska bank A to B, payable in one year, was given by a stranger thirteen months after issue to bank C in Utah for collection, which bank collected from A and paid over proceeds to holder. A month later B discovered the loss of the certificate and waited three months longer before he notified bank A of the fact, and asked that payment be stopped as the certificate had been stolen. The certificate had been paid on a forged indorsement. Is A liable to depositor, and, if so, would it have recourse upon C? *Opinion:* The payment of a certificate of deposit upon a forgery of the payee's indorsement does not relieve the issuing bank from liability to the depositor, and in the present case it is very doubtful whether the three months' delay of B, after finding that the certificate had been lost or stolen, in notifying bank A to stop payment (the delay being not in giving notice of a forgery of his signature after discovery thereof but in giving notice of the loss of the certificate) would be such negligence as would estop him from recovering the amount where A had, before receipt of such notice, paid the certificate upon the forgery of B's indorsement. There is also the added fact that the certificate was actually paid before the date when B discovered that his certificate had been lost or stolen. As to whether bank A would have a right of recovery against C, the few cases which exist on the subject are to the effect that a bank is bound to know the signature of a depositor who is payee of a certificate of deposit, which signature it keeps on file, equally as it is bound to know

the signature of a depositor whose deposits are subject to check, and if it pays on a forgery of the payee's signature, it is bound by such payment and cannot recover from a bona fide holder who has received payment; the rule being different, however, where the signature is not kept on file. Assuming A was bound to know the signature in this case and ordinarily precluded from recovering, it, however, might have a fair ground of recovery against C on the theory that the latter took the certificate from a stranger without identification and without notifying A of that fact, and was, therefore, negligent, although there is much conflict of authority upon this proposition. If the question was to be determined by the Nebraska courts, upon the authority of the decisions in *First Nat. Bank of Orleans v. State Bank of Alma*, 22 Neb. 769, 36 N. W. 289, 3 Am. St. Rep. 294, and *State Bank v. First Nat. Bank*, 87 Neb. 351, 127 N. W. 244, bank A could probably recover from C. (*Inquiry from Neb., Jan., 1921.*)

Indorsement "C as conservator of B"

1683. A time certificate of deposit issued by bank A in favor of B is presented to that bank for payment bearing the indorsement "C as conservator of B," also the indorsements of banks D and E. The question is. Would A have recourse on the indorsing banks should it turn out that C was an impostor? *Opinion:* If the indorsement of the certificate to bank E is not restrictive, that bank would be responsible and obliged to return the money paid in case the first indorsement of the certificate proved unauthorized. If its indorsement is restrictive, so that the bank is merely an agent for collection, and not owner of the certificate, bank A would have the same recourse upon bank D, provided that bank appeared as owner. The rule that a bank is bound to know the signature of its depositor and cannot recover upon a forgery thereof would not apply in the present case so as to make bank A bound to know the signature of the payee of the certificate of deposit, preventing recovery by it from the prior indorsers should that signature turn out to be forged or unauthorized, as the signature is not by the depositor himself, but by a representative. (*Inquiry from N. D., July, 1914.*)

Bank loaning money on certificate of deposit of loan association transferred through forgery of indorsement

1684. A note made by a building and

loan association, payable to the order of A and secured by mortgage, was indorsed over to the latter's wife. After A's death the note came into the hands of B, who had been appointed administrator of A's estate, who forged Mrs. A's indorsement thereto and had the association issue a certificate of deposit payable to her in place of it. B obtained a loan from bank C on the certificate, the indorsement to this being also forged. The building and loan association was compelled by the courts to settle with the widow, and the inquiry is—How shall the certificate held by bank C be redeemed? *Opinion:* As the issue of the certificate of deposit payable to Mrs. A was procured through fraud of B in exchange for the surrender of a note and mortgage owned by Mrs. A, and as the loan association has been compelled to make good to her the amount of the note and mortgage, and as the bank acquired the certificate through B's forgery of the indorsement of Mrs. A and hence took no title to them, it would be difficult to find any ground upon which the loan association could be compelled to redeem the certificate in the hands of bank C or how the bank can get the value of the money loaned out of the certificate. It would seem that, having loaned the money without any actual transfer of security, the sole recourse of the bank would be against B personally. (*Inquiry from Ohio, Jan., 1911.*)

Forgery of indorsement on certified check

Bond of indemnity to protect bank in making payment if allegation of forgery of indorsement not sustained

1685. A drew a check on bank B payable to C and delivered it to D, a representative of C, who, after procuring certification, forged C's indorsement and negotiated it. Payment was stopped, and when check was presented to bank B through a correspondent bank, it was protested. C looked to bank B for payment and offered to give a bond of indemnity. The question is as to the amount for which bond should be made out and length of time it should run. *Opinion:* If the indorsement is a forgery, there would be no liability on the part of bank B to pay any innocent purchaser of the certified check under forged indorsement. But there is the possibility to be guarded against that the indorsement was authorized and not forged, which makes it proper that B should have a satisfactory bond of indemnity, before paying over the money to C, to cover the

face amount of check and any prospective costs, should B defend payment and ultimately be compelled to pay to an innocent purchaser, and, as the statute of limitations would begin to run from the time B refused payment of the check, six years would be the proper time for the bond to run. (*Inquiry from Pa., June, 1918.*)

Forgery of indorsement on cashier's check

Issuing bank not bound to know indorsement and may recover money paid on forgery

1686. The inquiry is made as to whether or not a bank issuing its cashier's check to an unknown payee, at the request of a depositor or any other person, has a right of recovery against the indorsing bank to which it paid the check, in the event the indorsement of the payee whose signature is unknown to the issuing bank proves to be a forgery. *Opinion:* The rule prohibiting the recovery of money paid on the forgery of a check drawer's signature, or forgery of the payee of a certificate of deposit where the signature of the payee is on file, is based upon the fact that the bank is bound to know the signature and is estopped to assert the forgery against a bona fide holder. But this reason does not exist in the case of a cashier's check, and a bank issuing one is not bound to know the signature of the payee which is not kept on file and may recover money paid upon forgery of such signature. See A. B. A. Journal May 1916, p. 1015. (*Inquiry from Neb., Feb., 1919.*)

1687. A bank paid its own cashier's check, upon which the payee's indorsement was forged. The check was presented bearing the previous indorser's stamp guaranteeing prior indorsements. *Opinion:* The bank may recover the money paid. It is not bound to know the signature of the payee which is not kept on file. (*Inquiry from Kan., May, 1916, Jl.*)

1688. If a bank draws its cashier's check and the payee cashes it at some other bank, is the bank that issues it held responsible as to the signature of the payee? *Opinion:* A bank issuing a cashier's check is not bound to know the signature of the payee which is not kept on file, and may recover money paid upon a forgery of such signature. A cashier's check may be issued either to a depositor or to a purchaser who is not a depositor. In either event it would not come under the rule which requires the bank to know its depositor's signature. The

cashier's check is different from a check drawn upon the bank on which the signature of the depositor is a forgery, where invariably the signature of the depositor is kept on file and the bank is bound to know same. (*Inquiry from Ore., March, 1917.*)

Recovery of money paid on forged indorsement by mark and witness guaranteed by collecting bank

1689. Bank A issued its cashier's check payable to one John Brown. Bank B cashed this check for one known to it as John Brown, but who, it now appears, is a different person from the one to whom the check was made payable. The man for whom bank B cashed the check indorsed same by mark and the indorsement was witnessed. The check was paid by bank A, who had the signature of their customer, John Brown, on file, but who accepted an indorsement by mark, while their customer could write. Opinion desired as to who is the loser in this case. *Opinion:* Where a cashier's check, issued to John Brown, who can write and whose signature is on file as a customer of the issuing bank, is cashed by another bank for a man known to them as John Brown, who indorses the check by mark and witness and, upon guaranty of indorsement by the cashing bank, the check is paid by the issuing bank, the latter is not bound to know the genuineness of the payee's signature, nor estopped to deny its genuineness, but may rely on the guaranty of the presenting bank, and can recover the money paid upon the forged indorsement. *First Nat. Bank v. Northwestern Nat. Bank*, 152 Ill. 296. *Harter v. Mechanics Nat. Bank*, 63 N. J. L. 578. *Foster v. Shattuck*, 2 N. H. 446. *Graves v. American Exch. Nat. Bank*, 17 N. Y. 205. *Mo. Lincoln Trust Co. v. Third Nat. Bank*, 154 Mo. App. 189. *Mead v. Young*, 4 Tenn. Rep. 28. See, however, *Weisberger v. Barberton Sav. Bank [Ohio]* 95 N. E. 379. (*Inquiry from N. J., May, 1920, Jl.*)

Cashier's check to name supplied by forger

1690. Bank A, in exchange for \$150 currency and a forged check for \$75.50, issued to a forger its cashier's check payable to a different person for \$225.50. The forger indorsed the payee's name and forged the indorsement of another person as identifier and succeeded in cashing the check at Bank B in a neighboring town, to which Bank A paid the full amount. Bank A demanded that Bank B refund the amount.

Opinion: Bank A cannot recover the \$150 for which it received full value. As to the \$75.50, it can recover the amount on the ground that Bank B took the check under a forged indorsement and acquired no title. Although the check was payable to a name supplied by the forger, it cannot be regarded as payable to bearer under the Negotiable Instruments Act, as the drawer was without knowledge that the payee was fictitious. Nor can the indorsement be regarded as made by the precise person intended to receive the money, and therefore not a forgery, because the bank did not intend to make it payable to the person who received the check but to a different person whose name was supplied by the forger. *Boles v. Harding*, 87 N. E. (Mass.) 481. *Jordan Marsh Co. v. Nat. Shawmut Bk.*, 87 N. E. (Mass.) 740. *Second Nat. Bk. v. Guarantee T. & S. D. Co.*, 56 Atl. (Pa.) 72. *Trust Co. of America v. Hamilton Bk.*, 127 App. Div. (N. Y.) 515. *Snyder v. Corn Exch. Bk.*, 70 Atl. (Pa.) 876. *Hartford v. Greenwich Bk.*, 142 N. Y. S. 387. (*Inquiry from Idaho, Jan., 1917, Jl.*)

Cashier's check to stranger payee

1691. A stranger representing himself as B presented to the drawee bank a check payable to the order of B, and the bank delivered to the stranger its cashier's check payable to the order of B. The stranger indorsed the cashier's check in the name of B to another bank and that bank received payment. *Opinion:* As between the bank delivering the cashier's check and the bank receiving payment, the former would be the loser in the event the indorsement is not that of B. *U. S. v. Nat. Exch. Bk.*, 45 Fed. 163. Contrary case, *Dodge v. Bk.*, 30 Ohio St. 1. (*Inquiry from Mo., June, 1911, Jl.*)

Note: There is a conflict of authority upon this proposition. In *Gallo v. Brooklyn Savings Bank*, 199 N. Y. 222, an impostor presented an order on a savings bank and, not being able to satisfactorily identify himself as the depositor, received, instead of money, a check payable to the order of the depositor. The Appellate Division held the drawer liable to an innocent purchaser because (1) delivery of the check to the person claiming to be the payee was a representation by the drawer that he was the payee which he was estopped to deny, (2) the drawer was negligent in issuing the check to a stranger whom it could not identify. But the court of appeals reversed the judgment and held the drawer not liable. To the con-

trary, however, is *Montgomery Garage Co. v. Manufacturers Liability Ins. Co.*, 109 Atl. (N. J.) 296 (decided in 1920), where one E, representing himself to be T, delivered a bogus check and received from the drawer in exchange a check payable to T. The drawer was held liable to an innocent purchaser who had received the check from E indorsed by him as T. The court held: "Where the drawer of a check delivers it, for a consideration which turns out to be fraudulent, to an impostor under the belief that he is the person whose name he has assumed and to whose order the check is made payable, a bona fide holder for a valuable consideration, paid to the impostor upon his indorsement of the payee's name, is entitled to recover from the drawer; it appearing that the person to whom the check was delivered was the very person whom the drawer intended should indorse it and receive the money, and that the drawer made no inquiry before issuing the check concerning the identity or credit of the named payee, who was unknown to the drawer."

1692. A bank issued a cashier's check for \$431.44 to a stranger, who claimed to be Samuel Jones, in exchange for a check payable to and indorsed by Samuel Jones. On the following day the cashier's check was presented by a stranger to a clerk in a Houston store who became convinced that the person was Samuel Jones and aided him in getting same cashed in the S—— Bank of Houston. The cashier's check was paid by the issuing bank, and it was later discovered that the original check was a "forgery," and also that the handwriting of the names indorsed on these checks was entirely dissimilar. The question asked is whether the issuing bank has any recourse on the S——Bank. *Opinion:* If the cashier's check payable to Samuel Jones was indorsed by the person to whom it was delivered and who represented himself to be Samuel Jones, such indorsement would not, it seems, be held a forgery but by the precise person to whom it was intended to make payment; therefore, there would be no right of recovery by the issuing bank against the bank holding the check under such indorsement. But if it was indorsed by another person—and the facts indicate that it was in a different handwriting from that of the person who represented himself to be Samuel Jones and who indorsed the check in that name in exchange for which the cashier's check was given—so that the indorsement would be a

forgery, there would be a right of recovery. The case turns upon this essential fact: whether the indorsement was by the person to whom the check was delivered and who represented himself to be Samuel Jones. (*Inquiry from Tex., Jan., 1920.*)

Forgery of voucher checks

Money paid on forgery of payee's name recoverable

1693. A voucher check in form "X Y Z Trust Company to John Doe, Dr." after reciting statement requiring approval, reads, "When receipt below is signed by party to whom voucher is payable, this voucher becomes a check upon the X Y Z Trust Company." The question is asked—Should the name of John Doe or of a merchant who cashes the check for him be forged, could the Trust Company which pays the same to presenting bank, after discovering forgery in a reasonable time, recover from indorser? *Opinion:* The paper is not a negotiable instrument, as it does not conform to the requirements of negotiability. It contains no unconditional promise or order to pay the bearer, or to order, a sum certain in money. The mere fact that it is designated to become a check when the receipt is signed does not make it a negotiable check where the requirements of negotiability are not observed. In the case of a negotiable check, the rule is that the drawee bank is bound to know the signature and cannot recover the money paid on a forgery thereof to a bona fide holder who had received payment, but in case of a non-negotiable voucher such as this, it is doubtful if this rule would apply, but rather the general rule that money paid under mistake of fact would be recoverable, and the merchant who cashed the forged voucher and collected the money would be obtaining the money under mistake of fact, without consideration, and, therefore, liable. If the indorsement of the merchant was forged, there would be a right of recovery by the drawee from the person or bank receiving payment under the general rule that money paid under mistake of fact is recoverable. (*Inquiry from N. C., Nov., 1917.*)

Recovery of money paid on forged signature to voucher check after four years' delay

1694. A bank submits a voucher check drawn by the Chesapeake & Ohio Railway Co., in favor of J. J. T.—— which the bank cashed on March 27, 1912, and attention is particularly called to the clause therein reading as follows: "When properly

receipted, this voucher, if presented for payment within 30 days from March 26, 1912, becomes a sight draft on C. E. Potts, Asst. Treasurer, Ches. & Ohio Rwy. Company." The voucher check is marked, "Paid, March 28, 1912," by the Railway Company. On January 28, 1915, the voucher was mailed to the bank with request to be advised as to whom the money was paid "and in the event you are unable to do so please send us your check for \$97.50 to reimburse us for the amount" which the company stated it had been compelled to pay a garnishee creditor of J. J. T——, it having been proved that his signature had been forged. The bank inquires whether in view of the payment of voucher check by the Railway Company the bank's responsibility ceased. *Opinion:* This voucher check is not a negotiable instrument, but is a form of contract under which in substance the railroad acknowledges an indebtedness to J. J. T—— and agrees that when properly receipted the voucher will become a draft by T—— on the railroad for the amount. If a draft in the name of T—— had been drawn on the railroad in his own favor and this draft had been cashed by the bank and payment received from the railroad, then, upon discovery that the signature of T——, the drawer of the draft, was forged, the case would probably come under the rule that the drawee is bound to know the signature of the drawer and, if it pays upon a forgery, cannot recover the money paid from a bona fide holder. Virtually the present case would seem to come under the principle of this rule and if so, the railroad would be debarred from recovery. If not, then the general rule would apply that money paid under mistake of fact can be recovered as the person receiving payment gives no consideration therefor. In this case the money was paid the bank by reason of the mistake as to T——'s signature. But there is an important qualification of the above rule to the effect that money cannot be recovered where the person receiving payment has changed his position to his prejudice because thereof and cannot be put in statu quo by the payor. In the present case the payment was made four years ago and doubtless the bank, by reason of this delay, would not be in the same position as to recouping itself as if prompt notice of the mistake had been given. It would seem, even under the rule that money paid by mistake can be recovered, that the four years' delay would probably be fatal to the

railroad's right of recovery. (*Inquiry from Va., Feb., 1916.*)

Forged order on savings deposit

Protection of bank under savings bank rule where due care used

1695. The savings book of a depositor was abstracted from his trunk by another person, who, wearing the clothes of the depositor, presented the book and obtained the money on a forged order. A rule contained in the pass book exempts the bank from liability for payments made to any person presenting the book prior to notice that it has been stolen. *Opinion:* A rule such as contained in the book has been construed by the courts to protect the bank only in the event of the exercise of due care. The test of liability is whether or not the bank was negligent, which is a matter entirely for the jury. Of course, if the depositor was in collusion with the person presenting book, the payment would be valid on the ground of estoppel. (*Inquiry from Ill., May, 1917.*)

1696. A forged check and a pass book were presented at a bank by a man who had been in the habit of making deposits for the customer of the bank owning the savings deposit. The signature of the forged check seemed identical with the genuine signature. *Opinion:* The bank is protected under its rules where the person receiving payment presents the pass book and reasonable care is exercised by the bank in making the payment. (*Inquiry from Kan., March, 1911, Ill.*)

1697. Where payment is made by a savings bank on a forged order to one presenting the depositor's pass book, and the rule of the bank is that payment to one presenting the pass book is valid, the bank is protected if reasonable care is used; otherwise, not. *Langdale v. Citizens Bk. of Savannah*, 48 S. E. (Ga.) 708, 121 Ga. 105. *Cosgrove v. Provident Inst.*, 64 N. J. L. 653. *Kenney v. Harlem Sav. Bk.*, 114 N. Y. S. 749. *Gifford v. Rutland Sav. Bk.*, 63 Vt. 108. *Eaves v. People's Sav. Bk.*, 27 Conn. 229. *Appleby v. Erie Co. Sav. Bk.*, 62 N. Y. 12. *Kummel v. Germania Sav. Bk.*, 127 N. Y. 488. *Tobin v. Manhattan Sav. Inst.*, 6 Misc. (N. Y.) 110. *Chase v. Waterbury Sav. Bk.*, 77 Conn. 295. (*Inquiry from Kan., March, 1910, Ill.*)

Comparison of signatures as reasonable care

1698. A man not purporting to be a

depositor on presentment of a pass book and a forged order received payment from a savings bank. One of the by-laws of the bank subscribed to by the depositor read that "a payment on presentment of a pass book shall be a discharge to the bank for the amount so paid." *Opinion*: The by-law protected the bank where reasonable care was used. In the absence of suspicious circumstances, where the bank compared the signatures and found them similar, a court would likely hold that it used reasonable care. *Kingsley v. Whitman Sav. Bk.*, 182 Mass. 252. *Goldrick v. Bristol Co. Sav. Bk.*, 123 Mass. 320. *Jochumsen v. Suffolk Sav. Bk.*, 3 Allen (Mass.) 87, 88. *Ladd v. Augusta Sav. Bk.*, 96 Me. 510. *Levy v. Franklin Sav. Bk.*, 117 Mass. 448. *Hough Ave. Sav., etc., Co. v. Anderson*, 78 Ohio St. 341. *Allen v. Williamsburgh Sav. Bk.*, 69 N. Y. 314. (*Inquiry from Ky.*, Nov., 1912, *Jl.*)

Mother's signature forged by daughter

1699. A daughter of a depositor in the savings department of a bank forged her mother's signature to a draft and presented same, accompanied by the pass book, and had same honored. The bank has a rule printed in its pass books reading: "Although the company will endeavor to prevent fraud on its depositors, yet all payments to persons producing the pass books issued by the company shall be valid payments to discharge the company." Is the bank liable in view of this printed rule? *Opinion*: In the case of an ordinary check on a commercial account, the bank which pays upon a forgery cannot charge the amount to its depositor's account. In the case of a savings bank, or savings department of a bank, the law, however, is different. It is the custom of such banks or departments to provide a pass-book rule, similar to that quoted supra, protecting the bank where it pays upon production of the pass book accompanied by a forged order. The courts hold these rules to be binding as contracts between bank and depositor, but they do not give them literal effect. In other words, they hold that, notwithstanding such rule exempting a bank from liability, the bank must prove that it has used reasonable care in each particular case. The question in the instant case, therefore, would be whether, in making payment to the daughter, the bank used reasonable care, and this would be a question of fact for the jury. (*Inquiry from N. J.*, Feb., 1917.)

Collecting bank's duty as to drawer's identity

1700. A depositor of bank A, having an account with it in the name of John Pico, presented a savings bank pass book, bearing the name Giovanni Pico, issued by an out-of-town bank, B, made a draft on that bank in the name of Giovanni and requested A to collect the balance. He said that he was Giovanni and carried his account with B in that name, but that he was now known as John. The question is asked—If A advises B that drawer is unknown to it and that it did not warrant genuineness of signature, how far does its liability extend, if, after payment, it is shown that John and Giovanni are different persons and that the former has forged the name of Giovanni? *Opinion*: The drawee bank should be advised that the draft with pass book drawn in the name of Giovanni is drawn by a man who keeps a deposit with bank A as John, coupled with a disclaimer of warranty of genuineness of signature of drawer. If the drawee bank chooses to pay under such conditions, then it takes the risk of forgery by John of the name of Giovanni and bank A can credit the amount to the account of John who may be the same person. (*Inquiry from N. Y.*, June, 1920.)

Printed regulations only protect bank where due care used

1701. The printed regulations in a savings pass book are binding upon the depositor, but they do not absolutely relieve the bank from responsibility in case of payment to a wrong person who presents the book with a forged order, because the courts add thereto the implied condition that the bank in making such payment must have exercised reasonable care. *Hough Ave. Sav., etc., Co. v. Anderson*, 78 Ohio St. 341. (*Inquiry from Ohio*, May, 1914. *Jl.*)

1702. May a savings bank charge a payment on a forged order to the account of its customer? *Opinion*: The contract, generally printed in the pass books of savings banks, relieving them from payment on forged orders, is generally held effective when the bank has used due care (*Burrill v. Dollar Savings Bank*, 92 Pa. 134), but of no avail when this degree of care has not been exercised. See *Peoples Savings Bank v. Cupps*, 91 Pa. 315. The law as to what constitutes due care varies in the different states. (*Inquiry from Pa.*, April, 1918.)

1703. Where a bank exercises due care, it is not responsible when it pays a savings

deposit to the wrong person on presentation of the pass book with a forged order. *Langdale v. Citizens Bk. of Savannah*, 121 Ga. 105. *Cornell v. Emigrants Industrial Sav. Bk.*, 9 N. Y. Rep. 72. (*Inquiry from Tex., July, 1912, Jl.*)

Rule of due care in West Virginia

1704. A savings bank depositor's book was stolen, presented to the bank and payment made on forged indorsement; the bank not receiving notice of forgery until after perpetration of the fraud. The by-laws of the bank provide: "If any person shall present a book and falsely allege himself to be the depositor named therein, and thereby obtain the amount deposited, or any part thereof, this institution will not be liable to make good any loss the actual depositor may sustain thereby, unless previous notice of his or her book having been lost or taken shall have been given at the office of the bank." Is the bank liable to its depositor? *Opinion:* The courts quite generally hold, notwithstanding by-laws of the above character absolutely exempting the bank from liability, the bank must show that it exercised reasonable care in making payment, otherwise it will be liable. The determining question in every case of this kind is whether the bank exercised reasonable care. In *Zuplkoff v. Charleston Nat. Bank*, [W. Va.] 88 S. E. 116, there was a by-law of the bank similar to the one quoted supra, and under a quite similar state of facts the jury rendered a verdict for plaintiff, the depositor, for the full amount of the deposit, which was affirmed on appeal by the Supreme Court of Appeals. In that case the facts indicated a discrepancy in the signatures which aroused the suspicion of the bank officers, and they made certain efforts to discover whether the person presenting the book was the owner; but, according to the jury, they did not do enough in this direction, and failed to exercise reasonable care. In a case where the signature to the forged order is so like the signature on file as not to arouse suspicion there might not be the same duty of inquiry. (See *McKenna v. Bowery Sav. Bank*, 15 N. Y. Suppl. 16.) (*Inquiry from W. Va., June, 1917.*)

Note: See a recent decision of the Supreme Court of Pennsylvania, *Bulakowski v. Philadelphia Sav. Fund Soc.*, 113 Atl. (Pa.) 653, for an exhaustive presentation of the law as to the degree of care required by a savings bank. In this case a judgment for a depositor whose money had been paid upon

a forged order accompanied by pass book was reversed because the bank had been held to a too exacting degree of care. The court said: "If want of care may be established by showing, in the comparison of signatures, that, after a most searching examination and investigation under a high-power magnifying glass, certain dissimilarities appear which have a tendency to discover a forgery, then the careful scrutiny of signatures by the bank officer, acting in good faith, goes for naught; the bank becomes an insurer against loss in all cases, and care of the highest degree is substituted for ordinary diligence."

Forged telegrams

Forged telegram of bank ordering payment and waiving identification

1705. A bank received a telegraph message purporting to be signed by another bank, "Pay John Jones \$75, waive identification, we remit." The message was not sent by any bank but by a person unknown to the telegraph company, which cannot find out the identity of the sender. The bank paid the money on faith of the telegram. *Opinion.* Where a telegraph company receives and transmits a forged telegram purporting to be sent by one bank to another, ordering the payment of money, the company is not liable as an insurer of the genuineness of the message, but is bound to exercise reasonable care to receive and transmit only genuine messages and is responsible for negligence in that regard. Where a telegraph company receives from a person a message signed in the name of a bank, without making inquiry of the bank or ascertaining the authority of the sender to sign the bank's name, it does not use due care and is responsible. *West. Union Tel. Co. v. Totten*, 141 Fed. (Iowa) 533. *Bk. of Havelock v. West. Union Tel.*, 141 Fed. (Iowa) 522. *West. Union Tel. Co. v. Uvalde Nat. Bk.*, 97 Tex. 219. *Pac. Postal Tel. Cable Co. v. Bk. of Palo Alto*, 109 Fed. (Cal.) 369. *Wells v. West. Union Tel. Co.*, 123 N. W. (Iowa) 371. (*Inquiry from Ark., May, 1912, Jl.*)

1706. A telegraph company wiring a forged message, purporting to be from one bank to another, requesting the payment of money to a person named, without identification, is not an insurer of the genuineness of the message, but is bound to exercise reasonable care and is responsible for negligence. The use of the American Bankers Association cipher code affords increased protec-

tion. *Citizens Nat. Bk. of Des Moines v. West. Union Tel. Co.*, 139 N. W. (Iowa) 552. (*Inquiry from Cal.*, Sept., 1914, *Jl.*)

1707. Bank A received a telegram from the local telegraph office signed by bank B in another town, and sent from there, reading, "We waive identification and guarantee payment of" a described check, on the strength of which A paid the amount mentioned in telegram which later was found to be forged. The inquiry is as to whether the telegraph company would be liable. *Opinion:* The courts hold that a telegraph company is not an insurer of the genuineness of messages, but is bound to use reasonable care to see that telegrams forwarded the addressee are genuine and not forged. There are a few cases where the courts have held the telegraph company liable to the addressee which paid money on the faith of the forged telegram, because the telegraph clerk sending the message had not taken the proper precautions to ascertain that the person sending it in the name of a bank had the proper authority. Whether reasonable care has been exercised in any particular case is a question of fact for a jury. (*Inquiry from Fla.*, May, 1918.)

1708. A telegram was received by bank A, after banking hours, purporting to be from B, an out-of-town bank, reading, "Waive identification and pay John Doe fifty dollars, we remit." The A. B. A. code was not used. The next morning a person, representing himself to be John Doe, called at bank A, and producing a telegram purporting to be signed by bank B, instructing him to call and get the money, was paid the amount. It was soon afterwards learned that bank B did not send the telegram, and that the order was forged. The inquiry is whether or not the telegraph company would be liable. *Opinion:* The telegraph company is not an insurer of the genuineness of messages, but the courts hold it must use reasonable care, and if the facts show that it receives and transmits a message signed in the name of a bank, requesting another bank to pay money, without proper inquiry as to the authority of the person sending the message, it will be held responsible. See A. B. A. Journals for May, 1912, 686, and September, 1914, 163. (*Inquiry from Miss.*, March, 1917.)

Forged telegram from bank ordering payment

1709. A bank received from the delivery boy of a telegraph company a message pur-

porting to be signed by another bank requesting it to pay L. \$600. The money was paid L. who disappeared. Later in the day the telegraph company informed the bank that the message was forged. *Opinion:* The telegraph company is liable to the bank. While the telegraph company is not a warrantor of the truth of messages, it is bound to exercise due care in ascertaining the authenticity of a received message, and its act of delivery is a representation that the message was received from the bank whose signature is affixed. *Bank of Palo Alto v. Pacific Postal Tel. Co.* 103 Fed. 841. *Western Union Tel. Co. v. Uvalde Nat. Bk.* 97 Tex. 219. (*Inquiry from N. M.*, June, 1911, *Jl.*)

Delivery to bank of forged telegram by messenger of telegraph company

1710. Bank A received a telegram order purporting to be from an out-of-town bank for payment of money to B. A half hour later B called at bank and was paid. The telegram proved to be bogus, but it was delivered by a regular messenger of the telegraph company and the message was on one of its regular forms. There are circumstances which tend to show that the forgery was done in town where bank A is situated. It is asked if the telegraph company can be held liable for delivering the message. *Opinion:* Had the message been filed in the town of the purported sending bank and regularly transmitted, the liability of the company would depend upon whether it had exercised due care. But it appears that the message never was in the hands of any of the company's regular operators or agents, but only in the hands of a messenger. From whom he got it is not shown. Unless it can be proved that the message was handled in the telegraph office by one of the operators, it is doubtful if bank A could hold the telegraph company liable. It would involve the uncertain question whether the delivery of a forged telegram by a regular messenger would be an act binding on the company. (*Inquiry from Ind.*, June, 1912.)

Forged telegram from bank advising collection

1711. Bank A received from B a check drawn to his own order on bank C located in a near by town, who asked that it be collected so that he could open an account. A forwarded the check through regular channels, but before it reached bank C, B handed to the telegraph operator at an office near that bank what purported to be a message

from C advising A that the check was paid. The message was sent without inquiry, and a few hours afterwards B went to bank A and opened an account on the strength of the telegram, drawing out a portion of the money at the same time and leaving a small balance. A received word later on from C that B had no account with it and that the check was not good. A claims that the telegraph company is responsible. *Opinion:* A telegraph company is not an insurer of the genuineness of a message, but is bound to exercise reasonable care and is responsible for negligence in receiving and transmitting a forged message. In this case, it would seem, due care would have required the operator to ascertain the authority of the one presenting the message. In a similar case in Iowa (*Wells v. Western Union Tel. Co.*, 144 Ia. 605, 123 N. W. 371) the telegraph company was held liable and bank A in this instance would have good ground for enforcing its claim against the company. *A. B. A. Journal May, 1912. (Inquiry from N. J., July, 1912.)*

Bank receiving forged telegram in name of depositor and wiring another bank to make payment

1712. Bank A, in response to a telegram signed supposedly by H, a depositor, used the A. B. A. code and requested bank B to pay H upon identification a certain amount. B made inquiry at hotel where man was registered and, on the strength of information that H was there as a guest, made payment. The sender of the telegram turned out to be an impostor and the inquiry is as to which bank should stand the loss. *Opinion:* There are quite a number of cases in the courts of various states that hold that when an impostor who misrepresents a known person applies for money to a bank or other drawer of a check and the latter sends a draft to the applicant drawn payable to the person whose name has been used, the indorsement by the impostor of the name of such person is not a forgery and payment of the draft on such indorsement is valid. The theory is that the precise person received the money whom the sender intended to receive it, namely, the person who made the application. See, for example, *First Nat. Bank v. American Nat. Bank*, 170 N. Y. 88, 62 N. E. 1089. There are some conflicting cases, as, for instance, *Tolman v. American Nat. Bank*, 22 R. I. 462, 48 Atl. 480, 52 L. R. A. 877, 84 Am. St. Rep. 850; but, under the weight of authority, bank B,

having paid the money to the very person who sent the telegram to bank A, using the name of the latter bank's depositor, and to whom A ordered B to pay in the belief that he was its depositor of that name, would not be held negligent nor liable to A. (*Inquiry from Cal., Oct., 1917.*)

1713. A Texas bank received a telegram from a party in Missouri, signed "John Doe," the name of a customer, requesting it to have bank D, in Missouri, pay him \$500. The Texas bank complied, wiring bank D, under American Bankers Association Code, to make this payment upon proper identification. Payment was made by bank D to a party representing himself to be "John Doe," upon the identification of a clerk from a near by office. The alleged "John Doe" turned out to be an impostor. Bank D refuses to reimburse the Texas bank, claiming that it took due precautions in matter of identification, and is not liable. Can the Texas bank recover from the Missouri bank? *Opinion:* According to the facts stated it is unlikely that the Missouri bank would be held liable for paying the money to the alleged "John Doe," but the Texas bank would be the loser. The courts in such cases hold that the money is paid to the precise person intended to receive it. They apply the principle that, where one of two innocent persons must suffer loss by the fraud or misconduct of a third person, he who first reposes the confidence and commits the first oversight must bear the loss. *Maloney v. Clark*, 6 Kan. 82, is a case analogous to the instant one, and it was there held that the sender must bear the loss, and not the banker who was misled in the matter of identification of an impostor. There are numerous decisions along the same lines, and where one person impersonates another and a third person sends an order for the payment of money to the impersonator, believing him to be the person he represents himself to be, and in all these cases, with the exception of one in Rhode Island, where a contrary conclusion was reached, the loss has been placed upon the person who first reposed the confidence and committed the first oversight. (*Inquiry from Tex., Feb., 1919.*)

Bank receiving forged customer's telegram and wiring telegraph company to pay on identification

1714. A bank in a Pennsylvania town received a telegram from St. Louis, over the name of a customer, A, to forward funds by

wire. As the customer, was known to be in St. Louis at the time, it followed the instructions and wired the telegraph company to pay the money to its customer, A, upon identification. Later it was learned that an impostor had sent the telegram and secured the funds. Has the bank a cause of action against the telegraph company? *Opinion:* There have been several decisions to the effect that, where an impersonator of A writes B, in the name of A, asking for funds, and B, mails his check payable to A, which the impersonator in the name of A indorses and negotiates, the indorsement of A's name is not a forgery, but by the precise person intended by B to receive the money, although B was deceived. There are a few contrary cases. There is one decided case in which the facts are very similar to this one. *Western Union Tel. Co. v. Meyer*, 61 Ala. 158. An impostor at Cincinnati sent a dispatch in name of B to C at Selma, Ala., requesting C to send a telegraphic order payable to B at Cincinnati. C complied with the request, and the telegraph company paid the money to the impostor, who was the sender of the message. The court held that where there is nothing to create suspicion in the minds of the agents of the telegraph company, it is the duty of the party to whom the request for remittance is made to himself ascertain whether he who makes the request is the person he professes to be. Held, further, that, in the absence of anything generating suspicion, the telegraph company has no right to refuse payment of the money to him in reply to whose message it was sent; and is not liable for a payment made bona fide to such person though it turns out that he was an impostor. In the opinion, however, Manning, J., said that he was strongly inclined to the other conclusion—namely, that the telegraph company was liable—but deferred to the opinion of his brother, the case being one of first impression. (*Inquiry from Pa., Sept., 1916.*)

Bank wiring telegraph company to pay money to sender of message

1715. A person, pretending to be one J. S. G., wired a bank in M from K instructing bank to wire him certain moneys. These messages were repeated several times, and sums of from \$50 to \$100 were in each instance wired to said J. S. G. In sending money, identification was not waived. All moneys were paid to an impostor purporting to be J. S. G. The latter is well known in K

as well as in M. The telegraph company, by proper investigation, could have properly identified the sender of said telegrams. The company claims it used due diligence, and that the man who sent the telegrams, being the same person who received the moneys, was identified to its agent as being said J. S. G. Bank desires opinion as to whether it can recover from telegraph company. *Opinion:* See opinion in *A. B. A. J.* Sept. 1914, upon liability of a telegraph company in the sending of false messages. According to the law the telegraph company is not responsible as insurer of the genuineness of messages, but is bound to exercise reasonable care. Where a forged telegram ordering or requesting the payment of money is sent in name of a bank and the telegraph company does not make the proper inquiry, it would generally be held liable; but the proposition is a different one, it seems, where a telegram is forwarded in name of an individual which is a forged telegram. There are no known cases defining the precise duty of the telegraph company in such a case to make inquiry as to the identity of the sender. *Burrows v. West. Union Tel. Co.* [Minn.] 90 N. W. 1111, is a case somewhat similar to the instant one. That case simply goes to the extent of holding the telegraph company liable upon its check to an impostor who sent a false telegram equally as if it had paid cash to such impostor; but it does not go to the extent of holding who should be the loser as between the sender of the money in pursuance of the false wire and the telegraph company. There are numerous cases holding that where an impostor, representing himself to be A, applies to B for money and B delivers the impostor a check drawn payable to A, the indorsement by the impostor of A's name is not a forgery, but by the precise person intended, and that payment of such check on the indorsement is valid. (See, for example, *First Nat. Bank v. American Exch. Nat. Bank*, 170 N. Y. 88. *Contra: Tolman v. American Nat. Bank*, 22 R. I. 462. The weight of authority being in accordance with the first case cited.) In the instant case it would seem that, unless it should be held some duty of inquiry devolved upon the telegraph company to identify J. S. G. before paying the money, the line of cases above cited might be held to apply, and that, in ordering the telegraph company to pay J. S. G., the bank was in reality ordering them to pay the man who sent the telegram in name of J. S. G. It may be, however, that the telegraph com-

pany will be held negligent in the premises. (*Inquiry from Fla., Oct., 1917.*)

Forged telegram of A to bank asking to wire remittance

1716. A person pretending to be A telegraphed to a private banker B to send him by wire \$200. B thereupon instructed bank C, in city from which the telegram received originated, by wire in A. B. A. Code, to make the payment of \$200 to A upon identification. C paid the money to a person representing himself to be A and who was identified as such person, and several days later received word by telegraph from B that the signature of A was a forgery. B acted upon the telegram sent by impersonation without even ascertaining that the real A was not in the country. C desires to know its status. *Opinion:* The courts generally hold that, where an impostor claiming to be A writes or wires in the name of A to B, requesting that B transmit to him a sum of money, and B directs a bank in the place of the impostor to pay the money to A, a payment by the bank to the party representing himself to be A is payment to the precise person intended by B to receive the money. (*Inquiry from Mo., March, 1919.*)

Danger in practice of wiring money on telegram from customer

1717. Is it a dangerous practice for a bank to wire money on receipt from a customer of a telegram requesting same, waiving identification? *Opinion:* The danger in such a practice would lie in the fact that the person sending the telegram might be an impostor and send it in the name of a customer of the bank. In certain cases where telegraph companies have received and wired forged messages, purporting to be from one bank to another, requesting payment of money to a person named, without identification, it has, been held that while the telegraph company is not an insurer of the genuineness of the messages, it is bound to exercise reasonable care and is responsible for negligence. In such cases it is practicable for the telegraph company to ascertain from the bank whether the messages are authorized; but in the case of a telegram signed by an individual, presumably a customer of a distant bank, ascertainment of genuineness and authenticity is more difficult, and responsibility for negligence more remote. (*Inquiry from Iowa, Dec., 1920.*)

Forgery of express company money orders

Question of recovery of payment on forgery of signature of issuing agent

1718. A customer deposits with bank A an express company's money order which was forwarded to bank B and credit promptly advised. About two months later the cancelled order was returned to A with notation that the order was stolen and fraudulently issued on forgery of signature of agent and it was asked to refund amount. A questions the express company's right to recover. *Opinion:* By the express order, in this case, the express company agrees to pay to the order of the payee when countersigned by the agent at the point of issue and further agrees that the order will be cashed by the agents of a number of other express companies, including any of its own agents. Where paid by the company on forgery of the signature of the issuing agent, it might be held that the company was bound to know the signature of the issuing agent and precluded from recovering. The point has not been decided in the case of express company money orders. (*Inquiry from Ill., July, 1916.*)

1719. A money order for \$40 of S Express Co., blank of which has been stolen and forged, was cashed by a local store, collected through B bank from the express company, and shortly thereafter repudiated by the auditing department of the company, and money refunded all along the line. *Opinion* is desired as to whether the express company could be held liable by reason of the fact that the money had been paid by it on the forged signature of its agent. *Opinion:* Under the rule that the drawee is bound to know the signature of the drawer and precluded from recovery of money paid a bona fide holder where it mistakes such signature, it might be held that the express company is bound by the payment as would be a bank which paid a forged check. The point has not yet been decided, however, as to express money orders. (*Inquiry from Tenn., Jan., 1913.*)

1720. A bank became the innocent purchaser of an express money order bearing the forged countersignature of the issuing agent. The order was paid by the company before the forgery was detected. *Opinion:* In the absence of decided cases on the right of an express company to recover money paid on the forged countersignature of an

agent, the question depends upon whether the courts will apply the rule (1) that money paid under mistake of fact is recoverable, or (2) that the payment is final and irrevocable on the theory (a) that the paying agent is bound to know the signature of the counter-signing agent, and (b) that between parties equally innocent the law will place the loss where the course of business has placed it. *Bolognesi v. U. S.*, 189 Fed. 335. *Germania Bk. v. Boutell*, 60 Minn. 192. (*Inquiry from W. Va.*, April, 1913, *Jl.*)

1721. A bank cashes an American Express Co. money order for a customer, and same is forwarded through the regular channels to the New York office of that company, where it is paid and remittance made. Four months thereafter the express company reported to the collecting bank that the money order was fraudulently issued, the signature of its agent having been forged, and demanded restitution of the amount paid out on such fraudulent order. Who should be the loser in this transaction? *Opinion:* Where an express company money order, bearing the forged signature of the issuing agent, is cashed by an innocent purchaser, and paid by the home office of the company, it would seem that the latter (although the point has not been passed upon judicially) should be held bound, equally as a bank, to know the signature of the drawer (its own agent) and debarred from recovery under the circumstances. (See *Germania Bank v. Boutelle*, 60 Minn. 192.) (*Inquiry from Okla.*, Aug., 1920, *Jl.*)

Recovery of money paid on forged counter-signature of payee—right of recovery

1722. A bank cashed an express money order for a person claiming to be C. B. Brown, the payee, and it was forwarded to the New York office of the express company and was paid and cancelled on May 28th. On June 3rd the company returned the item to the bank's correspondent, claiming that the bank cashed it on a forgery of the signature of the payee. *Opinion:* It was held in the case of *Sullivan v. Knauth*, 146 N. Y. Supp. 583, (affirmed 115 N. E. 460) that, where a money order of this kind is issued and cashed on a forgery of the payee's signature, the bank which cashed and collected the money order is liable to refund, the transaction being similar to cashing a check upon a forgery of the signature of the payee. The bank's rights in the present case hinge en-

tirely upon whether the person for whom the bank cashed the money order and who indorsed the same was C. B. Brown to whom it was issued. If so, there would be no forgery, and the bank would be entitled to retain the money. But if it be the fact that same was cashed upon a forged indorsement, there is a liability to refund, and the fact that the bank was not notified for a week after payment would not release it from liability. (*Inquiry from Kan.*, Sept., 1920.)

Recovery of money paid upon raised express company money order

1723. The agent of an express company drew an order on the company for \$1.10 payable to a certain person who raised the amount to \$40.70. The order was not made payable at any bank or at any particular place. A merchant cashed the order for the increased amount and deposited it in his local bank and the order was paid by the express company without question. Some weeks later upon discovery of the alteration the express company demanded return of the money and the bank desires to know if the merchant who cashed the order or any other indorser can be held responsible. It is contended that, as the express company drew the order on itself and paid it without discovering the alteration, it could not very well expect other persons to discover same. *Opinion:* While money paid upon a forged instrument is generally recoverable as paid under mistake of fact, the general rule is that where a person pays his own instrument which has been forged or raised to a bona fide holder for value, he is bound by the payment and cannot recover. Thus, where the Bank of Georgia paid certain raised notes to the United States Bank, recovery was denied on the ground that the bank was bound to know its own paper and as between parties equally innocent, where one is bound to know and act upon his knowledge and the other has no means of knowledge, there is no reason for burdening the latter with the loss in exoneration of the former. *U. S. Bank v. Bank of Georgia*, 10 Wheat. (U. S.) 333. So, where the Government paid certain counterfeit notes to a holder for value the general rule was applied against recovery that where one accepts forged paper purporting to be his own and pays it to a holder for value, he cannot recall the payment. *Cooke v. U. S.*, 91 U. S. 389. An apparent modification has been made by some courts which allow recovery of money

paid upon certified checks raised after certification, but only to the extent the bona fide holder receiving payment has not been prejudiced. *National Bank of Commerce v. National Mechanics Bank*, 55 N. Y. 211. Where checks drawn by a customer are paid by a bank after being raised, the bank has a right of recovery because it is not paying its own but its customer's order. If, in the case submitted, the express company is paying its own paper drawn through an agent on itself which has been raised, there is fair ground for contending that it is bound to know its own paper and cannot recover from a bona fide holder. The contrary view would be that, the order being issued by an agent in one place upon the company in another, the latter is not bound to know the amount and would have a right of recovery as for money paid under mistake of fact equally as where it pays an order upon forgery of the payee's countersignature. The question has not, as yet, been decided by the courts. (*Inquiry from Ala., May, 1921.*)

Forgery of travelers' checks

Recovery of money paid on forgery of countersignature of purchaser

1724. A customer of bank A deposited with it an express company's travelers' check which was put through in the regular course of business and paid by the express company. Later it developed that the countersignature of the purchaser was a forgery, and about two months after payment the company returned the check to bank A requesting reimbursement. The bank wishes to know whether or not the company can recover from it. *Opinion:* It was held in *Sullivan v. Knauth*, 146 N. Y. Supp. 583 (affirmed 115 N. E. 460), where the countersignature of the purchaser of a travelers' check was forged and the check was paid by the issuing bankers upon the forgery, that the real owner of the check was entitled to recover the amount from the issuing bankers. The court said that the transaction was virtually the same as of a check payable to the order of a designated payee, unindorsed by said payee. That being so, the countersigned signature must be treated as the ordinary indorsement of a payee upon an ordinary check, and the bank is responsible if it pays on a forgery. Treating it in this way, the court said, the bankers issuing the travelers' check have their remedy over against prior indorsers as in an ordinary case of forgery of payee's signature

on any other negotiable instrument. Applying this rule to this case, the express company which issued the travelers' check would have a right to recover from the bank to which the money was paid, as upon a forgery of indorsement, unless there was some negligence or delay which would work an estoppel. (*Inquiry from Minn., Sept., 1919.*)

1725. An express company travelers' check, upon which there was a forged countersignature of the purchaser, was cashed by a bank for a stranger and paid by the express company. The signature of the purchaser was placed upon the check at the time it was issued by the company. *Opinion:* Both bank and express company had equal means of knowing genuineness of countersignature, and the express company could recover from the bank which received payment under the rule that money paid under a mutual mistake of fact, without consideration, is recoverable. *Nat. Bk. of Rolla v. First Nat. Bk. of Salem*, 125 S. W. (Mo.) 513. (*Inquiry from Mo., April, 1910, Jl.*)

Purchaser acquires no title where countersignature forged

1726. Inquiry is made as to whether or not a merchant who has in good faith cashed a travelers' check that has been stolen, and the countersignature forged, could look to the bank that issued the check, and from which the check was stolen, for payment. *Opinion:* The courts quite generally hold, as to travelers' checks, that the countersignature is the same as the ordinary indorsement of a payee upon an ordinary check, so, if such a check was stolen from a bank and the countersignature forged and then it was cashed by an innocent purchaser, such purchaser would be the loser, and could not look to the bank that issued the check for payment. (*Inquiry from Mo., Oct., 1916.*)

1727. Inquiry is made whether the issuing banks are held liable where another bank pays a travelers' check upon which the countersignature has been forged. *Opinion:* In *Sullivan v. Knauth*, 146 N. Y. Supp. 583, the defendant bankers issued travelers' checks, agreeing to pay on the countersignature of the person to whom the checks were issued, corresponding to his signature originally written in another place on the checks. It was held that the relation between the person to whom issued and the

issuing bankers was similar to that of bank and depositor and where certain such checks, not countersigned, were lost or stolen, and the countersignature forged, the bankers, having paid the checks on the forged signature, were liable to refund to the owner, and were entitled to reimbursement from their immediate indorser. In the present case a bank has cashed a travelers' check on forged countersignature. It is in the same position as if it had cashed an ordinary check on a bank upon forgery of indorsement, namely, it has paid money upon an instrument to which it has no title and no recourse upon the issuer; it must look to the person from whom it received the instrument. (*Inquiry from N. Y., May, 1918.*)

1728. A travelers' check, sold by a bank in Nebraska, issued to one H, and purchased by a bank in Texas, was lost by H, and his countersignature thereon was forged. *Opinion:* That the Texas bank, having cashed the check upon the forgery, took, no title and must look solely to the person from whom it purchased for reimbursement. *Sullivan v. Knauth, et al.*, 146 N. Y. S. 583. *Samberg v. Am. Exp. Co.*, 136 Mich. 639, 99 N. W. 879. (*Inquiry from Tex., June, 1914, Jl.*)

The Government as a party to forged paper

Recovery of money paid on forged indorsement of check on U. S. Treasurer

1729. In the case of checks or drafts drawn on the Treasurer of the United States, is the Government bound by the same rules as applied to banks and individuals where the signature or an indorsement is forged? Three years ago our bank cashed a check on the Treasurer of the United States which has just been returned with an affidavit that the indorsement is a forgery. We are unable to locate our indorser and, if compelled to refund, we will be the loser. *Opinion:* It was held by the Supreme Court of the United States in *Cooke v. U. S.*, 91 U. S. 389, that where the Government "comes down from its position of sovereignty and enters the domain of commerce, it subjects itself to the same laws which govern individuals there." In that case the United States sued to recover back money paid for the redemption of certain Treasury notes before maturity, alleged to be counterfeit, and the court held it was subject to the general rule of commercial law that where one accepts forged paper purporting to be his own, and pays it to a holder for value,

he cannot recall the payment. In the recent case of *U. S. v. Chase National Bank*, 252 U. S. 485, where the United States paid a forged draft, purporting to have been drawn on the United States Treasurer by an Acting Quartermaster in the Army to his own order, to a bank to which it had been indorsed, it was held it could not recover the amount as money paid under mistake of fact, as the drawee is bound to know the drawer's signature, and the fact that the Acting-Quartermaster's indorsement of the draft was also forged did not change the rule. Concerning the right of the Government as drawee to recover money paid upon forged indorsements, it was held by the Supreme Court, in *United States v. National Exchange Bank*, 29 Sup. Ct. Rep. 665, where the Government sued to recover money paid upon forged indorsements of pension checks, reversing the United States Circuit Court of Appeals which denied recovery because of unreasonable delay in giving notice to the bank after discovery of the forgeries, that as the bank by presentation and collection of the checks impliedly warranted the genuineness of the indorsements, which warranty was broken at the time of collection, there was a right of recovery which "was not conditioned upon either demand or giving notice of the discovery of facts which, by operation of the legal warranty, were presumably within the knowledge of the bank." This decision would seem to establish the Federal rule, applicable not only to the Government but to all banks and individuals, that the drawee may recover money paid upon forged indorsements irrespective of delay in giving notice after discovery unless barred by the statute of limitations, and under this rule it would appear that the Government has a right of recovery in the case submitted notwithstanding the three years' delay. This rule differs from the rule of some of the State courts to the effect that while delay in discovering a forgery of indorsement does not affect the right of recovery, undue delay after discovery in giving notice and demanding restitution may estop the bank and prevent recovery. See *Corn Exchange Bank v. Nassau Bank*, 91 N. Y. 74. *Missouri-Lincoln Trust Co. v. Third Nat. Bank*, 133 S. W. (Mo.) 357, 361. (*Inquiry from Okla., May, 1921.*)

Recovery of money paid on forged indorsement of treasury check

1730. The treasury department of the United States paid a check issued by the

treasurer of the United States to an honorably discharged soldier on a forged indorsement, and seeks to recover from the bank from which it received the check over a year after payment. This bank claims that the treasury department had in its files the signature of the payee, and that for this reason the loss should fall on such department rather than on the bank. *Opinion:* The general rule is that money paid upon a forged indorsement is recoverable from the person or bank receiving payment unless the drawee's delay, after discovering the forgery, in giving notice thereof prejudices the person receiving payment, in which event recovery is generally denied. *Houseman-Spitzley Corp. v. Am. St. Bank*, 171 N. W. (Mich.) 543. However, the case submitted is apparently controlled by *United States v. Nat. Exch. Bk.*, 214 U. S. 302, upholding the right of the government to recover money paid upon forged indorsements of pension checks notwithstanding failure to give prompt notice of discovery of the forgery. The ground of recovery was that the bank presenting the checks warranted their genuineness and its title. It would seem that the government is not barred from recovery because it has on file the signature of the true payee. In the case cited the court refused to rule "that the United States was charged with knowledge of the signatures of the vast multitude of persons who are entitled under the law to receive pensions. . . . To apply the rule [charging the drawee with knowledge of the true signature of the payee], however, to the government and its duty in paying out the millions of pension claims. . . . would require it to be assumed that that was known, or ought to have been known, which, on the face of the situation, was impossible to be known." (*Inquiry from Mich.*, June, 1921, *Jl.*)

Fact of forgery in dispute

1731. Bank A cashed a Treasury Department check for a well-known customer, the check being for interest on certain Liberty Bonds which he owned, and it was indorsed by him in ink in the teller's presence. Sixteen months afterwards A, through its correspondent to whom the check had been sent for credit, received notice from a Federal Reserve Bank that the indorsement was a forgery and that check had been charged back. It was not returned. A desires to know its legal position in the matter. *Opinion:* The general rule is that money paid on a forged indorsement is recoverable

and the delay of sixteen months in notifying of the forgery and demanding restitution will not affect the Government's right of recovery, *U. S. v. Nat. Exchange Bk.*, 214 U. S. 302. This is on the assumption that the indorsement of payee is a forgery. But if A's customer owned the bonds and his indorsement on the interest check is genuine, the Treasury Department has made a mistake, and the first step would be to investigate and learn from them upon what grounds they make the claim of forgery, what person has made claim of title to the check and what are the grounds of such claim. As a result of the investigation the facts should be clearly established one way or the other. If not a forgery, then, of course, the amount charged back must be credited to A. If a forgery, then amount is chargeable to A's customer and can be recovered from him. (*Inquiry from Ill.*, May, 1920.)

Payment by government on forged indorsement of postal money order recoverable notwithstanding delay

1732. Opinion desired as to bank's liability as indorser upon U. S. P. O. money order, dated Dec. 17, 1918, drawn on St. Paul, Minn., postmaster, cashed by payee at store of customer of bank, and deposited by customer in bank in December, 1918, cleared in usual manner and paid by post office in St. Paul in same month. *Opinion:* Where the United States issues commercial paper it is governed by the same rules as apply to individuals (*Cooke v. U. S.*, 91 U. S. 389). But post-office money orders are issued by the government in its character as sovereign, and are not negotiable instruments, and money paid upon forgery of the payee's indorsement is recoverable by the government notwithstanding delay in making claim of restitution through which the recipient is prejudiced. *Bolognesi v. U. S.*, 189 Fed. 335. *U. S. v. Stockgrowers' Nat. Bank*, 30 Fed. 912. See also *Jaselli v. Riggs Nat. Bank*, 36 App. D. C. 159, and *Moore v. Skyles* [Mont.] 82 Pac. 799. (*Inquiry from Minn.*, Aug., 1919, *Jl.*)

Forgery of municipal bonds

Warrantor liability of seller

1733. An Illinois bank, innocent holder of certain forged negotiable municipal securities, sold same to a Tennessee bank after that bank had investigated, pronounced them genuine, and offered to purchase same at par and accrued interest. The

bank (Illinois) asks what liability, under the law, it incurs to the Tennessee bank in the transaction. *Opinion:* Under the stated facts, it seems that the Illinois bank is liable to the Tennessee bank. In *Otis v. Cullom*, 92 U. S. 447, the court said, "There is an implied warranty, on the part of the vendor of municipal securities, that they belong to him and are not forgeries." See, also, *Jones on Corp. Bonds and Mtges.*, Sec. 220-a; Sec. 65 *Negotiable Instruments Law*. In view thereof, the Illinois bank is liable to the Tennessee bank on implied warranty of genuineness of the bonds; and, assuming that the Tennessee bank has sold the bonds, the Tennessee bank would be liable to the purchaser upon implied warranty of genuineness. The Illinois bank would not be liable to the purchaser, but only to the Tennessee bank. (*Inquiry from Ill.*, July, 1919.)

Criminal liability

Check dated on Sunday

1734. A decision in Michigan holds that the uttering of a forged check, dated on Sunday, is not a crime because an instrument void on its face cannot be the subject of forgery. The decisions bearing on the subject of the forgery of checks, dated on Sunday, both in states where the common law prevails that Sunday contracts are valid and in states where such contracts are made void by statute, are collected and discussed in 4 A. B. A. J., 547. *People v. Vrooman*—tried Jan. 12, 1912, in Cir. Ct. Co. of Emmet, Mich. *Com. v. Bond*, 188 Mass. 91. *St. v. Sherwood*, 90 Iowa 550. *People v. Harrison*, 8 Barb. (N. Y.) 560. *St. v. Van Auken*, 98 Iowa 674. *Shannon v. St.*,

109 Ind. 407. *Bell v. Mahin*, 69 Iowa 408. (*Inquiry from Ind.*, March, 1912, JI.)

Check signed in fictitious name

1735. A person signs a check in a fictitious name with intent to defraud. The question is raised as to whether he can be punished as a forger or whether the crime is simply that of larceny or obtaining money under false pretenses when he actually obtains money or property thereon, or whether he can be punished under some of the special statutes making criminal the mere issuing of checks against insufficient funds. *Opinion:* According to the decisions in the various courts, it is well settled that the signing of a check in a fictitious name, with intent to defraud, is a forgery. The importance of this question lies in the fact that the penalty for forgery is more severe than in the other offenses above stated and it is more desirable to prosecute under the forgery statutes. *Randolph v. St.*, 65 Neb. 520. *Bishop*, *Crim. Law*, Vol. 1, Sec. 572, Vol. 2, Sec. 543. *People v. Warner*, 62 N. W. (Mich.) 405. *St. v. Hahn*, 38 La. Ann. 169. *St. v. Wheeler*, 10 L. R. A. (Ore.) 779. *Logan v. U. S.*, 123 Fed. 291. *U. S. v. Turner*, 7 Pet. (U. S.) 132. *Harrison v. St.*, 72 Ark. 117. *Maloney v. St.*, 121 S. W. (Ark.) 728. *Williams v. St.*, 126 Ala. 55. *Cal. Penal Code*, Sec. 476. *People v. Jones*, 12 Cal. App. 129. *People v. Nishiyama*, 135 Cal. 299. *State v. Chance*, 82 Kan. 388. *St. v. Vineyard*, 16 Mont. 138. *People v. Brown*, 103 N. Y. S. 904. *Com. v. Bachop*, Pa. Sup. Ct. 294. *Brewer v. St.*, 32 Tex. Cr. Rep. 74. *Scott v. St.*, 40 Tex. Cr. Rep. 105. *Davis v. St.*, 34 Tex. Cr. Rep. 117. (*Inquiry from N. Y.*, Dec., 1916, JI.)

FRAUD AND CRIMES

Obtaining money or property under false pretenses

Procuring discount of worthless notes as ostensible lumber paper

1736. A firm, composed of two men, was engaged in the lumber business and procured discounts of worthless notes as ostensible lumber paper when, in fact, most of the notes were borrowed from irresponsible parties, without consideration, to be used for fraudulent purposes. A bank inquires whether the procuring of a loan or discount from a bank by such means would be the obtaining of money by false pretenses.

Opinion: The provisions of Section 1920 of the N. Y. Penal Code, relative to obtaining money under false pretenses, do not seem to reach this case. It is doubtful whether the parties could be punished under this section, unless it could be proved that they made a false statement of fact as to the character of the note or notes with intent to defraud the bank. Mere silence or suppression of the truth or withholding of knowledge is not false pretense. *People v. Baker*, 96 N. Y. 340. It is doubtful if in the case, as stated, a conviction could be obtained unless it could be proved that the firm obtaining the discounts had falsely stated that the notes

were received in consideration of lumber sold. (*Inquiry from N. Y., Aug., 1917.*)

Pretense relied upon must relate to existing fact

1737. A customer drew two checks, for \$200 and \$300 respectively. Although the customer's deposit was insufficient the bank promised to pay the checks upon the customer's false promise that he would have enough money to cover the checks when his wagons came in the next morning. The checks were paid, but the customer closed out his business without reimbursing the bank. *Opinion:* The customer could not be held criminally liable for obtaining money under false pretenses, because the pretense relied upon by the bank must relate to a past or an existing fact and not upon any representation as to the future, as in this case. *Com. v. Schmunck, 22 Pa. Super. Ct. 348. (Inquiry from Pa., Jan., 1912, Jl.)*

Person receiving money, knowing he is not entitled to it

1738. A bank in Wyoming asked its correspondent at L. to pay Mr. F. \$100, which was due him from a bank in Maryland. In the meantime and through error the Maryland bank wired the correspondent at L. to pay Mr. F. \$100. Mr. F. received the \$200, knowing that he was only entitled to \$100. *Opinion:* A person receiving money, knowing he is not entitled to it, from one who believes he is entitled to it, without making any other false representation or pretense, is probably not guilty of a crime under the false pretense statute of Wyoming. *Wyo. Rev. St. 1899, Sec. 5143. Martin v. St., 17 Wyo. 319, 98 Pac. 709. (Inquiry from Wyo., Aug., 1912, Jl.)*

Checking out money credited by mistake

1739. A presented a check on bank drawn on it by B, and requested that same be credited to his account. Through inadvertence the check was credited to the account of B, the drawer, who, upon learning of the error, immediately checked out his full balance, including the erroneous credit. Can the bank hold B liable civilly? Can he be punished in criminal proceedings? *Opinion:* The bank has a civil right of action against its former customer, B, for the amount of money credited to his account by mistake and paid out on his check through mistake of fact, and the claim should be placed in the hands of a lawyer for suit. Concerning the criminal liability

of B, the question is not free from doubt. See August 1912 A. B. A. Jl. (Vol. 5, p. 98), where the conclusion was reached that a person receiving money, knowing he was not entitled to it, without making any other false representation or pretense, is probably not guilty of a crime under the false pretense statute of Wyoming. This case is somewhat similar. The bank virtually paid B this sum of money by crediting it to his account. He knew he was not entitled to it, but the bank did not. He checked it out. It is doubtful whether these facts would constitute the crime of obtaining money from the bank by false pretense. (*Inquiry from Miss., Dec., 1920.*)

By means of stopped check

1740. After the payee of a check had deposited it and had been allowed to check against it, the bank was notified that payment had been stopped. It tried to obtain settlement with the drawer and later with the payee but was unsuccessful in each case. Is there any ground for criminal prosecution? *Opinion:* Whether there are grounds for criminal prosecution depends largely upon the special facts in the case. If the depositor in good faith took the check, believing that it would be paid and payment was stopped by the drawer because of some honest dispute, there would be nothing criminal in drawing against the credit prior to collection where the bank permitted him to do so.

If, however, the check was manufactured by the drawer in collusion with the payee with fraudulent intent that it should form the basis of a bank credit to the payee, and it was so used to obtain money from the bank, there would seem to be ground for criminal prosecution of the payee, and possibly of the drawer, for obtaining money under false pretense.

It does not appear that the drawer gave a bad check, but rather that he gave a check upon which he afterwards stopped payment. It would be difficult in such a case to prove that the original check was issued with fraudulent intent. (*Inquiry from Ky., Feb., 1921.*)

Passing worthless state bank bill

1741. A person passing for value a genuine but worthless bill of a state bank no longer in existence is not guilty of any crime under the Federal law, but might in a proper case be held under a state statute punishing the obtaining of money under

false pretense. *U. S. v. Beebe*, 149 Fed. 618. (*Inquiry from Tenn., Jan., 1912, Jl.*)

Cashing check by false pretenses

1742. A daughter signed her father's name to a check per her own and cashed it at a bank. Payment of the check was refused because the father, upon being notified of the check by the drawee, refused to pay any attention to it. Twice before the daughter had signed such checks, the first one being paid but the second refused, the daughter afterwards inducing her father to settle. The forwarding bank delayed two months, expecting either the father or daughter to settle. *Opinion:* If the check was unauthorized, the daughter can be prosecuted criminally for obtaining money under false pretenses, but not for forgery. The bank has no recourse against the father but only against the daughter, and its delay would not affect its rights. 19 Cyc. 1374. *People v. Bendit*, 111 Cal. 274. St. v. Taylor, 46 La. Ann. 1332. (*Inquiry from Tenn., Aug., 1913, Jl.*)

1743. A bank cashed a check for a person named O—— whose home is at Sayre, Pa. He represented himself as being connected with a life insurance company. The check which was drawn on a bank in Sayre, came back marked "N. S.," the person not being connected with said company. The bank asks whether O—— can be punished criminally. *Opinion:* The bank does not state whether O—— was the drawer or payee of the check which it cashed. He, however, according to the bank's statement, obtained money thereon by false representations and could be criminally punished under the act of March 31, 1860. (Purdon's Digest, 13 Ed., Vol. 1, p. 949) providing that if any person shall by any false pretense obtain from another person any money or valuable security with intent to cheat and defraud any person of the same, every such offender shall be guilty of misdemeanor, etc. (*Inquiry from Pa., Sept., 1919.*)

Obtaining bill of lading under false pretenses

1744. A bank received for collection a draft with a bill of lading attached. The consignee obtained the bill of lading upon tender of a check to the bank and received the goods. The consignee, asserting that the freight on the goods was not prepaid, stopped payment on the check, but at the

same time retained the goods and refused to pay the bank. *Opinion:* The consignee can be convicted of obtaining goods under false pretenses if it can be proved that, at the time he gave his check in order to get the bill of lading and the goods, he intended to stop payment. The action must be brought within three years if a felony, and within one year if a misdemeanor. Ala. Crim. Code (1907), Chap. 222, Art. I, Sec. 6920. Mack v. St., 63 Ala. 138. Carlisle v. St., 76 Ala. 75. O'Connor v. St., 30 Ala. 9. Ala. Crim. Code (1907), Chap. 247, Secs. 7345, 7346. (*Inquiry from Ala., Aug., 1913, Jl.*)

Larceny and embezzlement

Abstraction of overpayment when money handed bank for recount

1745. A's share in a fund collected by a bank is one-third and in paying him \$69, bank officer by mistake pays him \$79, \$10 too much. Two days later A came into bank and the officer asked for the \$10. A drew roll of bills from his pocket, said he had not touched same but roll is just as received from bank. Officer counts and finds only \$69. The officer states he is sure that he can prove that he gave A \$79. The officer then abstracted \$10 before returning roll. Did the bank officer act within his legal rights or was he guilty of larceny? *Opinion:* The money was taken without legal right. If one hands money to another to count in his presence and then to hand back, the possession remains in the owner and if the other, being a mere custodian, wrongfully appropriates the money, he is guilty of larceny. *Hecox v. State*, 105 Ga. 625. *Corn v. O'Malley*, 97 Mass. 584. But most of the cases hold that where the taking is bona fide under a claim of right, there is an absence of criminal intent which is an element of the offense and that, therefore, the taking is not larceny but a bare trespass or civil injury. *Valley Mercantile Co. v. St. Paul F. & M. Ins. Co.*, 143 Pac. (Mont.) 559. In this case the taking would probably not be held larceny, but it would be held there was no legal right to seize the money in question claimed to be due the bank, for this would be attempting to assume the functions of a court of proper jurisdiction and to arbitrarily pass upon the very point at issue. It might be urged that where there was an overpayment, followed by a return of the identical money for recount two days later, the abstraction was part of the original or same transaction and within the rights of the bank officer. It is very doubtful that it

would be so held in this case. (*Inquiry from Tenn., Oct., 1916.*)

Overpayment of check by mistake

1746. A bank erroneously made an overpayment to an agent of the holder of a check. The agent claims that he turned over the money without counting it while the principal claims that he received only the correct amount of the check. Is the agent guilty of larceny for retaining the excess? *Opinion:* If it could be proved the agent knowingly retained the excess, he would probably be guilty of embezzlement. But the crime would be difficult to prove. The burden of proof is on the commonwealth to establish the guilt of the accused, who is presumed to be innocent. To establish criminal liability it would be necessary to prove both the overpayment by the bank and the abstraction of the excess by the agent before turning the money over to the principal. The agent's word would be as good as the principal's, and unless it could be shown that the agent knowingly received and retained the excess, it is very doubtful if he could be held criminally liable. The question is solely one of proof. (*Inquiry from Iowa, Jan., 1919.*)

Conversion

Conversion or embezzlement of stock certificates

1747. A bank inadvertently remitted two sight drafts, to which were attached stock certificates, direct to the party on whom the drafts were drawn. The drawee received the items, but failed to remit for same, or to return the certificates. Bank desires to know whether it would have a criminal action against the drawee, or a civil action for the value of the stock. *Opinion:* Where the drawee of a draft to which are attached stock certificates retains the stock certificates for an unreasonable time after demand, without remitting the amount of the draft, he is liable in a civil action of trover for conversion of the drawer's property. He might also be held criminally liable for embezzlement, if it can be proved that such retention was with fraudulent intent to deprive the owner of his property, provided he held such certificates in some trust or agency capacity, and was not a mere debtor for the value of the stock. (See *Moore v. U. S.*, 160 U. S. 268. *Lyon*, 45 N. J. L. 272. *Siegel v. Levine*, 147 N. Y. S. 78. *McCann v. U. S.*, 2 Wyo. 274. *De Leon v. Terr.*, 9 Ariz. 161. *In re Huston*, 27 Ida. 231. *State v. Stoller*, 38 Iowa 321.

Com. v. Williams, 3 Gray [Mass.] 461. *In re Grin*, 112 Fed. 790. *Peo. v. Dougherty*, 143 Cal. 593. *Com. v. Weddle*, 176 Ky. 780. *Peo. v. Scharf*, 217 N. Y. 204. *State v. Covert*, 14 Wash. 652. *U. S. v. Breese*, 131 Fed. 915. *Peo. v. Meadows*, 199 N. Y. 1. *State v. Hatupin*, 99 Wash. 468). (*Inquiry from Wyo., Feb., 1921, Jl.*)

Conversion of stock obtained under trust receipt—Lack of criminal intent

1748. A bank inquires as to criminal liability of A who obtained stock upon a trust receipt for the specific purpose of selling to John Doe and paying the proceeds to the bank. A sold part of the stock to John Doe and obtained a loan on the other part, and the proceeds he deposited in his bank and gave a check therefor to the lender bank. *Opinion:* The facts would probably indicate a lack of criminal intent, although the check was not paid because the bank set off the deposit against an indebtedness of A. Concerning the right of the bank to make the set-off although the deposited proceeds were trust funds still, the bank was unaware of this and it seems would have the right of set-off. (*Inquiry from Iowa, Oct., 1919.*)

Conversion of notes by innkeeper

1749. W. S. S., a lodger at a boarding house, died, and among his effects were two notes for \$200 and \$180 respectively, which were not indorsed by him. W. W. S., the boarding-house keeper, indorsed the notes in his own name, cashed them at a bank, and appropriated the money thus collected in satisfaction of an alleged board bill. The makers who through a Nebraska bank paid the notes are sued by the estate of W. W. S. *Opinion:* The inn keeper in collecting the notes in the method used was guilty of conversion, and the makers are still liable to the estate, although the makers in turn can recover the money from the Nebraska bank as having been paid under a mistake of fact without consideration; and the Nebraska bank can recover from W. W. S. on the same grounds. W. W. S. would not be criminally liable for larceny or embezzlement if it could be shown he collected the notes in good faith under a supposed claim of title. *Long v. St.*, 44 Fla. 134. *Higginbotham v. St.*, 42 Fla. 573. *Eastman v. St.*, 48 Fla. 21. (*Inquiry from Fla., April, 1912, Jl.*)

False statements for credit

1750. The following Act to punish the

making or use of false statements to obtain property or credit, recommended by the American Bankers Association, has been enacted, with more or less modification, in the following states: Arkansas, California, Colorado, Connecticut, Delaware, Florida, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, Vermont, Virginia, West Virginia, Wisconsin, Wyoming.

Be it enacted, etc.

Section 1. Any person,

(1) Who shall knowingly make or cause to be made, either directly or indirectly, or through any agency whatsoever, any false statement in writing, with intent that it shall be relied upon, respecting the financial condition, or means or ability to pay, of himself, or any other person, firm or corporation, in whom he is interested, or for whom he is acting, for the purpose of procuring in any form whatsoever, either the delivery of personal property, the payment of cash, the making of a loan or credit, the extension of a credit, the discount of an account receivable, or the making, acceptance, discount, sale or endorsement of a bill of exchange, or promissory note, for the benefit of either himself or of such person, firm or corporation; or

(2) Who, knowing that a false statement in writing has been made, respecting the financial condition or means or ability to pay, of himself, or such person, firm or corporation in which he is interested, or for whom he is acting, procures, upon the faith thereof, for the benefit either of himself, or of such person, firm or corporation, either or any of the things of benefit mentioned in the first subdivision of this section; or

(3) Who, knowing that a statement in writing has been made, respecting the financial condition or means or ability to pay, of himself or such person, firm or corporation, in which he is interested, or for whom he is acting, represents on a later day, either orally or in writing, that such statement theretofore made, if then again made on said day, would be then true, when in fact, said statement if then made would be false, and procures upon the faith thereof, for the benefit either of himself or of such person, firm or corporation, either or any of the things of benefit mentioned in the first subdivision of this section:

Shall be guilty of a felony, punishable by (insert amount of fine, term of imprisonment or both).

Borrower omitting indebtedness of \$2,000 from statement of liabilities

1751. A borrower submitted to a bank a written statement of his assets and liabilities, on the strength of which he procured from the bank a loan of \$1,000, upon which he paid \$600. Thereafter he went into voluntary bankruptcy, and the bank then learned that at the time said statement was submitted to the bank the borrower owed another bank about \$2,000 not set forth in said statement. The bank inquires whether a criminal charge would lie against the borrower for making a false statement for the purpose of procuring a loan. *Opinion:* The borrower referred to would be guilty of a violation of law. He knowingly made a false statement in writing to the bank with intent that it should be relied upon respecting his financial condition for the purpose of procuring a loan. Under the Act passed by the Pennsylvania Legislature in 1913, it is made a misdemeanor to make a false statement in writing for the purpose of obtaining property, money, credit or the extension of credit, and any person found guilty of a violation thereof may be sentenced to pay a fine not exceeding \$1,000 or to undergo imprisonment not exceeding one year, or both, at the discretion of the court. (*Inquiry from Pa., Feb., 1918.*)

False oral statement by accommodation indorser to procure credit for maker

1752. A person came to the bank and represented that he was the owner of a house and lot free from all incumbrances, and on the statement thus given the bank accepted him as an indorser on a note. When the note fell due, it was protested, and judgment was obtained for the amount thereof. The indorser transferred the house and lot to his wife after the note became due, and now claims the property was hers, having been deeded to him by mistake. Is he criminally liable for obtaining money under false pretenses? *Opinion:* There appear to be no decided cases which would serve as a precedent upon the criminal liability of an accommodation indorser who makes a false oral statement for the purpose of procuring credit for the maker of a note, but, analyzing the statute (Penal Code N. Y., Sec. 1290), a person who with intent to appropriate the property of the true owner to the use of any

other person obtains from the possession of such true owner by color or aid of fraudulent or false representations or pretense any money or personal property is guilty of larceny and this, it seems, would make criminal the act of the person in the present case, assuming he did not own the house and lot. He might contend that he did not personally obtain the loan, and this would raise the question whether the words "obtains from such possession" (Penal Law, Sec. 1290) would cover the case of one who makes a false representation for the benefit of another who obtains possession. But this with the words "with the intent * * * to appropriate the same to the use of * * * any other person" might be construed as covering the case. There is a further criminal statute (Penal Code, Sec. 544) as follows: "A purchase of property by means of a false pretense is not criminal, where the false pretense relates to the purchaser's means or ability to pay, unless the pretense is made in writing and signed by the party to be charged." The false pretense in this case that the person was the owner of a house and lot, related to his means or ability to pay, and if it was a case of a purchase of goods, not being in writing etc., it would not be criminal. But it seems a loan of money could hardly come under the description of a purchase of property so that this provision would, probably, not be applicable. (*Inquiry from N. Y., July, 1915.*)

Civil liability for deceit

1753. A bank asks what recourse it would have in case of any misrepresentation in a statement submitted for the purpose of procuring credit. *Opinion:* An action for deceit may be founded on a person's false and fraudulent representations concerning his own solvency and financial responsibility whereby another is induced to extend credit to him in a sale or other commercial transaction and suffers loss thereby; provided such representations consist of definite statements of fact as distinguished from mere expression of opinion or statements of a promissory character relating to the future. (*Inquiry from Miss., Sept., 1912.*)

Loan to depositor—Rescission on ground of fraud

1754. John Doe procured a loan of \$3,000 from A bank on collateral deposited and a "property statement" submitted.

The "statement" proved to be materially false, in that Doe did not have clear title to the property which he claimed to have in said "statement." Can the bank rescind the loan (the note has not yet matured), charge Doe's account with same, and hold the collateral until the balance is paid? *Opinion:* The depositor having obtained a loan upon a false statement, this, it would seem, would entitle the bank to rescind the credit, and hold the collateral for reimbursement of the portion of the loan already withdrawn. (See *Bank v. Union Trust Co.*, 50 Ill. App. 434. *Kling v. Irving Nat. Bank*, 21 N. Y. App. Div. 373. *A. B. A. Jl. Dec.* 1916, p. 502.) In the Illinois case it was held that where a depositor procured a discount upon false representations as to solvency, the bank, upon discovering his insolvency, may rescind the discount and charge back the amount of the note with which the depositor has been credited. This case, it would seem, would support the bank's right to charge back the amount of the credit to the depositor's account, because of his fraud in obtaining such loan upon a false property statement. He would then be indebted to the bank for the amount drawn against the credit, and the bank could resort to the collateral for this amount. (*Inquiry from Ill., Dec., 1916.*)

Statement signed by husband and wife showing "Real Estate" as assets where same belongs solely to wife

1755. John Jones borrows money and gives his individual note, the loan being on the faith of a statement addressed to the bank "for the purpose of establishing credit," signed by John Jones and Minnie Jones, in which is listed as assets the item "real estate \$40,000." The proceeds of the note are placed to the credit of a joint account carried by John and Minnie and are checked out by both. The real estate belongs to Minnie Jones. Judgment is obtained against John. Is there any recourse against Minnie? *Opinion:* If, as stated, the real estate belongs to Minnie Jones, and the title is in her name, it cannot be seen how it could be subjected to payment of a judgment owed solely by John. Had Minnie Jones signed the notes jointly with her husband, her separate estate would have been liable therefor under the Colorado Married Woman's Act, in view of the fact that part of the proceeds inured to the benefit of her separate estate, but, as the bank loaned the money on the note to the hus-

band alone, it is hard to see how her realty can be subjected to the satisfaction of a judgment on such a note. It is more than doubtful that the doctrine of estoppel could be invoked against Minnie Jones to prevent her from asserting her title to the property in a case where she did not sign or indorse the note and the loan was not made to her but to her husband solely. The mere fact that she enjoyed the proceeds of a part thereof would not seem to affect the case, since John Jones could make whatever disposition he so felt of the funds after the notes were discounted. Further it is doubtful if Minnie Jones can be held liable in an action for deceit for the loss occasioned the bank by reason of signing with her husband the statement listing as assets "real estate \$40,000." This might be held to be a misrepresentation that the real estate belonged partly or wholly to her husband, when in fact she owned all, on the faith of which the bank loaned money to its injury, upon which she could be held liable, but the question is doubtful. (*Inquiry from Colo., July, 1914.*)

Verification under oath of financial statement

1756. The question is raised as to whether the requirement of verification under oath by the maker of a statement of his financial condition for the purpose of procuring credit would result in the imposition of a heavier penalty in case of falsity than where the statement is unsworn. *Opinion:* The taking of a false oath by the maker of a false financial statement would not be perjury, the statement not being required by law or made in a judicial proceeding. It would be "false swearing," but as such is not a crime. The only effect of requiring a sworn statement would seem to be the moral effect upon the judge in whose discretion rests the severity of the penalty. Conn. Pub. Acts, 1911, Ch. 202. Gen. St. Conn., Sec. 1254. (*Inquiry from Conn., May, 1919, Jl.*)

Fraud in negotiation of check

Liability of person identifying payee

1757. Where A orally identified the payee of a check to the purchasing bank, A is not liable to make the check good in the event of non-payment, provided no false representations were made by A which were acted upon by the bank to its injury. To hold the person identifying the payee liable in the event of dishonor, such person should be required to indorse the check. See opinions 1662-1665. (*Inquiry from Ariz., March, 1911, Jl.*)

Introducing swindler to bank

1758. A bank cashed a check in the sum of \$105 for a stranger who was correctly introduced by a customer using these words. "This man is all right, please wait on him." The stranger was a swindler, and his check was no good. *Opinion:* The customer was not liable for the swindler's fraud because his statement was a matter of opinion and not of fact. See opinions 1662-1665. Ewart on Estoppel, p. 72. Bk. v. Hammond, (Colo. 1898) 55 Pac. 1090. Homer v. Perkins, 124 Mass. 431. Belcher v. Costello, 122 Mass. 189. Lahay v. City Nat. Bk., 15 Colo. 339. (*Inquiry from Tenn., July, 1909, Jl.*)

Various frauds and crimes

Photographing United States notes

1759. The United States Criminal Code prohibits the making of photographs of any obligation or other security of the United States, except under authority of the Secretary of the Treasury. U. S. Crim. Code Sec. 150. (*Inquiry from Pa., May, 1917, Jl.*)

Conspiracy to commit robbery

1760. A person, learning that a shipment of currency is to be made by one bank to another, proposed to another person to commit robbery, pointing out the subject of the robbery and outlining a plan; but the second person refused and the first person went no further. *Opinion:* The first person was guilty of a misdemeanor in soliciting a person to commit robbery. St. v. Hathhorn, 166 Mo. 229. Rex v. Crocker, 2 B. & P. N. R. 97. Gabe v. St., 6 Ark. 519. Dig. Ark. Stat., 1904, Chap. 48, Sec. 1617. Evans v. People, 90 Ill. 384. Gaunce v. Backhouse, 37 Pa. St. 350. St. v. Jackson, 7 S. C. 283. U. S. v. Hirsch, 100 U. S. 33. Com. v. Flagg, 135 Mass. 545. Com. v. McGill, Add. (Pa.) 21. Reg. v. Gregory, L. R. 1 C. C. 77. Begley v. Com., 22 Ky. L. Rep. 1546. Com. v. Randolph, 146 Pa. St. 83. (*Inquiry from Ark., July, 1915, Jl.*)

Delivery of goods without taking up warehouse receipt

1761. The Uniform Warehouse Receipts Act passed in Louisiana in 1908 among other provisions contains one punishing an officer or agent of a warehouse who delivers goods represented by a negotiable receipt without taking up the receipt. La. Laws 1908, Secs. 14, 36, 54. (*Inquiry from N. Y., Dec., 1908, Jl.*)

Possession of forged instruments with intent to defraud

1762. A person of criminal tendencies has in his possession and exhibits a forged certified check in the sum of \$5,000 upon a bank in another state, but so far as known has made no attempt to realize anything on the instrument. *Opinion:* A person may be convicted of forgery by having possession of a forged instrument with intent to defraud although never uttered by him, but, unless something was said or done by the possessor to indicate an intent to defraud, the mere possession of the forged instrument would not constitute a crime. See citations in opinion No. 1760. (*Inquiry from Ark., July, 1915, Jl.*)

Shipping negotiable securities as merchandise

1763. It seems to have been the custom of banks throughout the country to forward notes and other negotiable instruments by express as "valuable papers," placing a nominal valuation on same. Is not this practice in violation of the Interstate Commerce Act, for the reason that valuable papers, under the express companies' classification, are rated as merchandise, while notes, bonds and other negotiable instruments, whether payable to bearer or order, bear a higher rate? *Opinion:* It would seem that the transaction mentioned would very likely be held a violation of the Interstate Commerce Act. It is not known that the specific transaction has come before the courts, but Sec. 10 of the Act expressly provides that any person who obtains transportation for property at less than the regular rates by false billing, false classification, or false representation of the contents of the package or the substance of the property is guilty of fraud, which is declared to be a misdemeanor. Concerning the sending of negotiable paper, this comes under the published "money classification," and not under "freight classification." There have been several convictions under Sec. 10, but none involving the shipment of negotiable, paper at a merchandise rate. (See Nichols, etc., Co., v. U. S., 212 Fed. 588, and O'Con-

ner v. Great Northern Ry., 136 N. W. 743, construing certain phases of this section.) (*Inquiry from Wash., April, 1917.*)

Note: See also Ellison v. Adams Express Co. (1910). 245 Ill. 410, Nonotauk Silk Co. v. Adams Express Co. 1912. 256 Ill. 66.

Renunciation of interest by heir procured by fraud

1764. A died without a will, leaving a widow and no children. His estate consisted of 320 acres of land and other property worth \$10,000. The widow falsely represented to A's sister that it was necessary to obtain her affidavit renouncing her interest in her brother's estate in order to probate the estate. On these representations the sister gave her affidavit. *Opinion:* A court of equity would revoke the sister's renunciation and enable her to claim her share as heir of the estate. Hymal's Succ., 49 La. Ann. 461. Clauss v. Burgess, 12 La. Ann. 142. Rev. Codes Mont., Vol. I., Tit. VII, Sec. 4820, Sec. 2. Kern v. Raunser, 20 Ky. L. Rep. 1954. Farmer v. Bryant, 34 N. H. 9. Carter v. Fowler, 33 La. Ann. 100 Baptiste v. Peters, 51 Ala. 158. Barrington v. Ryan, 88 Mo. App. 85. (*Inquiry from Kan., June, 1914, Jl.*)

Extradition from one state to another—Duty of diligence of public official

1765. A bank asks whether anything can be done to compel the state's attorney to act within a reasonable time to get out extradition papers to bring back a fugitive who obtained from the bank \$30 by means of a worthless check on a Texas bank. *Opinion:* Where a man criminally defrauds a bank in Illinois and escapes across the state line and there is danger in delay, it should, of course, be the duty of the public officials to immediately take steps to bring the fugitive back; but the forcing of dilatory officials to do their duty rests, it seems, with the people who elect them and any outside interference would only make matters worse. (*Inquiry from Ill., Aug., 1919.*)

GUARANTY

Form of guaranty to bank

1766. A bank submits the following form of guaranty, and requests information as to its legal effect.

"To The First National Bank:

For value received, and for the purpose of enabling——— to obtain credit from you, the undersigned hereby guarantees

prompt payment, at maturity, or at any time thereafter, of any and all indebtedness, upon which said _____ now is, or may hereafter from time to time become, obligated or bounden to you, either as principal or as guarantor or indorser, and agrees to pay all costs and expenses incurred by you in enforcing this guaranty, together with interest at 7% per annum.

Notice of acceptance of this guaranty, and of any and all indebtedness or liability accepted by you during its existence, is hereby waived. This instrument shall continue and apply to all indebtedness and liabilities accepted or received by you, until written notice is received by you from the undersigned, not to make any further advances upon the faith hereof."

Opinion: The form of guaranty submitted appears to be what is designated an unlimited guaranty—i. e., one that is unlimited as to both time and amount—and to be terminated only upon the written notice of the guarantor revoking same. It seems intended to be, and is, a continuing guaranty; that is, one of those unrestricted guaranties which continue in force until revoked. It has been said that the true rule for construing guaranties is to give effect to the intention of the parties as expressed in the instrument, read in the light of the surrounding circumstances. (Home Sav. Bank v. Hosie, 119 Mich. 116.) The intention of the parties to this instrument would seem to be that the party of the first part shall guarantee to the bank all present and future indebtedness of a named third party to an unlimited amount, until due notice of revocation of the guaranty; the instrument in its present form would be so interpreted, and would well subserve the intention and purpose of the parties thereto. There can be raised no objection to the waiver of notice of acceptance of the guaranty, since the rule is well recognized that the parties to the contract may expressly or by implication waive the necessity of notice of acceptance. (Reynolds v. Douglass, 12 Pet. [U. S.] 497. Farwell v. Sully, 38 Iowa 387. Peoples Bank v. Lemaire, 106 La. 429, 31 So. 138.) (*Inquiry from Mich., Nov., 1919.*)

Continuing guaranty—Assignment of notes

1767. A bank submits a form of guaranty containing this provision: "In consideration of \$1.00 * * * and for further consideration of certain lines of credit extended to

me from time to time by the _____ Bank, I * * * hereby sell, assign * * * unto the said _____ Bank any and all notes deposited with the said Bank for collection * * * giving said bank a first lien on any and all said notes deposited" * * * The Bank asks—How often should this guarantee be renewed? Whether one dated 1915 would still be effective? *Opinion:* The liability under a guaranty will be regarded as continuing when by the terms of the contract it is evident that the object is to give a standing credit to the principal debtor to be used from time to time either indefinitely or until a certain period. *Scovill Mfg. Co. v. Cassidy*, 195 Ill. App. 448; *Woelfel v. Rotan Grocery Co.*, (Tex. 1916) 184 S. W. 803. *Glasser, Kohn & Co. v. U. S.* 224 Fed. 84, citing numerous cases. Where the guaranty is a continuing one, on which loans are made from time to time, the statute of limitations does not begin to run in favor of the guarantor until default in payment is made. *State Bank v. Knotts*, 10 Rich. L. (S. C.) 543. The guaranty submitted, therefore, would still be effective. (*Inquiry from Wis., Jan., 1919.*)

1768. A is a corporation and B and C its guarantors. During the first six months a bank advanced to A until it reached the limit, i. e., ten per cent of capital and surplus. Around the latter part of October A paid all its indebtedness to the bank. In January it was necessary to go through the same financing. Is the guarantee binding for advances made the following January in view of the fact that A's liabilities to the bank were fully liquidated in October? *Opinion:* Under the cases hereinafter cited, liability under a guarantee will be regarded as continuing when by the terms of the contract it is evident that the object is to give a standing credit to the principal debtor to be used from time to time either indefinitely or until a certain period (*Sec. Mfg. Co. v. Cassidy*, 195 Ill. App. 448. *Woelfel v. Rotan Grocery Co.* [Tex. 1916] 184 S. W. 803). It being evident that standing credit is desired and contemplated to be given to the corporation, "A", and advances made to it up to the agreed limit whenever needful, the existing guaranty would "be binding for the advances made the following January." (*Glasser, Kohn and Co. v. U. S.* 224 Fed. 84.) (*Inquiry from Wis., Feb., 1919.*)

Guaranty by bond salesman

1769. To what extent can a bond or loan salesman be held liable on his individual

guarantee on securities sold where there is no other interest involved than the profit in the sale? *Opinion*: There is an absence of decisions involving this class of guarantees. Such a guarantee would be based on sufficient consideration and the liability of the guarantor would extend or be limited according to the terms of his agreement strictly construed. In *Edwards v. Noel*, 72 Mo. App., 131, a bond broker wrote plaintiff concerning certain bonds then on the market, stating all the facts regarding the security and adding that he considered them

in every way desirable. Plaintiff by letter ordered \$1,500 worth of the bonds, adding: "If they are sold before you receive this letter, send me next best you have to this amount. Only send me bonds you can guarantee." The bonds being in denominations of \$1,000, one of these bonds and a \$500 bond on different security were sent him. Subsequently plaintiff paid for both bonds. It was held that plaintiff's demand for guaranty related only to bonds other than those described in the broker's first letter. (*Inquiry from Ill.*, Nov., 1911, *Jl.*)

HOLIDAYS, SATURDAY AND SUNDAY

Holidays

Payment of a check on Saturday half holiday

1770. In view of the uncertainty of the law, the following statute, drafted by the American Bankers Association, gives a bank the right to pay, certify or accept a check or other negotiable instrument on Saturday afternoon:

"Nothing in any law of this state shall in any manner whatsoever affect the validity of, or render void or voidable, the payment, certification or acceptance of a check or other negotiable instrument or any other transaction by a bank in this state, because done or performed on any Saturday between twelve o'clock noon and midnight, provided such payment, certification, acceptance or other transaction would be valid if done or performed before twelve o'clock noon on such Saturday."

The above law or a law similar thereto has been passed in the following fourteen states: Alabama, Illinois, Kansas, Michigan, Minnesota, Missouri, New Jersey, New Mexico, North Carolina, Pennsylvania, South Dakota, Tennessee, Virginia and West Virginia.

Instrument executed on holiday

Validity of document signed on holiday

1771. A document signed on a legal holiday is valid unless the act is expressly prohibited by the statute creating the holiday. *Griffith v. Mayor* (Miss.) 58 So. 781. Miss. Code 1906, Sec. 4011. (*Inquiry from Miss.*, Aug., 1916, *Jl.*)

Note and mortgage executed and delivered on holiday

1772. In Washington a note and mortgage executed, acknowledged and delivered on a legal holiday is not prohibited by stat-

ute and is valid. *Hooks v. St.*, 58 Fla. 57. *Ryan v. Schutt*, 135 Ill. App. 554. *Steere v. Trebilcock*, 108 Mich. 464. Rem. & Ball. Code Anno., 1910, Chap. 5, Sec. 61. Neg. Inst. L. Rem. & Ball. Code Anno., 1910, Ch. III, Sec. 3475½. *Glenn v. Eddy*, 51 N. J. L. 255. *St. v. Super. Court*, 49 Wash. 1. (*Inquiry from Wash.*, April, 1913, *Jl.*)

Notes executed and delivered on Sunday

Validity in New York

1773. At common law a note executed and delivered on Sunday is valid, but in many states the courts have held such notes void by reason of Sunday statutes. In New York the execution and delivery of such notes, not being acts characterized as "serious interruptions of the repose and religious liberty of the community," would probably be held valid. *Greenbury v. Wilkins*, 9 Abb. Pr. (N. Y.) 206. N. Y. Penal Code, Sec. 2140. (*Inquiry from N. Y.*, Nov., 1911, *Jl.*)

Note executed but not delivered on Sunday

1774. A bank requests advice as to whether a note or an acceptance dated on Sunday and accepted on Sunday, is valid. *Opinion*: In many states Sunday contracts are made void by statute; but, as delivery, completes the contract, the courts hold that, although a note is dated on Sunday, if it is delivered on a week day, it is valid. It seems there is not the same restriction on Sunday contracts in New York as in some other states. The laws in the different states are not uniform but, as a general proposition, even in a state where a contract executed on Sunday is invalid, the mere dating on Sunday will not invalidate it if delivered on a week day. (*Inquiry from N. Y.*, March, 1919.)

Dating on Sunday or holiday*Validity of renewal note dated on Sunday in Missouri*

1775. A bank asks an opinion regarding the following: A note, payable sixty days after date, falls due on Sunday, and a renewal note given to extend the same is dated on Sunday. Is this a valid instrument, and would the fact that this is a renewal note have any effect on its being dated on Sunday? *Opinion:* At common law a note made on Sunday was as valid as if done on any other day. By statutes in many of the states, however, no contract can be entered into or secular business legally conducted, on Sunday and a note executed and delivered on Sunday has been held, in many cases, to fall within the interdiction of such general laws. In other states, however, the Sunday statutes which prohibit labor, or the performance of work, have been held not to extend to the making of contracts. Whether or not the Missouri law would prohibit a Sunday contract, and even assuming that it would, the transaction, as stated, would not be invalidated. It is a case of a note which falls due on Sunday with renewal given which is dated on Sunday. The dating on Sunday would not invalidate the renewal, provided it was delivered on another day, and it will be presumed such delivery on a business day to be a fact. (*Inquiry from Mo., Oct., 1915.*)

Check dated on Sunday or holiday in South Carolina

1776. In view of the authorities and in the absence of a prohibitory statute, it would seem that a bank in South Carolina could safely pay a check dated on Sunday or on a holiday. *Hellams v. Abercrombie*, 15 S. C. 110. *Mitchell v. Bates*, 57 S. C. 44. *Mills v. Williams*, 16 S. C. 593. *Farnum v. Fowle*, 12 Mass. 89. *Green v. Walker*, 73 Wis. 548. *Richardson v. Goddard*, 23 How. (U. S.) 28. (*Inquiry from S. C., March, 1913, Jl.*)

Check or note dated on Sunday in South Dakota

1777. In South Dakota a check or note dated on Sunday or on a holiday would in all probability be held valid, although there is no decision on the point. *Comp. L. S. Dak., Ch. 234, p. 564.* *Comp. L. S. Dak., Title 3, Part 5, p. 314.* *Johnson v. Brown*, 13 Kan. 529. *Merritt v. Earle*, 29 N. Y. 115. *Raines v. Watson*, 2 W. Va. 371. (*Inquiry from S. D., May, 1914, Jl.*)

Validity of note dated on Sunday in Texas

1778. At common law, Sunday contracts are lawful and except in those states where, by statute, the execution and delivery of a note on Sunday is prohibited, a note dated on Sunday is valid. Texas has no such prohibitory statute. *Behan v. Ghio*, 75 Tex. 87. *Schneider v. Sansom*, 62 Tex. 201. *Terry v. French*, 5 Tex. Civ. App. 120. *Markle v. Scott*, 2 Tex. Ct. App., Civ. Cas., Sec. 674. *Tex. Pen. Code, Arts. 183, 185, 186.* *Tex. Rev. St., Art. 3712.* *Tex. Rev. St., Art. 191.* 7 *Wait's Act. & Def.* 114. 2 *Parsons on Con.* 892, n. 2. (*Inquiry from Tex., Aug., 1913, Jl.*)

Instrument maturing on Saturday*Presentment of time instrument maturing on Saturday in Missouri*

1779. Under the Negotiable Instruments Law of Missouri a negotiable instrument falling due on Saturday, other than one payable on demand, cannot be presented for payment and protested until the next succeeding business day. (*Inquiry from Mo., April, 1912, Jl.*)

Note: See 1770 supra.

Presentment on Saturday afternoon in North Carolina

1780. Saturday afternoon in North Carolina is not a half holiday and presentment and protest can be made on Saturday afternoon the same as on the afternoon of any other business day. (*Inquiry from N. C., Dec., 1908, Jl.*)

Note: In 1919 a statute recommended by the American Bankers Association was passed providing that the payment, certification or acceptance of a check or other negotiable instrument, if done or performed on a Saturday afternoon or on a legal holiday, is valid. In 1907 the Saturday half holiday recognized by the Negotiable Instruments Law was abolished by statute.

Presentment on Saturday afternoon in South Carolina

1781. The Negotiable Instruments Act provides that "instruments falling due on Saturday are to be presented for payment on the next succeeding business day, except that instruments payable on demand may, at the option of the holder, be presented for payment before twelve o'clock noon on Saturday when that entire day is not a holiday." Is the provision limited to those cities of South Carolina where, by special

statute, Saturday afternoon is a half holiday?
Opinion: This provision plainly makes *all* paper the maturity of which falls on Saturday due and presentable on the next succeeding business day—whether Saturday is a holiday or half holiday at the place of payment or not—the only exception made being in the case of *demand* paper, and in that case an option is given to the holder to make presentment and demand before twelve o'clock noon on Saturday where such paper is payable at a place in which Saturday afternoon is by statute made a half holiday. (*Inquiry from S. C., Feb., 1919.*)

*Time instrument falling due on Saturday—
 When payable*

1782. A draws on B at one day's sight with documents attached, to be delivered on acceptance. B, who does business in New York City, accepts draft on Friday and receives documents. The bank asks whether the item became due on Saturday, or must holder wait until Monday for payment?
Opinion: The Negotiable Instruments Law provides: "Instruments falling due or becoming payable on Saturday are to be presented for payment on the next succeeding business day, except that instruments payable on demand may, at the option of the holder, be presented for payment before twelve o'clock noon on Saturday when that entire day is not a holiday." But the question arises. Should the acceptor desire to pay the acceptance on Saturday, could he force the holder to accept payment on that day? The section has not as yet, so far as discoverable, been judicially construed, but it seems the common-sense interpretation of a requirement that an instrument falling due on Saturday must be presented for payment on the next succeeding business day is to postpone the maturity of the instrument to the next succeeding business day. If this interpretation should be made by the courts, then, in the case stated by the bank, acceptor B could not pay the acceptance on Saturday unless the holder was willing to accept payment on that day but would have to wait until Monday and then pay the amount, and it is clear that the holder cannot present for payment until Monday. (*Inquiry from N. Y., March, 1919.*)

Note: See article by General Counsel on "Maturity of Time Paper Falling due on Saturday" (published in Journal A. B. A. Dec., 1920, Vol. XIII, No. 6, p. 431) in which, after full consideration, the following conclusion is maintained:

"We are inclined to take the view, until the question is decided differently by some court, if it ever is, that under a reasonable interpretation of the Negotiable Instruments Act where an interest-bearing time note made payable at a bank falls due by its terms on Saturday, the instrument matures on Monday, not only for the purpose of presentment for payment to hold indorsers but for all purposes and that the fact that there is sufficient money in bank on Saturday, when by its terms it falls due, is not a legal-tender that stops the running of interest, as the instrument, by force of law, is not legally due until Monday."

1783. By statute in Pennsylvania a note otherwise presentable for payment on Saturday is "payable" on the next business day, hence a bank owning a note so payable would be entitled to interest for two added days and a renewal note should be dated Monday, 2 Purd. Dig. (13th Ed.), p. 1839, Sec. 3. (*Inquiry from Pa., July, 1914, Jl.*)

Note: In 1917 a statute recommended by the American Bankers Association was passed, making the payment of a negotiable instrument on a Saturday afternoon valid.

Payment of check on holiday

*Payment of check on holiday of uncertain
 validity*

1784. In the absence of judicial decision upon the precise point, payment of a check on a holiday would be of uncertain validity and at the risk of the bank, should the drawer stop payment at the opening of business on the next business day. (*Inquiry from Ala., June, 1913, Jl.*)

Note: See 1770 supra.

Payment of check on Saturday in Illinois

1785. In Illinois (1) Saturday is a legal half holiday in cities of 200,000 or more, and in such cities paper maturing on Saturdays matures and is presentable and protestable the following business day, except that checks and other demand paper are at the holder's option presentable on Saturday forenoon and protestable the same day; (2) in cities of under 200,000 Saturday is not a legal half holiday except that the Negotiable Instruments Act postpones presentment of all Saturday maturing paper to the following business day, with like option to the holder of checks and other demand paper to present Saturday forenoon and protest the same day. Ill. St. Anno., Secs. 7638, 7725, 7741, 7794. (*Inquiry from Ill., March, 1917, Jl.*) See 1770 supra.

Payment of check on holiday valid under Kansas statute

1786. It is unsafe in the present condition of the law for a bank to pay a check upon a holiday. Saturday afternoon is not a half holiday in Kansas, but in view of the Negotiable Instruments Law relating to presentment for payment on Saturday, payment of a check on Saturday afternoon except to the drawer would be at the risk of the bank. (*Inquiry from Kan., Feb., 1915, Jl.*)

Note: In May, 1915, a statute was passed, making the payment of a negotiable instrument on a Saturday afternoon or upon any legal holiday valid.

Payment of check on holiday in Missouri

1787. Is the payment of a check on a legal holiday valid in Missouri? *Opinion:* This question does not appear to have been passed upon by the Missouri courts, and, in the absence of statute, it would be hardly safe for a bank to pay one on such a day, as the drawer might stop payment before the opening for business on the following business day because of some fraud of the payee and might contend that payment on the holiday was invalid. (*Inquiry from Mo., Oct., 1917.*) **Note:** See 1770 supra.

1788. A bank inquires if it would be safe to pay a check on a legal holiday. *Opinion.* The point does not appear to have ever been decided, but it would seem hardly safe for a bank to pay a check on a legal holiday, as the drawer might stop payment before the opening for business on the following business day because of some fraud of the payee and might contend that payment on the holiday was invalid. (*Inquiry from Mo., Oct., 1917.*)

Note: See 1770 supra.

1789. A Missouri bank states that it pays over the counter more checks on Saturday afternoon, as a rule, than any other two full days in the week; that these checks are mostly of farmers for hired labor, and those of local coal mine, who pay by check every two weeks. It sees no remedy for the situation except to have every customer sign a waiver of the right to stop payment on any checks which might be paid or certified on Saturday afternoons, or an act of the legislature authorizing the practice; and asks an opinion on the question. *Opinion:* In Missouri there is no Saturday half holiday statute, and by custom some banks keep open until 3 or 4 P. M., while those in the large cities theoretically close at 12, but pay

checks up to 1 P. M. The Negotiable Instruments Law of Missouri requires instruments becoming payable on Saturday to be presented on the next succeeding business day, except that the holder of a demand instrument may present same before 12 o'clock. This provision creates a doubt as to the validity of payment of a check after 12 o'clock on Saturday where the depositor objects and stops payment before the opening of business on Monday, and to remove the doubt, a statute is recommended validating Saturday afternoon payments. (See Ohio Gen. Code Sec. 5978. Minn. Stat. Sec. 5897. Tenn. Code, Sec. 3515. Va. Laws 1918, Ch. 66. See also "half-holiday" statutes of N. J., Pa., and S. D.) (*Inquiry from Mo., Dec., 1920, Jl.*)

Note: Missouri now has the A. B. A. statute making the payment of a negotiable instrument on a Saturday afternoon or upon any legal holiday valid. See 1770 supra.

Payment of check on Saturday afternoon valid under Ohio statute

1790. In the present condition of the law and in the absence of direct judicial precedent, payment of a check on a holiday or half holiday would be of uncertain validity and at the risk of the bank, should the drawer stop payment at the opening of business on the next business day. Farnum v. Fowle, 12 Mass. 89. Green v. Walker, 73 Wis. 548. Stewart v. Brown, 112 Mo. 171. Slater v. Shack, 41 Minn. 269. Nat. Mut. Ben. Ass'n v. Miller, 85 Ky. 88. Page v. Shainwald, 169 N. Y. 246. Richardson v. Goddard, 23 How. (U. S.) 28. Ohio Gen. Code, Secs. 13044-9. Sellers v. Dugan, 18 Ohio St. 489. Ohio Gen. Code, Secs. 5976, 5977, 5978. Morel v. Stearns, 37 Misc. (N. Y.) 486. Handy v. Maddox, 85 Md. 547. Ohio Gen. Code, Title VII, Div. 2, Sec. 8301. Sec. 8190. (*Inquiry from Ohio, April, 1913, Jl.*)

Note: In May, 1913, a statute was passed, making the payment of a negotiable instrument on a Saturday afternoon, which is by law a half holiday, valid.

Payment of check on Saturday half holiday in Pennsylvania

1791. An opinion is asked as to the legality of cashing checks after 12 o'clock noon, Saturday, by banks in the State of Pennsylvania which remain open until 3 o'clock P. M. and re-open for a certain period in the evening. *Opinion:* The Act of February 16, 1911, amending and re-

enacting the Holiday Law, contains the following provisions: It enumerates certain days as holidays and Saturday from 12 o'clock noon to 12 midnight, which it designates a half holiday, and provides that these days and half days "shall for all purposes whatever as regards the presenting for payment or acceptance, and as regards the protesting and giving notice of dishonor, of bills of exchange, checks, drafts, and promissory notes, made after the passage of this act, be treated and considered as the first day of the week, commonly called Sunday, and as public holidays and half holidays; and all such bills, checks, drafts, and notes, otherwise presentable for acceptance or payment on any of the said days, shall be deemed to be payable and be presentable for acceptance or payment on the secular or business day next succeeding such holiday or half holiday; except checks, drafts, bills of exchange, and promissory notes, payable at sight or on demand, which would otherwise be payable on any half-holiday Saturday, shall be deemed to be payable at or before twelve o'clock noon of such half holiday; provided, however, that for the purpose of protesting or otherwise holding liable any party to any bill of exchange, check, draft, or promissory note, and which shall not have been paid before twelve o'clock noon of any Saturday designated a half holiday, as aforesaid, a demand for acceptance or payment thereof shall not be made, and notice of protest or dishonor thereof shall not be given, until the next succeeding secular or business day." Under this, it is seen, paper payable on Saturday is made presentable and payable on the following business day, except checks and demand paper, otherwise payable on Saturday, is payable before twelve o'clock noon, with a proviso that if not paid before twelve o'clock noon, demand and notice, for the purpose of holding parties liable, shall not be made or given until the next succeeding business day. Were this the entire law, it would seem to be unsafe to pay checks after twelve o'clock noon on Saturdays. But the act further provides: "And provided, further, that nothing herein contained shall be construed * * * to prevent any bank from keeping its doors open, or transacting its business, on any of the said Saturday afternoons, if by a vote of its directors it shall elect to do so." Part of the business transacted by a bank is the payment of checks and it might seem reasonable to conclude that the last stated proviso was intended to allow a bank to legally pay checks

on Saturday afternoon or evening where it voted to keep open, as well as to legalize the presentment of paper payable at a bank which kept open on Saturday afternoon. The Supreme Court of Pennsylvania in *Robesen v. Pels*, decided in 1902, construed this last stated provision as follows: "This last clause is clearly indicative of the purpose of the whole Act to relieve banks and others from the strict requirements of the commercial law as to demand payment, etc., of negotiable paper if they choose to avail themselves of the permission; but not to make it obligatory on them to do so; at least as to Saturday afternoons." It would seem that, in view of the above, payment of a check on Saturday afternoon by a bank, which kept open by directors' vote, would probably be held valid. (*Inquiry from Pa., March, 1917.*)

See 1770 supra.

Protest on holiday

Payment and protest of check on holiday in North Carolina

1792. Clearing House Association desires to know if a check can be legally protested for non-payment, and if a check can be legally paid on a legal holiday, where it is the custom of local banks to remain open for business, or would it be safer for them to close on all legal holidays? *Opinion:* Under a law enacted in North Carolina in 1919, banks may keep open and do business on legal holidays, at their election, and payment and protest on legal holidays of checks on banks which keep open on such days are legal. N. C. Laws 1919, Ch. 253. (*Inquiry from N. C., July, 1920, Jl.*)

Note: See 1770 supra.

Protest of check dishonored on Saturday in Pennsylvania

1793. With reference to the Pennsylvania Saturday half-holiday statute (Pa. Act. Feb. 16, 1911, Pamphlet Laws, p. 3) a bank submits this query: Where a check is presented for payment on a Saturday before twelve o'clock noon and payment thereof is refused, should the check be protested on Saturday or on the next succeeding secular or business day? *Opinion:* Under the Negotiable Instruments Act (Neg. Inst. Laws, Secs. 92, 94, 172) a check may be presented Saturday forenoon, and, if dishonored, protest must be made on the day of dishonor. But under the Pennsylvania statute passed in 1911, while a check may be presented Saturday forenoon, for the pur-

pose of protesting any check which shall not have been paid before twelve o'clock noon, demand for payment and notice of protest shall not be made and given until the next succeeding business day. Under Pa. Laws 1917, No. 351, bank transactions on Saturday afternoon are made valid and banks are

given option to do business on Saturday afternoon. But this Act is not deemed to change the legal effect of the Act of 1911 that, for the purpose of protesting checks not paid before 12 o'clock, demand shall not be made until the next succeeding business day. (*Inquiry from Pa., Oct., 1920, Jl.*)

INDORSER AND INDORSEMENT

Contract and liability of indorser

Liability conditioned on due demand and notice

1794. What is the liability of an indorser on a demand note who has not waived demand, notice and protest? *Opinion:* Liability of an indorser on a demand note is conditional upon presentment for payment within a reasonable time and notice of dishonor. Unless he waives demand and notice he is relieved from liability if these requisites are not complied with. (*Inquiry from Ark., Feb., 1907.*)

1795. A woman (not the payee) obtained money from a bank upon a check payable by A to B, the check being indorsed by B, by the woman and by a merchant known to the bank. She represented that the check had been delivered to B, a storekeeper, for goods, and that the goods not being up to standard, B returned the check to her therefor. The check was not paid by the bank on which drawn. Who stands the loss? *Opinion:* The cashing bank has recourse upon the drawer of the check and also upon the indorsers if their liability has been preserved by demand and notice; otherwise the indorsers are discharged. (*Inquiry from Md., Jan., 1917.*)

Indorser's liability on check purchased at drawee's request

1796. A bank cashed a check for the indorser by telephone request of the drawee. Presentment was duly made and before payment the drawee failed. Indorser claimed freedom from liability because check was cashed for the benefit of the drawee and not for his benefit. Is this a valid contention? *Opinion:* The indorser is liable on his indorsement upon due notice of dishonor whether or not the transaction benefited him or was for the sole benefit of the drawee bank. The liability provided by the written contract of indorsement is not changed or affected by parol considerations of this nature. (*Inquiry from Tenn., Aug., 1914, Jl.*)

Indorser's liability on collateral note

1797. Is the indorsement of an individual on a collateral note as binding as on an unsecured note? *Opinion:* Assuming the collateral note is negotiable, the liability of the indorser on the note secured by collateral would be just as binding as upon a negotiable note that was unsecured. It was held, for example, in *Buck v. Freehold Bank*, 37 N. J. Law 307, that, although the holder has received collateral from the maker, the law implies no contract to proceed on the collateral before suing the indorser. (*Inquiry from Ohio, Feb., 1918.*)

Liability of indorser on non-negotiable check

1798. A check is drawn payable to Dan Fisher without the words "order" or "bearer." Dan Fisher indorses the check payable to "H & M" who indorse it to bank. Payment is refused. What are the rights of the bank? *Opinion:* The check as drawn is payable to Dan Fisher only. Such an instrument is not negotiable. The authorities are not in accord respecting the liability of the indorser of a non-negotiable instrument, but it seems to be the rule in Missouri that such indorsements simply transfer the title and do not make the indorser liable in case the instrument is not paid. (See *Nat. Bk. v. Gay*, 71 Mo. 627) and, this being the case, no liability attaches to Fisher or H & M. The drawer is liable unless he has a defense against the payee. (*Inquiry from Mo., Nov., 1915.*)

Liability of indorser "for identification only"

1799. The payee's indorsement of a check was forged and a subsequent holder indorsed the same and procured cash from the purchasing bank upon faith of an indorsement by a customer of the bank "for identification only." *Opinion:* The indorser for identification warranted not only that the indorser was the person he represented himself to be, but also that he was a bona fide indorsee with good title. *Mass. Nat. Bk. v. Snow*, 187 Mass. 159. *Greaser*

v. Ingargman, 76 N. Y. S. 922. Poess v. Twelfth Ward Bk., 86 N. Y. S. 857. Ala. Nat. Bk. v. Rivers, 116 Ala. 1. Lahay v. City Nat. Bk., 15 Colo. 339 (*Inquiry from Ark., Jan., 1914, Jl.*)

Indorsement "value in account"

1800. A draft on A payable to B is indorsed by B to C "Value in Account." The draft is returned unpaid. Question is raised whether action can be taken by C upon the draft, where the indorsement is not "Value received" but "Value in account." *Opinion:* Such form of indorsement appears not to have been judicially interpreted. It is quite safe to assume, however, if the question came before the courts it would not be held a mere restrictive or agent-creating indorsement, but rather a title-conveying form. There is no necessity to couple the words "value received" with an indorsement. The simple form, "Pay to the order of Tom Jones", is an indorsement which conveys title and makes the indorser liable in event of non-payment. If, however, "value received" is added, the effect is the same. In *Citizens Nat. Bk. v. Walton*, 96 Va. 435, a writing on the back of a negotiable note, signed by one of two payees, "For value received, I hereby assign and transfer unto W. M. M. Fielding all right, title, and interest that I may have in the within note", was held to render him liable to an innocent holder as an indorser, and not as an assignor. *A fortiori*, an indorsement "value received," without more, would render the indorser liable to an innocent holder as indorser; and an indorsement for "value in account" would confer title and enforceable rights on the indorsee. (*Inquiry from Cal., Nov., 1920.*)

Indorsement of payee (a) where check payable to him in care of bank; (b) where payee's address follows his name

1801. Does a check payable to the order of "John Doe, care of Blank Trust Co., Philadelphia," require the indorsement of the bank as well as the payee? Where a payee's address is written directly under his name, need he incorporate this in his indorsement? *Opinion:* (a) The indorsement of John Doe is legally sufficient without that of the trust company. This precise point has never been passed upon by the courts, but it would seem that the addition of the name of the bank is simply a statement of the address of the payee and does not make the bank a co-payee. (b) The

indorsement is complete without adding the payee's address. (*Inquiry from Pa., April, 1917.*)

Proper place for indorsement on check

1802. Must the indorsement of the payee be upon the back of a check? *Opinion:* The word indorsement comes from the Latin word "dorsum" which literally means back of man or beast, and, as indicated by this derivation, it is generally made by writing the indorser's name on the back of the instrument. But it has been many times held by the courts that, although unusual, an indorsement is legal and valid if made on any portion of the instrument, for example, on the face and even under the maker's name. See *First Nat. Bk. of Messer*, 71 S. E. (Ga.) 148. See also *Neg. Inst. Act* providing that "the indorsement must be on the instrument itself or upon a paper attached thereto," without limitation to the back of the paper. Further, the courts have held that an indorsement on an attached paper called an "allonge" is valid; the "allonge" being used where there have been so many indorsements on the back that there is no room for more; in such case the holder may attach a piece of paper sufficient to bear his own and subsequent indorsements. (*Inquiry from Ohio, March, 1914.*)

Indorsement of check, "pay yourselves or order"

1803. What is the effect of the indorsement of a check, "Pay yourselves or order"? *Opinion:* This would be construed as an indorsement to the drawee and not to another holder to whom the check was forwarded. (*Inquiry from Wis., Nov., 1912, Jl.*)

Indorsement to bank for credit to account of third person

1804. A check on another bank is deposited with an indorsement that it be credited to the account of a third person, which is done. If the check is dishonored, is there a right of recourse against the third person as an indorser? *Opinion:* The third person cannot be held liable as indorser, for the assumption is that he never signed as such. However, the bank, in which the deposit has been made, has the right to charge his account therewith. With few exceptions all checks which are credited to depositors are done so conditionally, with the express or implied understanding that the bank has the right to charge such checks

back if they are not paid. See *Dymock v. Midland Nat. Bank*, 67 Mo. App. 97.

If, however, which is unlikely, the credit to the account of the third person is absolute and the bank has taken title to the check prior to collection, then, upon non-payment, the bank cannot charge back the amount to the third person, whether or not he has withdrawn the funds and its only recourse is against the payee as indorser, and against the drawer of the check. (*Inquiry from Wash., April, 1917.*)

Indorsement declaring note free from offsets and consenting to negotiation

1805. A form of note is submitted payable by John Doe to his own order and is indorsed by John Doe as follows: "There are no conditions offsetting this note, and any bank, banker, corporation or individual has my permission to purchase the same. John Doe." *Opinion:* The indorsee of this note would take full enforceable rights as a holder in due course. The coupling with the indorsement of a statement that the note is free from offsets does not detract from its negotiability nor does the consent of the indorser to its negotiation. A note, in form negotiable, made payable by the maker to his own order and indorsed in blank, is negotiable free from offsets and the indorser's statement to that effect, while superfluous, does not affect negotiability of the instrument. (*Inquiry from Kan., Dec., 1920.*)

Indorsement by payee to whom check delivered though drawer intended another

1806. The drawer of a check payable to the order of C. E. Spencer mailed the same to the payee named, but intended to pay J. W. Spencer. The check was indorsed by C. E. Spencer, and negotiated to Jones, who also indorsed it. Later the check was paid. Jones has disappeared. The bank questions its liability. *Opinion:* Payment by the drawee on the indorsement of C. E. Spencer was good and chargeable, as it was the drawer's own fault that the person intended did not receive the money. *Good-fellow v. First Nat. Bk.*, (Wash.) 129 Pac. 90. *Weisberger Co. v. Barberton Sav. Bk.*, (Ohio) 95 N. E. 379. (*Inquiry from Ark., Nov., 1915, Jl.*)

Indorsement by assignee of payee of checks given by receiver

1807. A national bank bought from depositors of a bank a number of its re-

ceiver's certificates. The receiver will give the national bank the checks drawn by him and made payable to the original holders of the certificates, before notice of the transfer. Is it necessary for the bank to procure the indorsements of the payees, or is an indorsement as assignee sufficient? *Opinion:* It seems that before delivering the checks made out to the original depositors the receiver might insert under the name of the payee that of the national bank as assignee; but even if he does not do this, the checks having been delivered by the receiver to the national bank with knowledge that that bank is the assignee of the respective payees, payment by the drawee bank to the national bank upon its indorsement as assignee of the original depositor would be justified, provided the drawee bank obtains the authority of the receiver to make payment upon such indorsement, without the indorsement of the original payees. (*Inquiry from Ill., Dec., 1913.*)

Indorsement by payee to drawee

1808. A bank submits an indorsement stamp as follows: "Pay to the order of—National Bank. John Doe," and asks whether it is permissible for the bank to pay out cash to clerk of customer on checks stamped as above, or if such stamps are to be used only for depositing checks. This question was raised by a customer who believes his clerk has made use of same in getting money on checks made payable to his order. The bank asks if it is liable for allowing this practice when the head of a firm has been sending his clerk to the bank with checks to be cashed and the bank knew at the time of cashing that the clerk was employed by the customer. *Opinion:* Where a check drawn payable to one of its customers is indorsed by him payable to the order of the bank and intrusted to his clerk, it would seem the form of indorsement would be notice to the bank that it was the customer's intention to have the money deposited to his credit. If the bank pays the cash on such an indorsement to the clerk, the bank would take the risk of his having authority to collect the money. But knowledge and acquiescence of the customer in such payments to the clerk would constitute implied authority. It is stated that it is the practice of the customer to send his clerk to the bank with checks to be cashed. Presumably it is meant checks drawn by the customer payable to bearer and intrusted to the clerk. But if the customer desires checks payable

to his order to be cashed by the bank for the clerk, he should make a different form of indorsement, namely, a blank indorsement or else write the bank a letter giving specific authority to the clerk to receive cash on checks indorsed to the bank. Where, however, the customer safeguards his check by indorsing it to the bank and then intrusts it to his clerk, the limit of the prima facie authority of the clerk is to deposit the check to the credit of the customer and there is no authority to be implied from its mere possession by the clerk for his receiving the amount thereon; unless the customer knows and acquiesces in such payments to the clerk, the bank makes such unauthorized payment at its peril. (*Inquiry from Ariz., June, 1919.*)

Indorsement with waiver of protest

Operates to transfer title as well as waive protest

1809. The payee of a note indorsed it as follows: "We hereby waive demand, protest and notice of non-payment of the within note. John Doe Co., John Doe, President, William Doe, Secretary." Is this both a waiver of protest and an indorsement, or a waiver of protest only? *Opinion:* Where the payee of a note indorses the same by signing his name under a waiver of protest, such indorsement operates both as a waiver of protest and as an indorsement transferring title. *Voss v. Chamberlain*, (Iowa) 117 N. W. 269. *Mullen v. Jones*, (Minn.) 112 N. W. 148. *Elgin City Bk. v. Zelch*, 57 Minn. 487. *German Sav. Bk. v. Hanna*, 124 Iowa 374. *St. Nat. Bk. v. Haylen*, 14 Neb. 480. *Baskin v. Crews*, 66 Mo. App. 22. *Robinson v. Lair*, 31 Iowa 9. *Weitz v. Wolf*, 28 Neb. 500. (*Inquiry from Pa., Oct., 1917, Jl.*)

How long indorser liable

1810. Where a demand note payable to the order of Richard Roe is indorsed, "Demand, notice and protest waived. Richard Roe," how long can Richard Roe be held as an indorser? *Opinion:* As demand, notice and protest are waived, the indorser could be sued at any time until the statute of limitations comes to his relief, namely, six years. The Negotiable Instruments Act provides that presentment of demand paper must be made within a reasonable time to hold the indorser, but it is left to the courts to determine what is and what is not a reasonable time. As short a period as three months and as long a one as twenty-one

months has been held to be within reasonable time. The combined provisions of statute and authority seem to leave the question as one of fact to be determined by the circumstances of each particular case. See *Merrit v. Todd*, 23 N. Y. 28. *Schlesinger v. Schultz*, 110 N. Y. App. Div. 356. *Commercial National Bank v. Zimmerman*, 185 N. Y. 210. *Herrick v. Wolverton*, 31 N. Y. 581, 1 Am. Rep. 461. *German-American National Bank v. Atwater*, 165 N. Y. 36. *State of N. Y. Nat. Bank v. Kennedy*, 130 N. Y. Suppl. 412. *German-American Bank v. Mills*, 99 N. Y. App. Div. 312, 91 N. Y. Suppl. 142. (*Inquiry from N. Y., Jan., 1916.*)

Indorsement guaranteeing payment and waiving protest

Indorsee takes title and full enforceable rights

1811. A bank bought a series of notes, executed in Oklahoma, bearing indorsements of waiver of protest and guaranteeing payment by all indorsers. Has the bank full enforceable rights, free from defenses? *Opinion:* Under the Oklahoma law the bank has a clear right of recovery on the notes free from defenses. *Mangold and Glandt Bk. v. Ulterbach*, 160 Pac. (Okla.) 713. In this case it was held that when the payee of a negotiable promissory note transfers it by indorsing thereon, "Payment guaranteed; protest waived" the purchaser is an indorsee within the rule protecting an innocent purchaser of such paper for value and before maturity against defenses good between the original parties. (It was formerly held in Oklahoma, before the N. I. Act, that such form of indorsement was only a special contract and did not transfer title. *Ireland v. Floyd*, 42 Okla. 609. But this is no longer law.) (*Inquiry from Kan., Nov., 1917.*)

Holder not required to exhaust security of maker before suing indorser

1812. A bank has in its files certain notes indorsed by its customer, "Payment guaranteed, protest waived." In case of default in payment, the bank seeks to know whether it must exhaust the security of the maker before recovering from the indorser. *Opinion:* Where the payee of a note transfers it by indorsing, "Payment guaranteed, protest waived" this, according to the weight of authority, is an indorsement in the commercial sense, under which an innocent purchaser for value before maturity becomes a holder in due course with right to

enforce against the maker free from defense and with immediate recourse upon the indorser upon dishonor at maturity. *Tr. Co. v. Nat. Bk.*, 101 U. S. 70. *Kellogg v. Douglas County Bk.*, 58 Kan. 43. 2 Daniel Neg. Inst. Sec. 1781. *Robinson v. Lair*, 31 Iowa 9. *Heard v. Dubuque County Bk.*, 8 Neb. 10. *Sav. Ass'n v. Hunt*, 17 Kan. 532. *Mangold, etc., Bk. v. Utterback*, (Okla. 1916) 160 Pac. 713. (*Inquiry from Kan., Feb., 1918, Jl.*)

Liability of indorser guaranteeing payment

1813. A bank submits a demand note on which appears an indorsement by Richard Roe guaranteeing payment. The bank wishes to be advised whether the indorser can be held in the absence of demand and notice. *Opinion:* Richard Roe who guaranteed payment on the back of the note is liable without demand or notice of dishonor on the due note. If the note had been indorsed in blank, demand and notice would have been necessary. (*Inquiry from Pa., Sept., 1915.*)

Indorsement guaranteeing payment and consenting to extension

Validity of clause

1814. Are the provisions in the following form of extension clause on the back of a note valid? "For value received, we and each of us jointly and severally guarantee payment of principal and interest of the within note, as and when the same shall become due and of any extension thereof in whole or in part, accepting all its provisions, authorizing the maker, without notice to us or either of us, to obtain an extension or extensions in whole or in part, and waiving protest, demand and notice of protest", etc. *Opinion:* The indorser's consent that the time of payment may be extended without notice thereof authorizes the payee and the maker to extend the time of payment from time to time, without notice to the indorser, and without thereby releasing him from liability until and unless the indorser sees fit to pay the note at any time after maturity, and become immediately subrogated to a right of action against the maker. *Bonart v. Rabits*, 14 La. 970, 76 So. 166. The waiver submitted seems to be valid and binding upon all indorsers of the note who sign same and does not affect its negotiability. (*Inquiry from Ohio, March, 1920.*)

Form of clause on notes of South Carolina bank

1815. A bank submits the following

indorsement which is printed on the back of its notes, and inquires whether it is proper in form: "For value received the undersigned jointly and severally hereby guarantee the payment of the within note at maturity, and waive demand, protest, notice of protest and non-payment thereof, and consent that the holder may grant any extension of the within note that he deems proper. This guaranty shall be directly enforceable against us without first resorting to the principal debtors or exhausting any and all remedies against them." *Opinion:* The foregoing form of guaranty and indorsement would effect its transfer, according to the weight of authority, and would be binding on the indorser according to its terms. Under the Negotiable Instruments Act there is an immediate right of action against the indorser, upon dishonor of the instrument, and the clause relieving of necessity of first suing maker, would seem unnecessary. (*Inquiry from S. C., May, 1920.*)

Trade names

Indorser's liability on note signed in trade name

1816. The F. N. bank holds a note signed "Smith Mfg. Co., John Jones, proprietor, payable to the F. N. Bank," and having several indorsers. Assuming that the company is merely a trade name, is the bank justified in taking a note so drawn? Can it hold the indorsers? *Opinion:* A person has a right to do business and make a contract under an assumed name upon compliance with the statutory requirements, Sec. 440 N. Y. Penal Law, non-compliance therewith being a misdemeanor. Even if the statute had not been complied with, the note would be binding on the maker, and the indorsers would also be liable in that they warrant its genuineness and validity in all respects. (*Inquiry from N. Y., Dec., 1917.*)

Indorsement in name of extinct corporation

1817. A bank had two corporation depositors. Corporation A, owning all the stock of corporation B, surrendered the charter of B but continued business under the trade name of B as well as under the name of A. Can the bank safely receive on deposit, to the credit of corporation A, checks payable to corporation B and indorsed in the name of B without bearing the indorsement of corporation A also, the omission of the latter indorsement being presumably for the purpose of withholding knowledge from the drawer of the check that

the business interests of the two corporations are identical? *Opinion:* In the absence of some prohibitive statute, there is nothing to prevent a person or corporation from doing business under a trade or assumed name, and there appears to be no reason why the bank could not safely receive on deposit from A checks payable to and indorsed in the name of B, but not bearing also the indorsement of A. In *Jones v. Home Furnishing Co.*, 41 N. Y. Suppl. 71, it was held that the maker of a note given for a valuable consideration cannot escape liability on the ground that the note was made payable to a company which had no existence, and that, therefore, the indorsement to plaintiff was fictitious, and passed no title, where it appears that the name of the payee was the name under which plaintiff did business, and that the consideration for the note was received by the maker from plaintiff. If two corporations had different stockholders, some question might arise as to whether one corporation was appropriating funds belonging to the other, with knowledge of the bank; but in this case corporation A owns corporation B, which goes out of existence, and simply does business under the name of B as well as of A. Under the circumstances checks payable to and indorsed in the name of B, which are in reality payable to and owned by A, can be safely credited to A's account without specific indorsement of A. (*Inquiry from Pa., May, 1920.*)

Indorsement by proprietor in name of unincorporated company

1818. A note is made payable to J. C. Smith Tanning Company which is not incorporated, J. C. Smith being sole owner. J. C. Smith indorses the note simply, "J. C. Smith Tanning Co." Is the indorsement valid? *Opinion:* J. C. Smith can be held liable on the note by the bank which discounts it. The Negotiable Instruments Act provides that "one who signs in a trade or assumed name will be liable to the same extent as if he had signed in his own name." And concerning indorsements it is the rule of the law merchant that no particular form of signature is necessary, but the indorser will bind himself by any form adopted. The indorsement "J. C. Smith Tanning Co." proved to have been made by J. C. Smith and is, therefore, binding on the latter in the same way as if the note was payable to and indorsed by J. C. Smith. (*Inquiry from Ky., April, 1915.*)

Indorsement by corporation

Indorsement of note by single officer of corporation

1819. The by-laws of a corporation provide that its commercial paper shall be executed by two officers, but are silent as to who shall indorse, and it is the long settled custom of the corporation to have but one officer indorse such paper for discount and sale. Is such an indorsement proper? *Opinion:* The questioned authority of one officer to indorse, though not expressly conferred, is established by custom and acquiescence of the directors in a long-continued course of dealing so as to be binding on the corporation, and it is not legally necessary to amend the by-laws to expressly invest such authority in the indorsing officer, though such an amendment would provide an express and more specific delegation of authority. *First Nat. Bank v. American Bangor State Co.*, [Pa. 1910] 77 Atl. 1100. 2 Thompson on Corporations, Sec. 1564. (*Inquiry from Mo., Dec., 1920, Jl.*)

Renewal indorsement by corporation

1820. A corporation indorses over to a bank notes payable to it, and, because of non-payment by the makers, they are renewed. The bank asks whether the renewal indorsements by the corporation would be held to be accommodation indorsements. *Opinion:* The renewal indorsements would not be held to be accommodation indorsements. The corporation is an indorser for value at the time the paper is discounted and liability on the original note would be sufficient consideration to support the renewal. (*Inquiry from W. Va., Feb., 1917.*)

Joint or alternative payees

Indorsement by alternative payee

1821. Does a certificate of deposit payable to the order of John Smith or Mary Smith require the indorsement of both parties? *Opinion:* The order to pay is complete and sufficient upon the indorsement of either payee. *Voris v. Schoonover*, (Kan.) 138 Pac. 607. Gen. St. Kan., 1909, Sec. 5294. *Union Bk. v. Spies*, 151 Iowa 178, 130 N. W. 928. (*Inquiry from Kan., Feb., 1917, Jl.*)

Indorsement by one of two payees

1822. May a drawee bank refuse payment of a check payable to "John and James Doe," when indorsed "John and

James Doe, James Doe," when by a rubber-stamp indorsement the presenting bank guarantees the payee's indorsement? *Opinion:* It appears that the indorsement of one of the payees is lacking and it does not appear that James Doe who indorsed the names of both payees had authority to indorse for John Doe. Therefore the bank was justified in refusing payment as it was not presented with any evidence of authority of one payee to indorse for the other. See Sec. 41 of the Negotiable Instruments Act. The drawee is not obliged to accept the guaranty of the presenting bank. (*Inquiry from Pa., May, 1920.*)

1823. A note payable to John Jones and Sam Jones was indorsed by Sam Jones to a bank as collateral for a loan to him. Is the indorsement effective? *Opinion:* Unless Sam Jones had authority from John Jones to indorse and transfer the note, the bank would hold the note subject to the rights of John Jones and would have no authority, without his consent, to apply any payments by the maker in reduction of the loan to Sam Jones. The Negotiable Instruments Act, Sec. 41, provides that where an instrument is payable to the order of two or more payees or indorsees who are not partners, all must indorse, unless the one indorsing has authority to indorse for the others. (*Inquiry from Mont., May, 1920.*)

1824. A note was indorsed: "Pay to the order of George Hanson and William Smith." Smith asked a bank to discount his one-half interest in the note. Would the indorsement of Smith alone make the bank a holder in due course? *Opinion:* Smith must obtain Hanson's authority to indorse the note. Negotiable Instruments Act, Sec. 41, reads: "Where an instrument is payable to the order of two or more payees or indorsees who are not partners, all must indorse, unless the one indorsing has authority to indorse for the others." (*Inquiry from Colo., Dec., 1920.*)

*Indorsement of certificate of deposit
by alternative payee*

1825. Does a certificate of deposit "payable to the order of self or Mary Smith" require the indorsement of both parties? *Opinion:* The Negotiable Instruments Act provides that: "Where an instrument is payable to the order of two or more payees or indorsees who are not partners, all must indorse unless the one indorsing has authority to indorse for the others," and that "the instrument * * * may be drawn to the

order of * * * (4) two or more payees jointly or (5) one or some of several payees." Under these provisions, it has been held in *Voris v. Schoonover*, 138 Pac. (Kan.) 609, that where a promissory note payable to the order of "A or B," not "A and B," is indorsed by A only, to one who takes it in good faith for value and without any notice of the infirmity in the instrument or defect in the title, the indorsee is a holder in due course, under the Negotiable Instruments Law. See, also, *Union Bank v. Spies*, 151 Iowa 178. (*Inquiry from Kan., Jan., 1917.*)

Accommodation indorsement

*Form of indorsement for accommodation of
maker*

1826. A person borrowing money from a bank is asked to give his note with the indorsement of a third party. If the note is first made payable to the order of himself, should his indorsement be preceded or followed by that of the accommodation indorser, and if the latter is the correct method, should the maker again indorse? *Opinion:* It is a common practice when a man borrows money from a bank and gives his note with an accommodation indorser to make the note payable directly to the bank and the latter, signing before the payee, is liable as indorser to the payee bank. Where the note is made payable by the maker to the order of himself, if the maker indorses first, followed by the accommodation indorser, it is not necessary for the maker to indorse again. Whether the accommodation indorser signs above or below indorsement of the maker, in either event he would be held liable to the bank as indorser. (*Inquiry from N. J., Feb., 1915.*)

1827. What is the legal difference between a note drawn by A payable to the order of "Myself," indorsed by A and B, and a note drawn by A payable to the order of a bank and indorsed by B? *Opinion:* A note by A to his own order, indorsed by A and then by B, and discounted by the bank for B, indicates that B has given value to A for the note, and the bank can look to B as indorser and to A as maker. If, however, B has indorsed for accommodation of A and the proceeds go from the bank to A, then, equally, B can be held as indorser. So in either case B is an indorser and is liable as such to the bank provided there is due demand and notice. Where the note is made payable to order of the bank and is indorsed by B before delivery, B is likewise liable as indorser. (*Inquiry from N. Y., Nov., 1915.*)

Accommodation indorsers on corporation note

1828. A demand note payable to the order of bank A at bank B, and signed "The John Doe Co., John Doe, President, Frank Doe, Secretary," is indorsed "John Doe," "Frank Doe," "Richard Roe." May the indorsers be sued? Would liability be changed by having note made "pay to order of ourselves?" *Opinion:* The parties signing on the back will be liable as indorsers provided their liability has been preserved by due demand and notice. Should the note have been made "payable to the order of ourselves" instead of to bank A, the makers would first have to indorse to complete the note and then the indorsers would be liable to the bank to whom it was delivered. (*Inquiry from Pa., March, 1915.*)

Indorsement in representative capacity

Check to "A for a/c of B, trustee" indorsed by A to C

1829. A check made payable to the order of "John Doe for account of John Smith, trustee," is indorsed by John Doe to Mary Jones. May a bank in which neither John Doe nor John Smith has an account allow Mary Jones to deposit the check to her account? Is the form of the check notice to such bank? *Opinion:* The majority of courts hold that where a check is made payable to a person as trustee, it is negotiable on the indorsement of the trustee and the indorsee is not put on notice. *Safe Deposit & Trust Co. v. Diamond Nat. Bk.*, 194 Pa. 334. *Batchelder v. Central Nat. Bank*, 188 Mass. 25. Decisions in Mississippi and Tennessee are to the contrary. In Maryland the courts have drawn a distinction between such a case and one where a check was made payable to a bank to deposit to the credit of a trustee's account and, there being no trustee's account, the bank deposited it to the credit of the personal account of the trustee, who misappropriated the money. In this case the bank was put on notice and held liable for participating in the breach of trust. *Duckett v. Mechanics Bank*, 86 Md. 400. In the case submitted the check is not made payable to Doe, trustee, but is made payable to Doe for the account of Smith, trustee. Doe negotiates the check by indorsement to Mary Jones. He may place the proceeds to account of Smith, trustee, and he may not. If he does not, the question is whether the indorsee is put on notice. In view of the uncertain rule upon this question, the safest

course for the bank is to refuse to credit the check to the account of Mary Jones until satisfied the consideration given by her for the check went to the account of John Smith, trustee. (*Inquiry from N. Y., Dec., 1912.*)

Indorsement by "A, Tax Collector," after retirement from office

1830. Where a check is made payable to "John Smith, Tax Collector," after Smith has ceased to hold that office, and is negotiated by indorsement of the payee to a bank which guarantees prior indorsements and receives payment, is it required to refund? *Opinion:* The bank receiving payment is a holder in due course and not liable to refund, for the indorsement is by the precise payee intended; there is no breach of the guaranty of genuineness, and the suffix "tax collector" is *descriptio personae* and does not put the indorsee upon inquiry. *McKinnon v. Boardman*, 170 Fed. 920. *Central St. Bk. v. Spurlin*, (Iowa) 82 N. W. 493. *Fox v. Citizens' Bk.*, (Tenn.) 37 S. W. 1102. *Gunn v. Hodge*, 32 Miss. 319 (*Inquiry from Miss., June, 1917, Jl.*)

Note: In *Gunn v. Hodge*, 32 Miss. 319, it was held that a note made payable to a person in a representative capacity was payable to the payee personally, the word "executor," etc., being merely descriptive. But in the later case of *Bank of Hickory v. McPherson*, 59 So. (Miss) 934, a purchaser from H of a check to "H, Commissioner" was held to be put on inquiry. While this is contrary to the prevailing rule, it may hold good in Mississippi; if so, the above opinion would be modified accordingly.

Indorsement of check to "A, general agent"

1831. A check in payment of a life insurance premium was drawn payable to and indorsed by "A, general agent." He had the check cashed by a bank in which neither he nor the company had an account. Unknown to the cashing bank, the company had given the bank in which it had an account in the city specific instructions regarding the manner in which all such items were to be handled. Is the bank liable to the insurance company? *Opinion:* The question is whether the form of the name of the payee and of the indorsement put the purchaser on inquiry and charged it with the knowledge that the inquiry would have disclosed. The law on this point is conflicting and the question has not been decided in South Carolina. The following cases are

to the effect that the purchaser of the check would be charged with notice. *Ford v. Brown*, 114 Tenn. 467, 88 S. W. 1036. *Hazeltine v. Keenan*, 54 W. Va. 600. 46 S. E. 609. *Bank of Hickory v. McPherson*, 59 So. (Miss.) 934. There are numerous cases the other way. See *Batchelder v. Central National Bank of Boston*, 188 Mass. 25. *Safe Deposit & Trust Co. v. Diamond Nat. Bank*, 194 Pa. St. 334. *Denton Nat. Bank v. Kenney*, 81 Atl. (Md.) 227. *U. S. Fidelity & Guaranty Co. v. First Nat. Bank*, 123 Pac. (Cal.) 352. It would seem that when a check is made payable to John Smith, agent or trustee, in the absence of actual notice of anything wrong, it carries the presumption that Smith has the right to receive payment of the check from the drawee direct, or to deposit it to his personal account, or to obtain the cash thereon from a bank of which he is not a customer. This is in accordance with the apparent weight of authority. There is probably a duty of inquiry when the payee seeks to transfer the check in payment of his personal debt. (*Inquiry from S. C., July, 1914.*)

Indorsement "Treasurer, Congregational Church"

1832. Is it proper to indorse a check "Treasurer, Congregational Church," where the payee is thus designated? *Opinion*: Such indorsement, while not satisfactory to bankers, assuming the indorsement is by the authorized official, is legally sufficient. *Mass. Neg. Inst. Act., Secs. 25 & 57. McBrown v. Corporation*, 31 Ind. 268. *Vater v. Lewis*, 36 Ind. 289. (*Inquiry from Vt., June, 1915, Jl.*)

Indorsement "A and B per A"

1833. Should a bank accept for deposit in the personal account of A a check payable to "A and B," and indorsed "A and B, per A"? *Opinion*: Where a check payable to A and B, who are not partners, is indorsed "A and B per A" and is offered for deposit to the credit of A's personal account, the bank before accepting the deposit should be satisfied that B has authorized A to make such indorsement. Where A and B are partners the general rule is that in the case of a trading or commercial firm any member has implied authority to indorse and transfer paper by indorsement in the firm name, and such transfer may be made to himself. Such authority is not implied in the case of a non-trading firm. *Allen v. Corn Exch. Bk.*, 87 N. Y. App. Div. 335 (*Inquiry from N. Y., Nov., 1912, Jl.*)

Indorsement by mark

Where payee can write

1834. The payee of a cashier's check indorsed it by his mark, witnessed by two reputable persons. The bank refused to pay it on the ground that the payee could write. *Opinion*: The bank should pay. An indorsement by mark of a negotiable instrument is valid and title is transferred thereby, even though the marksman can write. *Brown v. McClanahan*, 9 Baxt. (Tenn.) 347. *Palmer v. Stephens*, 1 Denio (N. Y.) 471. *Jackson v. Tribble*, 156 Ala. 480. *Baker v. Dening*, 8 Adol. & El. 94. *Brown v. Butchers', etc., Bk.*, 6 Hill (N. Y.) 443. (*Inquiry from N. M., Sept., 1916, Jl.*)

Witness' signature warrants genuineness

1835. What is the liability of a person witnessing an indorsement of the payee of a check by a mark? *Opinion*: Where the payee of a check indorses by mark and his signature is witnessed, the witness' signature can be looked upon as a warranty of the genuineness of the payee's indorsement, the same as a subsequent indorser warrants the genuineness of the signature of each prior indorser. *Second Nat. Bk. v. Curtis*, 153 N. Y. 681. *Clark v. Saugerties Sav. Bk.*, 62 Hun (N. Y.) 346. (*Inquiry from Tenn. May, 1909, Jl.*)

Payment to responsible owner although mark unwitnessed

1836. Should a drawee bank pay a check containing as the payee's indorsement an unwitnessed mark? *Opinion*: In the absence of an express guaranty of the indorsement the drawee bank may safely pay to a responsible owner who would be liable to refund if the indorsement was forged or unauthorized. (*Inquiry from Wyo., Nov. 1913. Jl.*)

Competency of witness to indorsement by mark

1837. (1) Is the signature of an accommodation indorser made by mark, with attesting witness, valid and enforceable where the witness is the wife of the borrower, who signs the note as maker? (2) Could the cashier of the bank taking the note act as witness to the mark and signature? *Opinion*: 1. It is reasonably safe to say that the wife of the accommodated party would be a competent witness. If the wife of the payee witnessed the signature of the maker by mark, there might be a question as to her competency. 2. If the cashier were an officer and not a

stockholder, there might be a question as to his competency, assuming that the statute of Michigan required that a mark be witnessed in order to be valid. If the statute does not so require, it would seem to follow that the witness would be competent in any event, as the common-law disqualification of a person testifying as a witness by reason of his interest has been quite generally removed by statute. (*Inquiry from Mich., April, 1915.*)

Indorsement by rubber stamp

For deposit

1838. A check payable to John Doe is indorsed by a rubber stamp as follows: "For deposit with the Blank National Bank of Blank to the credit of John Doe." *Opinion:* The rubber-stamp indorsement is valid except in localities where Clearing House rules forbid the form of indorsement, "For deposit." For all practical purposes the indorsement, "For deposit," by a rubber stamp is as good a receipt to the drawer as a hand written indorsement. (*Inquiry from Cal., Aug., 1910, Jl.*)

Deposit of check indorsed in blank by payee

1839. A check drawn on a national bank was indorsed by rubber stamp in blank by the payee and deposited in his bank, which forwarded it to the national bank with the usual stamp guaranteeing prior indorsements. The national bank returned the check with the following printed slip attached: "This check is returned for indorsement of the payee. A plain stamp indorsement without 'For deposit,' or 'For Credit,' is no indorsement whatever. This bank will refuse payment on all checks bearing this kind of indorsement whether 'guaranteed' or not." *Opinion:* A rubber-stamp indorsement in blank of the payee's name to a check is legal and where the check is deposited in the payee's bank, the drawee bank is protected by such guaranty in making payment equally as in a case in which the words "for deposit" or "for credit" are prefixed to the indorsement. Of course a drawee bank is not under obligation to honor a check presented by an indorsee unless properly indorsed by the payee, but if the payee imprints or authorizes the imprint of his indorsement by rubber stamp, the courts have held such indorsement to be legal. *Mayers v. McRimmon* (N. C.) 53 S. E. 640. *Horner v. Mo. Pac. Ry.*, 70 Mo. App. 283. (*Inquiry from N. Y., Dec., 1918, Jl.*)

Discount of note having payee's rubber-stamp indorsement

1840. A note bearing the rubber-stamp indorsement of the payee's name was discounted at a bank and the proceeds placed to the credit of the payee's account. The proceeds were afterwards embezzled by a party holding a power to sign checks against such account. The payee claimed that the indorsement was unauthorized and unratified. *Opinion:* Indorsement of name of payee of note with rubber stamp conveys good title if placed on note by one having authority and with intent to indorse, but if indorsement is unauthorized and not ratified no title passes. 4 Am. & Eng. Encyc. L. 258. *Horner v. Mo. Pac. Ry.*, 70 Mo. App. 291. *Mayers v. McRimmon*, 140 N. C. 640. (*Inquiry from N. Y., June, 1912, Jl.*)

Legality of rubber-stamp indorsement

1841. Is an indorsement by a rubber stamp legal? *Opinion:* Such an indorsement is legal but in some cases it would be more difficult to prove its authenticity than if hand written. *Mayers v. McRimmon*, 140 N. C. 640. 4 Am. & Eng. Encyc. L. 258. *Horner v. Mo. Pac. Ry.*, 70 Mo. App. 291. (*Inquiry from Pa., Dec., 1912, Jl.*)

Unsafe practice to cash, instead of credit to customer, checks indorsed by rubber stamp

1842. A bank has several customers who cash pay-roll checks and indorse them by rubber stamp. The bank receiving such checks asks if it could hold the customer liable if checks were not good, and what its status would be if the customer received cash but later claimed that he did not get the money on the ground that the checks had been stolen and the stamp placed thereon without his authority. *Opinion:* An indorsement by a rubber stamp is valid when made by the payee or indorsee or by one having authority from him, and may be relied upon by a bank when the amount of the instrument is credited to the account of the indorser. But where cash, instead of credit to account, is requested upon an instrument so indorsed by a customer, the bank, if afterwards confronted with the claim that the instrument was stolen from the indorser, the stamp placed thereon without his authority and that he had not received the amount, would be at a disadvantage in disproving such claim. The safer practice, whether the indorsement of a customer is hand written or by rubber stamp, is to place the amount to his credit and re-

quire his own check in withdrawal. *Rosenberg v. Germania Bk.*, 44 Misc. (N. Y.) 233. *Mayers v. McRimmon*, (N. C.) 53 S. E. 447. *Lynn First Nat. Bk. v. Smith*, 132 Mass. 227. (*Inquiry from Wis.*, March, 1918. *Jl.*)

Indorsement in blank by payee corporation without official's written signature

1843. A corporation discounted a trade note, indorsing the same with its rubber stamp without the written signature of an authorized official. *Opinion:* The indorsement is valid and effectual to transfer title, but good banking practice requires in addition the written signature of an authorized official, as better evidence of authenticity. (*Inquiry from Wis.*, Feb., 1911, *Jl.*)

1844. Does a rubber-stamp indorsement of a corporation on a note require the signature in ink of an officer? *Opinion:* While the rubber-stamp indorsement of a corporation placed on a note by one having authority would convey good title to the discounting bank, it is desirable to have the subscription of the officer with pen and ink, to indicate to the bank the person who put on the stamp and that it was affixed by one having authority to do so. (*Inquiry from N. Y.*, April, 1912.)

Indorsement of voucher check by payee corporation

1845. Is a rubber-stamp indorsement to a voucher draft acknowledging receipt in full sufficient or should an officer of the company or corporation sign the receipt in ink? *Opinion:* The indorsement by the payee with rubber stamp is legally sufficient but as anyone can so stamp a signature it would not, of itself, carry evidence that it was made by the authority of the payee. Such authority would have to be proved in case of dispute. Signature of an officer, in ink, would be more desirable as all it would be necessary to prove in such case would be the authority of the officer to receipt for the company. Where, however, the voucher check was deposited in the payee's bank to its credit, it would seem that the mere rubber stamp, without more, might be sufficient, for the fact of deposit would show that the company had received and deposited the proceeds. (*Inquiry from Ariz.*, Jan., 1919.)

Bank indorsement by rubber stamp without officer's signature in ink

1846. A check payable to John Smith

is indorsed, "John Smith by James Brown;" it is also indorsed by rubber stamp, "Pay to the order of Bank A. All previous indorsements guaranteed. B National Bank." Is Bank A protected by the rubber stamp guaranty of B National Bank without the signature, in ink, of an officer of that bank? *Opinion:* The courts have held that the name of an indorser stamped with a rubber stamp placed on the instrument by one having authority is a valid indorsement. Ordinarily, therefore, bank A would be protected, and could hold B National Bank on its guaranty of previous indorsement which would cover not only genuineness but the authority of James Brown to indorse for John Smith. The only trouble would be in case B National Bank's indorsement was disputed. If it contained the signature in blank of an authorized officer of the bank, it would be easier to prove that the guaranty was genuine. As a general proposition the payor bank is better protected where the rubber-stamp indorsement is subscribed by the signature, in ink, of an officer of the indorser. See *Mayers v. McRimmon*, 140 N. C. 640, 52 S. E. 227. (*Inquiry from Cal.*, Oct., 1914.)

1847. Does a bank indorsement stamp require the name of the cashier or other officer in order to make it binding? *Opinion:* The stamp without the signature of the official is legal, but it should bear the name of the cashier or other officer in order to indicate that such stamp is put on by the proper authority. (*Inquiry from Ill.*, May, 1915.)

Indorsement without recourse

Indorsement "without recourse" does not relieve indorser as warrantor of fraudulent note

1848. A gave his note to a cattle company, secured by a chattel mortgage on certain cattle. The cattle company indorsed the note "without recourse" and sold the note and mortgage to a bank. The note and the mortgage proved fraudulent, there being no such cattle as described in the mortgage. *Opinion:* The cattle company is liable to the bank, as there was a breach of implied warranty of the validity of the thing sold. *Cross v. Hollister*, 47 Kan. 652. *Challis v. McCoum*, 22 Kan. 157. *Meyer v. Richards*, 163 U. S. 385. *Drennan v. Bunn*, 124 Ill. 175. (*Inquiry from Kan.*, July, 1916, *Jl.*)

Indorser liable where note a forgery

1849. Does an indorsement "without

recourse" relieve the indorser from responsibility in case the note is a forgery? *Opinion:* The indorser is not relieved from liability. By this indorsement the indorser warrants that the instrument is genuine and in all respects what it purports to be. (*Inquiry from Mich., Jan., 1912, Jl.*)

Holder in due course can recover from maker

1850. B gave his note to A, which A indorsed to a bank "without recourse," receiving credit in his account. B refused to pay the note at maturity, claiming that A obtained the note through fraud. *Opinion:* The bank can enforce payment from B, provided the proceeds of the note have been checked out before the notice of fraud. The indorsement "without recourse" does not affect the bank's status as a holder in due course. *Morrison v. Farmers, etc., Bk., 9 Okla. 967. Upham v. Prince, 12 Mass. 14. Epler v. Funk, 8 Pa. 468. Consterdine v. Moore, (Neb. 1902) 91 N. W. 399. Lomax v. Picot, 2 Rand. (Va.) 247. Hamilton v. Fowler, 99 Fed. 18. Stevenson v. O'Neal, 71 Ill. 314. Beach v. Bennett, (Colo. 1901) 66 Pac. 567. (Inquiry from Okla., June, 1913, Jl.)*

1851. Is the maker of a note given without value liable to one who takes under an indorsement "without recourse"? *Opinion:* The maker is liable provided the indorsee is a holder in due course; the mere form of the indorsement does not constitute notice of the payee's defective title. (*Inquiry from Pa., Dec., 1909.*)

Indorsement "without recourse" not applicable to subsequent indorser

1852. Where a note is indorsed in blank by the payee with the words "without recourse" written over his signature, and is later indorsed by a second indorser, do the words qualify the payee's indorsement only, without applying to the second indorser, who failed to insert them? *Opinion:* The phrase has no application to the second indorser and does not qualify his liability. *Ogden Neg. Inst., Sec. 106. (Inquiry from Wis., April, 1912, Jl.)*

Indorser relieved from obligation to pay but liable for genuineness

1853. A bank sold a note after indorsing the same "without recourse on us." In case of default in payment, can the purchaser recover from the bank? *Opinion:* The bank is relieved from any obligation to

pay in case of dishonor by the principal debtor, but is not absolved from liability in case the instrument is not genuine. The usual form is to write the words "without recourse" above the signature of the indorser. (*Inquiry from Mo., Feb., 1918.*)

Indorsement "without recourse" relieves from responsibility for non-payment

1854. A bank wishes to devise a form of indorsement which would restrict its responsibility to guaranteeing the genuineness of notes on which such indorsement is placed. The bank does not wish to shoulder any responsibility for payment of the paper. It submits for criticism and suggestion, the following form: "Genuineness of signatures and of prior indorsements guaranteed." *Opinion:* A transfer of title to paper, guaranteeing genuineness of the signature, but without shouldering responsibility for payment in case of dishonor, could be effected by delivering the instrument without any indorsement, if payable to bearer or if payable to order by indorsing it "without recourse." (*Inquiry from N. Y., April, 1919.*)

Indorsement of check "without recourse"

1855. Is the indorsement of a check "without recourse" legal and in accordance with business methods? *Opinion:* Most of the decided cases concerning an indorsement "without recourse" involve promissory notes; but such an indorsement made upon a check is perfectly legal and there may be cases where such an indorsement may be necessary to protect the payee where he has no interest in the check, as, for example, where A owes C and makes his check payable to B to deliver to C, A not knowing C's whereabouts while B is in a position to locate him. In such a case B, finding C and indorsing the check over to him, would naturally indorse "without recourse" so as to relieve himself from any liability as indorser in case the check was not paid. (*Inquiry from N. Y., Jan., 1919.*)

Indorsement as warranty

Warranty of genuineness to indorsee

1856. A bank cashed a check indorsed to it as follows: "Pay to the order of the Commercial National Bank," and asks whether this indorsement would warrant the genuineness and sufficiency of the prior indorsement, "John Smith by Will Brown." Brown had no authority to indorse and the

Commercial National Bank, if compelled to refund to the payor, wants to know if it has recourse upon the indorsing bank. *Opinion:* An ordinary indorsement, "Pay to the order of Commercial National Bank," would warrant to the indorsee the genuineness and sufficiency of the prior indorsement, and if Brown had no authority, the bank compelled to refund to the payor bank would have recourse upon the indorsing bank. (*Inquiry from Kan., Aug., 1917.*)

Question whether indorsee's warranty of genuineness runs to drawee

1857. A check made payable to J. C. Doe drawn on bank A is indorsed "R. A. Doe." It is presented by and paid to bank B, and that bank makes inquiry as to its liability in case of forgery of payee's indorsement. *Opinion:* Bank B which indorses the check and receives payment would be liable to the payor bank if the indorsement should be unauthorized or a forgery. Assuming that there is no express guaranty of indorsement, some courts hold the indorsement of bank B is itself a guaranty of genuineness and sufficiency of prior indorsement to the drawee but others hold, under the N. I. Act, the indorser's warranty of genuineness does not run to the drawee, but only to a holder in due course, and these courts place the liability on a different ground, namely, that the bank has received money without consideration to which it is not entitled and, therefore, must refund. Whatever the theory, there is a clear liability of bank B, in the case stated, if the indorsement of the payee's name is unauthorized. (*Inquiry from S. C., June, 1915.*)

Indorser warrants to indorsee authority of salesman to indorse for payee

1858. A check on bank A to the order of Factories Mdse. Co. is indorsed, "Factories Mdse. Co., Jack Smith," Smith being a salesman of payee. What is the liability of a person (Jones) who later indorses the check and deposits it in B bank in event payee's indorsement is unauthorized? *Opinion:* It has been held in a number of cases that a salesman authorized to sell goods and even to collect accounts has no implied authority to indorse the name of the concern which he represents to a check payable to its order taken by him in collection. Unless there was some express authority, therefore, to Smith to indorse, or a course of dealing whereby he indorsed similar checks and such indorsement was known to and acquiesced in by his principal, the indorsement of the

payee's name would be without authority, and bank A could not charge it to the account of the drawer. Bank A, however, would have the right to recover from bank B and also from Jones who by indorsing the instrument warranted the genuineness and sufficiency of the payee's indorsement. Bank B would have right of recourse upon Jones in case bank A looked to it. The Negotiable Instruments Act expressly provides that "every indorser who indorses without qualification warrants to all subsequent holders in due course * * * that the instrument is genuine and in all respects what it purports to be; that he has a good title to it; that all prior parties had capacity to contract * * * ." Under this provision Jones warrants the genuineness and sufficiency of the indorsement. (*Inquiry from Minn., June, 1915.*)

Indorsement does not warrant genuineness of signature to drawee

1859. A bank is the drawee of a draft drawn by the executor of the estate of its deceased depositor for the balance to the credit of his account. The draft is accompanied by a certified copy of letters testamentary showing right of the executor to withdraw, as well as the necessary waiver, but the executor himself has never filed his signature, so that the bank has no means of determining whether his signature is genuine or not. The drawee asks for a guaranty of genuineness of this signature before making payment, but the bank to whom the draft is made payable contends that such guaranty is unnecessary, as its indorsement guarantees the genuineness of the instrument in every respect, including the maker's signature. *Opinion:* An indorsement of a check signed by an executor is not a warranty to the drawee of the genuineness of the drawer's signature, but where the indorsing bank is the payee of the check, and receives payment thereof from the drawee, it would be liable to refund, should the drawer's signature be non-genuine, because of having received money to which it was not entitled, although it made no express warranty of genuineness, and in such case the rule holding the drawee bound to know the drawer's signature and precluding recovery from a bona fide holder would not apply. *Nat. Bk. of Commerce v. Farmers, etc., Bk., (Neb.) 128 N. W. 522. Cherokee Nat. Bk. v. Union Tr. Co., (Okla.) 125 Pac. 464. Farmers, etc., Bk. v. Bk. of Rutherford, 115 Tenn. 64. (Inquiry from N. Y., June, 1919, Jl.)*

Liability of third persons indorsing guarantee of payment

1860. What is the liability of persons other than the payee who indorse on a note, "For value received we hereby guarantee payment of the within note"? *Opinion:* They are liable as guarantors and not as indorsers. It would be preferable to have such persons indorse "for value received we hereby guarantee prompt payment of the within note at maturity" in order to hold them liable as sureties. *Zahn v. First Nat. Bk.*, 103 Pa. 576 (and cases cited therein). *North St. Bk. v. Bellamy*, (N. Dak.) 125 N. W. 888. *Iron City Nat. Bk. v. Rafferty*, 207 Pa. 258. (*Inquiry from Pa.*, Sept., 1912, *Jl.*)

Authority to indorse*Attorney indorsing client's name to check*

1861. An attorney employed to collect a note received from the maker a check covering the amount, which was drawn in favor of the client. The attorney indorsed the check as attorney for such client and then by himself personally and deposited it to his personal account in his bank. He later used all the money from his own account and moved away. May the client recover from the bank? *Opinion:* An attorney employed to collect a note has no authority, solely by reason of such employment, to indorse his client's name to a check, payable to such client, received in collection, and the drawee which pays such check upon such indorsement is responsible if the money is misappropriated, unless it can prove that the client authorized the attorney to so indorse. *Graham v. U. S. Sav. Inst.*, 46 Mo. 186. *Jackson v. Nat. Bk.*, (Tenn.) 20 S. W. 802. *Jackson Paper Mfg. Co. v. Com. Nat. Bk. (Ill.)* 65 N. E. 136. *Deering & Co. v. Kelso*, (Minn.) 76 N. W. 792. *Brown v. People's Nat. Bk.*, (Mich.) 136 N. W. 506. (*Inquiry from Ala.*, Sept., 1917, *Jl.*)

1862. A check payable to a client was indorsed by "John Doe by John Jones, Attorney." John Jones deposited the check in his personal account, and misappropriated the proceeds. Who stands the loss? *Opinion:* If the indorsement by John Jones, Attorney, of the name of the payee was unauthorized, it would be just the same as if the indorsement were a forgery. In other words, the bank could charge back the amount of its customer's account but would have a right of recovery from the bank in which Jones deposited the check to his per-

sonal credit. That bank would be the ultimate loser. (*Inquiry from Ind.*, Jan., 1918.)

Clerk indorsing employer's name with rubber stamp

1863. Where the clerk of a depositor, entrusted with a rubber stamp containing an indorsement by the depositor to his bank, uses the stamp upon checks of which the depositor is payee and receives the cash thereon from the bank, which he misappropriates, concealing his crime for a considerable period because of his function to receive the monthly statements, what is the liability of the bank? *Opinion:* The liability of the bank to the depositor depends upon whether (1) the clerk had authority to collect as well as to indorse to the bank; (2) if without original authority, depositor has ratified his acts, or (3) depositor has been negligent; and if none of above conditions exist, the bank is liable. *Standard Steam Specialty Co. v. Corn Exch. Bk.* (N. Y.) 116 N. E. 386. *First Nat. Bk. v. Allen*, 100 Ala. 476. *Dana v. Nat. Bk.*, 132 Mass. 156. *Critten v. Chemical Nat. Bk.*, 171 N. Y. 219. *Myers v. Southwestern Nat. Bk.*, 193 Pa. 1. *First Nat. Bk. v. Richmond Electric Co.*, 106 Va. 347. *Kenneth Inv. Co. v. Nat. Bk.*, 103 Mo. App. 613. (*Inquiry from Sept.*, 1917, *Jl.*)

Unauthorized indorsement by traveling agent

1864. A check given to a traveling agent in payment of his firm's bill was cashed by him. In indorsing he signed his firm's name per his own. Is the check chargeable to the account of the drawer? *Opinion:* An authority to an agent to sell goods and collect accounts does not include an authority to indorse checks payable to the principal, taken in collection. The drawer could rightfully object to having the check charged to his account, unless the agent had express authority from his firm, or authority which could be implied from a course of similar dealings, to indorse his firm's name and negotiate checks. (*Inquiry from Pa.*, Dec., 1916.)

1865. A employed B as his agent to collect his accounts. A check was drawn payable to A, on which B without authority indorsed his principal's name, as well as his own. The drawee, knowing that B was the agent of A, paid the check. *Opinion:* The drawee is liable to the drawer for having paid the check upon the unauthorized forged indorsement of the payee. B's authority to

collect accounts does not include authority to indorse his principal's name to checks payable to the principal. (*Inquiry from Me., July, 1911, Jl.*)

1866. An agent indorsed a check payable to the firm with the firm name per his own initials, and received the cash. It was afterwards claimed that he had no authority to collect the money. Is the drawee bank liable for the amount of the check? *Opinion:* The authority of an agent to collect does not include authority to indorse checks payable to the principal which have been received in payment. *Graham v. U. S. Sav. Inst.*, 46 N. W. 186. *Thomson v. Bank*, 82 N. Y. 1. But where an agent is permitted to indorse checks payable to his principal, authority to indorse will be implied. *Best v. Krey*, 83 Minn. 32. Proof that the agent had previously indorsed checks in that manner, and paid over the proceeds to his principal, who received with knowledge would make out a case of implied authority. In the absence of authority the drawee bank paying the check is liable to the principal. (*Inquiry from S. D., April, 1918.*)

Indorsement by agent of payee without authority

1867. A check payable to John Doe & Co. is indorsed to B by an unauthorized agent. B indorsed to C and guaranteed all prior indorsements and C collected from the drawee. *Opinion:* The drawee bank can recover from C as the apparent owner of the check. (*Inquiry from Minn., Dec., 1911, Jl.*)

1868. A check payable to a firm is given to its agent and cashed by a bank upon the indorsement of the firm by the agent. The check is collected. Thirty days later it turns out the agent had no authority to indorse and the firm did not receive the money. *Opinion:* The bank which cashed the check is liable to refund to the drawee, and the elapsing of thirty days before the discovery does not relieve it from liability. *White v. Cont. Nat. Bk.*, 64 N. Y. 316. (*Inquiry from Neb., Nov., 1911, Jl.*)

1869. A check payable to a firm was indorsed by the agent of the firm without authority. It was cashed by a bank and paid by the drawee. *Opinion:* The cashing bank was liable to the drawee for a return of the money, irrespective of whether the indorsement was guaranteed. The rule stated is that money paid under a mistake of fact without consideration is recoverable. (*Inquiry from Wis., Dec., 1909, Jl.*)

Unauthorized indorsement by wife of husband's check

1870. Is a drawee bank liable to the payee of a check where it cashed it on the indorsement of his wife in her own name? *Opinion:* As the check was not indorsed by the payee the bank would be responsible for the amount, in the absence of proof that the husband authorized the wife to receive payment. (*Inquiry from Neb., Oct., 1919.*)

Unauthorized indorsement of payee's name by another

1871. A check drawn to Bill Miller and indorsed "Bill Miller by A. F. Miller" was placed to the credit of Jack McRoberts in the M—— Bank. It was afterwards claimed that such indorsement was unauthorized. Is McRoberts liable to the bank? *Opinion:* The indorsement being unauthorized, the depositor of the check stood in the position of a guarantor, and, therefore, bound to make up the loss. *Marcuson v. Yorkville Bank*, 147 N. Y. Suppl. 472. (*Inquiry from Mont., May, 1918.*)

Bookkeeper authorized to indorse for deposit cannot indorse for discount

1872. Has a bookkeeper authorized to indorse checks for deposit to the credit of a firm authority to indorse notes payable to his firm for the purpose of discount and credit? *Opinion:* There is no such authority implied. The bank should require an express power of attorney. (*Inquiry from Md., Jan., 1912.*)

Authority of railroad agent to indorse for principal

1873. An agent of a railroad company indorsed a check payable to it, "N. & E. Railway, Amos Owen," and deposited it in his personal account. Is the bank liable to the railroad? *Opinion:* The entire question hinges upon the fact as to whether Owen had authority to indorse checks in the name of the railroad company. If he had express authority to collect funds, and indorse checks payable to the railroad, mingling the proceeds with his personal funds, or if such authority could be implied from a course of dealing, then the railroad might be bound. (*Inquiry from Tenn., May, 1920.*)

1874. For several years a railroad company had permitted its local agent to indorse checks payable to the company and receive payment of same, the agent indorsing on back "John Doe, Agent." Such

a check was paid to the agent by a bank that had been accustomed to so paying. The agent absconded, and the railroad company claimed that, as it had some years previously issued a general order to its local agents not to cash checks given to them in the course of the company's business, but to transmit checks directly to the treasurer, the bank was liable. No notice had ever been given to the bank of any revocation of agent's implied authority. Is the bank liable? *Opinion:* It is a general rule that an authority to an agent to collect accounts does not of itself include authority to indorse checks payable to the principal. But if an agent is permitted to indorse checks payable to his principal, authority to indorse will be implied, and the principal cannot recover from one who cashes a check for the agent where the agent appropriates the proceeds. The fact that the railroad company expressly instructed its agents not to cash checks, but to transmit them directly to the treasurer, would not affect the rights of the bank in the absence of notice to them of such revocation of implied authority. The implied authority being established, the form of indorsement would be sufficient. See *Thomson v. Bank*, 82 N. Y. 1. *Graham v. U. S. Savings Inst.*, 46 Mo. 186. *Hamilton Nat. Bank v. Nye*, 37 Ind. App. 464. *Best v. Krey*, 83 Minn. 32. (*Inquiry from Ind.*, Sept., 1915.)

Unauthorized indorsement by railroad agent

1875. The agent of a railroad company deposited to his personal account two checks payable to the company and indorsed "U, Agent C Railway Co." *Opinion:* In the absence of express or implied authority, a railroad agent cannot indorse checks payable to his company and deposit them to his personal credit, and the depository bank would be liable if the agent misapplied the funds. *Knoxville Water Co. v. East Tenn. Nat. Bk.* (Tenn.) 131 S. W. 447. (*Inquiry from Mont.*, Oct., 1913, *Jl.*)

Authority of joint depositor to indorse co-depositor's name as payee

1876. Jones and Smith are joint depositors, and either has the privilege of withdrawing the entire balance to the credit of the two. Smith offers for credit to the account a check payable to Jones, the check, however, not bearing the indorsement of the payee (Jones). Would the depository bank be justified in receiving for credit such a check if indorsed, "Jones by

Smith?" *Opinion:* The fact that A and B are joint depositors, each having the privilege of withdrawing the entire balance, does not authorize B to indorse the name of A to a check payable to the latter and deposit it to the credit of the joint account where it would be subject to withdrawal by B. The bank would not be justified in receiving for credit check so indorsed, in the absence of evidence of B's authority to indorse A's name. (*Inquiry from Ore.*, Sept., 1919, *Jl.*)

Unauthorized indorsement of corporation's name by president

1877. In the case of a check payable to a corporation, indorsed in the corporation's name by the president, who had no authority to so indorse, and collected from the drawee upon a guaranty of prior indorsements, what are the rights of the drawee bank? *Opinion:* The indorsement of the payee being proved to be unauthorized, the check, of course, was not chargeable to the depositor, and the recourse of the drawee bank is upon the bank that received payment and guaranteed the indorsement. (*Inquiry from Pa.*, March, 1916.)

Check to corporation indorsed by secretary to third person

1878. The Blank Mfg. Co. had an account with a bank which used a stamp to indorse their checks for deposit as follows: "Pay to the order of the ——— Nat. Bank, ——— O., or order, The Blank Mfg. Co., per John Doe, Sec'y." The secretary presented a check so indorsed and deposited it to the credit of Mr. Smith, a traveling representative of the company who keeps a personal account with the bank. Would the bank be liable if it was later discovered that the check should have gone to the credit of the company? *Opinion:* In the case stated the probability is that the bank would be held liable should it be proved that the secretary was without authority to place the check to the credit of the traveling representative. The safer course would be to refuse to receive the check except for deposit to the credit of the corporation. (*Inquiry from Ohio*, Feb., 1917.)

Authority of insurance agent to indorse name of company

1879. An insurance agent deposits in his account checks payable to the order of certain insurance companies. He indorses these checks in the name of the company, and by

his own name as agent. Is the agent acting within his authority in so doing? *Opinion:* A check payable to an insurance company indorsed in its name by an agent of the company should not be cashed for the agent individually or placed to the credit of his individual account in the absence of evidence of authority by the corporation to the agent to indorse checks in its name and receive the money thereon personally. Such authority does not exist from the mere fact of agency, but must be expressly conferred or implied from a course of dealing. (*Inquiry from N. J., July, 1919.*)

Ratification of unauthorized indorsement

1880. A customer deposits with a bank a check payable to a corporation, and guarantees prior indorsements. The corporation indorsement was made by A who represented a collection agency having claim of corporation in its hands, and was unauthorized. The check was paid. The collection agency paid its client for the check and demanded repayment. The drawee bank charges back to the receiving bank which now asks if it has a right to charge back to customer. *Opinion:* If the drawee bank had the right to charge back to the receiving bank, that bank had the corresponding right to charge back to the customer on his guaranty, but in view of the fact that payee corporation received the money for the check from the collection agency, it might be held that the indorsement by the latter of the corporation's name was ratified, and if so, the check was not chargeable back to the receiving bank by drawee bank. (*Inquiry from Ore., April, 1916.*)

Ratification by corporation of indorsement of payee's name by officer

1881. A bank received from G. & Company, a corporation, a letter reading as follows: "We are sending you herewith, as per your request, the necessary resolution in this matter," etc. "The following resolution was passed: Resolution stating that all checks made payable to G. & Company, indorsed and deposited by A to the credit of A. & Company, prior to August 26th, were handled in accordance with authority of the company, and such action is hereby ratified and confirmed. Approved—President—Secretary." Is this sufficient? *Opinion:* It is quite evident that the corporation, "G. & Company," ratified the action of "A", one of its officers, in indorsing and depositing checks, made payable to said corporation,

to the credit of "A. & Company." Since G. & Company, through its Secretary and Treasurer, duly notified the bank that such action was taken through its board of directors, the bank was justified in relying and acting upon the same. The bank was not required to inquire into the facts leading up to its passage, but was justified in placing full reliance upon the information thus furnished by the properly accredited officers of the corporation. It has been held that where an authorization of a board of directors is necessary to the execution or ratification of a given contract, their failure to enter the resolution in the corporation records does not affect its validity, but the fact may be proved by parol. *Yolo Bank v. Weaver* [Cal. 1892] 31 Pac. 160. *Oakford v. Fisher*, 75 Ill. App. 544 (holding that the fact that the board of directors of a corporation made no record of their action does not affect the validity of a sale of personal property duly authorized by them.) *Warren v. Ocean Ind. Co.*, 16 Me. 439. *McMichael v. Brennan*, 31 N. J. Eq. 396. *McCartney v. Glover Valley Co.*, 232 Fed. 497. (*Inquiry from Ohio, Oct., 1919.*)

Sufficiency of indorsement

Prefix "Miss" or "Mrs." unnecessary

1882. A check was drawn to the order of "Miss E. M. Taylor" and bore the indorsement of "E. M. Taylor." *Opinion:* The indorsement is in the proper form, as the prefix "Miss" is not recognized in law as a part of the payee's name. (*Inquiry from Pa., Dec., 1909, Jl.*)

1883. A check payable to the order of "Miss R. A. Penny" was indorsed "R. A. Penny," presented for payment in due course, and refused for the reason that "Miss" was not included in indorsement. *Opinion:* The title "Miss" is no part of the name and not legally necessary in the indorsement. The check, therefore, should have been paid. A refusal to pay because of an incorrect indorsement would not, it seems, justify protest as there is no due presentment and dishonor thereof. This check was not defectively indorsed and although the bank believed it was, and refused payment for that reason, nevertheless such refusal of a check duly presented with proper indorsement would constitute a dishonor and justify protest. (*Inquiry from Wash., March, 1916.*)

1884. Is a check payable to "Miss Wilda Reimbaugh" properly indorsed, "Wilda

Reimbaugh?" *Opinion*: The prefixes "Mr.," "Mrs." and "Miss" are not themselves names or parts of names and a check payable to Miss Wilda Reimbaugh is correctly indorsed "Wilda Reimbaugh." (*Inquiry from Ind., Dec., 1913.*)

1885. A check payable to "Mrs. M. E. Smith" was indorsed "M. E. Smith" and cashed at a bank which forwarded the same with the indorsement. "All prior indorsements guaranteed." The drawee refused payment. *Opinion*: The indorsement without the prefix "Mrs." was regular and valid and the drawee should have honored the check. In a case where an indorsement is insufficient or irregular the drawee is not compelled to pay the check even upon a guaranty, although payment upon such guaranty is customary, but is entitled to a reasonable opportunity of verifying the endorsement before making payment. *Merchants' Bk. v. Spicer*, 6 Wend. (N. Y.) 443. *Hudson v. Goodwin*, 5 Har. & J. (Md.) 115. *Cooper v. Bailey*, 52 Me. 230. *Brown v. Butchers' Bk.*, 6 Hill (N. Y.) 443. *George v. Surry*, 32 E. C. L. 576. (*Inquiry from Ark., May, 1913, Jl.*)

1886. A check was made payable to "Mrs. Mary Osage" and indorsed "Mary Osage." When presented to the bank, payment was refused upon the claim that the indorsement was incorrect. *Opinion*: The indorsement, "Mary Osage" was proper and legal, and the drawee bank is not justified in refusing payment because of the omission of prefix "Mrs.," said prefix not being part of the name of the payee, but only a title. *Calvin v. Free*, 66 Kan. 466. *Bickford v. Mattocks* (Me.) 50 Atl. 894. *Grant Tr., etc., Co. v. Tucker*, (Ind.) 96 N. E. 487. (*Inquiry from Kan., July, 1918, Jl.*)

Check to J. W. Smith and wife indorsed J. W. Smith and Mrs. B. Smith

1887. A check which was drawn payable to J. W. Smith and wife was indorsed "J. W. Smith and Mrs. B. Smith." Is the indorsement correct? *Opinion*: If Mrs. B. Smith is the wife of J. W. Smith, her indorsement in this form is valid and would pass title. The prefix Mrs. is no part of the name. (*Inquiry from Ore., Aug., 1915.*)

Check "G. T. Jones" indorsed "Geo. T. Jones"

1888. Should a drawee bank pay a check to "G. T. Jones" indorsed by "Geo. T. Jones?" *Opinion*: If Geo. T. Jones and G. T. Jones are the same person, the indorsement is

valid and would pass title. But, assuming the bank does not know this and cannot ascertain the same by reasonable inquiry, the question arises as to whether it has a right to refuse payment because the check is payable to "G. T." and indorsed "Geo. T." If a bank pays a check indorsed in a name other than that given as payee, it is negligent and payment is made at its peril. In the case of a check payable as above stated, the difference is so slight as to create doubt that refusal to pay on that ground alone would be justified. (*Inquiry from Iowa, Aug., 1915.*)

Faulty indorsements

Obliteration of indorsement by stamping one over another

1889. Is a bank justified in returning a check for proper indorsement where, because of several machine and rubber-stamp indorsements stamped over each other, it is impossible to read them? *Opinion*: When an indorsement is obliterated or made illegible so that the name of the indorser cannot be read, it would seem reasonable to construe the instrument as if it bore no indorsement, and a bank would apparently be justified in returning the same to the sender to have it properly indorsed. (*Inquiry from Fla., Dec., 1917.*)

Technical defect in indorsement

1890. A check drawn by D. Smith, payable to himself, was certified and paid by the drawee, after the same had been presented by the Blank National Bank, bearing the following indorsement: "Pay to the order of J. Hinds, Attorney, D. Smith. Deposit to the credit of J. Jones, Trustee, J. Hinds, Attorney. Pay any bank or banker, Blank National Bank." *Opinion*: There is a technical defect in Hinds' indorsement, which does not show that the deposit is to be credited in the Blank National Bank. The drawee would probably be safer in paying if the check was indorsed for deposit in the Blank National Bank to the credit of Jones, Trustee. It would not be necessary for the Blank National Bank to show by its indorsement that the deposit was properly credited as a condition precedent to receiving payment of the check. (*Inquiry from Pa., July, 1911, Jl.*)

Individual signing for company without official designation

1891. May a drawee bank return a check indorsed, "John Doe Produce Company by

John Brown" without the official designation of the person signing the indorsement where the check is further indorsed, "Prior indorsement guaranteed?" *Opinion:* It is within the right of the drawee bank to refuse payment and return the check where the indorsement of a payee corporation is made by an individual without official designation and there is no proof that the individual has authority to indorse for the company. But the words, "Prior indorsement guaranteed", by the collecting bank correct this, it being a guaranty that the indorsement of the payee is sufficient and made by one in authority and upon that guaranty. The efficacy of such a guaranty of indorsement is to facilitate the payment and obviate the delay in sending the check back. The drawee, however, is not obliged to pay on the guaranty. (*Inquiry from Ala., March, 1920.*)

Check to "A & Co.," indorsed "A & Co., Inc."

1892. (1) Would it be safe to pay a check made payable to John Brown & Company and indorsed John Brown & Company, Inc., or made payable to John Brown & Company Inc., and indorsed John Brown & Company? (2) Has the word "Limited" the same effect as "Inc?" *Opinion:* (1) The Negotiable Instruments Act (Sec. 73 N. Y. Act) provides that "where the payee or indorsee is wrongly designated or misspelled, he may indorse the instrument as therein described, adding, if he think fit, his proper signature." It seems that it would be safe to pay a check made payable to John Brown & Co. and indorsed John Brown & Co., Inc., if the bank knows John Brown & Co., Inc., is identical with John Brown & Co., but it would be better to send the check back for correction. John Brown & Co., Inc. indicates a corporation. It appears on the face, therefore, they are not the same parties, and it would require outside evidence to show that they were. The same also applies where the check is made payable to John Brown & Co., Inc. and indorsed John Brown & Co. The payee indicates a corporation, and the indorsement a partnership. (2) The word "Limited" denotes a limited partnership. (*Inquiry from N. Y., Oct., 1914.*)

Drawee not obliged to pay on guaranty of defective indorsement

1893. A check payable to J. E. Doe was indorsed Elmer Doe by mistake; the indorsement was guaranteed, and, when pre-

sented, payment of the check was refused. *Opinion:* Where the indorsement of the payee is defective, the drawee is not obliged to pay upon the guaranty of the indorsement. If the drawer withdrew his account before the check was properly presented, the loss, if any, would fall upon the owner of the check, who could recover against the drawer. *Harden v. Birmingham Tr., etc., Co. (Ala.) 55 So. 943. (Inquiry from Ill., Dec., 1913, Jl.)*

Check returned for defective indorsement not a lien on funds

1894. A drawee returned a check because of improper indorsement. Did it have a right to pay other checks between the time of the first and the second presentment? *Opinion:* The bank had such right. It had not accepted the check, and, unless properly and satisfactorily indorsed, there was no obligation on its part to pay it. The presentment of the check in the first instance did not constitute any lien on the funds of the drawee or place it under any obligation to hold these funds for that particular check. (*Inquiry from Ill., March, 1913.*)

Drawee not liable to holder for refusal to pay or certify

1895. A bank inquires if it would be liable for loss sustained by the holder of a check, which had been refused by the bank on account of faulty indorsement, and the account withdrawn before the indorsement could be corrected and the check again presented, provided the holder of the check had requested same to be certified, and certification refused for the reason this was not requested by the drawer of the check. *Opinion:* The drawee of a check is not obliged to pay same on faulty indorsement nor is it obliged to certify such a check at request of the holder as the bank's only obligation is to pay. Of course, it may certify, but this is optional. It would follow that, if the drawer withdrew his account before the indorsement was corrected and the check again presented, the holder would have no recourse on the bank but would have to look to the drawer and any prior indorser solely for redress. (*Inquiry from Cal., Jan., 1915.*)

Certification of defectively indorsed check or payment on guaranty

1896. Is it proper for a drawee bank to certify a check and return it for proper indorsement, when it is payable to "E. C.

Jones," indorsed, "E. C. Jones Sign Company," and further indorsed, "Pay to the order of any bank or bankers. Prior indorsements guaranteed?" *Opinion:* Legally, the drawee bank is entitled to proper indorsement before paying a check, and may rightfully refuse to pay where the indorsement is defective or missing. (*Harden v. Birmingham Trust & Sav. Bank [Ala.] 55 So. 943.*) But with some banks it is customary for drawee to certify before returning check for proper indorsement, so as to save the fund to the holder, and some banks will pay upon a guaranty of prior defective indorsements. (*Inquiry from N. Y., July, 1919, Jl.*)

Drawee's right to require guaranty

1897. A check is drawn by a customer on his bank in Oregon, payable to a Brick and Tile Company of Newark, New Jersey, and by them indorsed to the Blank National Bank of Newark, who in turn indorse with the usual form, "Pay to any bank or banker or trust company. All prior indorsements guaranteed. Blank National Bank." Other indorsements by a national bank and the Federal Reserve bank, both of New York, and by the Federal Reserve bank of San Francisco, follow, all making their indorsements read substantially the same as the first indorsement with the exception that the last named indorsement makes the check payable direct to the Wells Fargo Express Company, guaranteeing all previous indorsements. The local agents of the express company indorse without guaranteeing prior indorsements and present the check to the Oregon bank for payment. The bank as a condition of payment, requires the express company to guarantee prior indorsements. *Opinion:* The express company, appearing from the indorsements to be only an agent for collection, the bank is entitled to a guaranty of prior indorsements as a prerequisite to making payment and, in the absence of such guaranty, the bank is justified in refusing payment without incurring responsibility to the drawer of the check. *Bk. of Ind. Ter. v. First Nat. Bk. (Mo.) 83 S. W. 537, First Nat. Bk. v. Savannah Bk., etc., Co., (Ga.) 68 S. E. 872. First Nat. Bk. v. City Nat. Bk., 182 Mass. 130. Nat. Park Bk. v. Seaboard Nat. Bk., 114 N. Y. 28. Nat. Park Bk. v. Eldred Bk., 90 Hun (N. Y.) 285. (Inquiry from Ore., March, 1917, Jl.)*

Liability of collecting bank

1898. Is a presenting bank liable to the

drawee bank for loss from improper indorsements? *Opinion:* If the presenting bank appeared on the check only as agent for collection it would not be liable for a prior forged, unauthorized or defective indorsement after payment of the proceeds to its principal unless it expressly guaranteed prior indorsements; but if the check was indorsed over to the presenting bank in unrestricted form so that the presenting bank was the apparent owner, such bank would be liable to the bank of payment. (*Inquiry from Ark., March, 1915.*)

Recovery by drawee of money paid upon irregular indorsement

1899. Is a bank cashing a check payable to W. Jones on the indorsement of H. Jones liable to refund the amount of the check to the drawee bank who paid it? *Opinion:* The fact that the drawee bank paid the check, charged it up to the drawer and returned it to him with cancelled vouchers does not estop it from its right of recovery of the money paid, where the drawer refuses to be charged with the check because it is not indorsed by the payee but by another man, named Jones, with different initials. There are two theories upon which the bank receiving the money is liable to refund it: (1) that by its indorsement it guarantees the genuineness and sufficiency of prior indorsements, which warranty, where the payee's indorsement is missing, would include a warranty of title; (2) that, irrespective of warranty of indorsement and of title, the bank or person receiving the money on a check to which it had no title is liable to refund as for money had and received without consideration. (*Inquiry from Okla., Aug., 1919.*)

Guaranty of prior indorsement

Necessity for special guaranty of prior indorsements

1900. What is the necessity of a special guaranty such as, "Prior indorsements guaranteed?" *Opinion:* The Negotiable Instruments Law codifies the rule of the law merchant by a provision that "every indorser who indorses without qualification warrants to subsequent holders in due course . . . (1) that the instrument is genuine and in all respects what it purports to be; (2) that he has a good title to it; (3) that all prior parties had capacity to contract; and (4) that he has no knowledge of any fact which would impair the validity of the instrument or render it valueless . . ."

The above provision, in a case where an owner indorses an instrument to an indorsee for value, would fully protect the latter in case of forgery or insufficiency of prior indorsements, but the necessity in many cases of a special guaranty such as, "Prior indorsements guaranteed," is because of two reasons: (1) where the paper is held by a bank under an indorsement showing it to be an agent for collection, the bank's own indorsement is not a warranty of genuineness, it being merely agent and not owner of the paper; (2) the indorser's warranty provided by the Negotiable Instruments Law runs only to subsequent holders in due course and the definition of a holder in due course as given by that law does not include the drawee. For these reasons, special guaranties, such as "Prior indorsements guaranteed," are put upon instruments by collecting banks in order to induce payment by the drawee and provide it with a right of recourse upon the bank making the guaranty in case such prior indorsements are forged, unauthorized or otherwise insufficient. (*Inquiry from Kan., Jan., 1921.*)

Guaranty of indorsement of payee manifestly not genuine

1901. Must a drawee bank pay a check on which the payee's indorsement is manifestly not genuine, where the presenting bank guarantees prior indorsements? *Opinion:* The drawee bank is not obliged to pay such check. Of course, it may do so, but it is not compulsory, as the bank is entitled to a proper and genuine indorsement before making payment. (*Inquiry from Ill., May, 1915.*)

Collecting bank not negligent for failure to guarantee prior indorsements

1902. A check indorsed by payee, "John Doe per J. B." was deposited in bank A for collection. The check was indorsed by that bank, "Pay to the order of bank B," and forwarded to the drawee bank, where payment was refused because of the improper indorsement of payee. The drawee then had sufficient funds in bank to meet the check. Bank A reindorsed the check, "First indorsement guaranteed," and, upon presentation, drawee bank again refused payment upon the ground that in the meanwhile the drawer's funds had been attached by creditors. Should bank A in the first instance have expressly guaranteed the payee's indorsement? *Opinion:* Bank A, being the agent for collection, was under

the duty of using reasonable care and diligence in effecting it. It did indorse the check by a straight or special indorsement but the provision of the Negotiable Instruments Act (Sec. 66) that every indorser who indorses without qualification warrants to all subsequent holders "in due course" genuineness, etc., does not include a drawee. It is customary in many cases for collecting banks to expressly guarantee prior indorsements but it is not part of their duty to do so and the only case where such express guaranty is necessary for the protection of the drawee is where the indorsing bank receives the paper under an indorsement for collection which shows it to be an agent and not owner. As bank A received the check under indorsement of payee in blank, it is apparent owner of the check, there was no necessity for an express guaranty, and in any event, not being bound to guarantee expressly the prior indorsement of payee, the latter could not hold it negligent for not doing so. See *Rossi v. Nat. Bank of Commerce*, 71 Mo. App. 150, *Muller v. Nat. Bank of Cortland*, 96 N. Y. App. Div. 71; *First Nat. Bank v. City Nat. Bank*, 182 Mass. 130, 65 N. E. 24. (*Inquiry from Ill., March, 1913.*)

If collecting bank owner, real or apparent, special guaranty not necessary

1903. In case of the indorsement of a check by the payee, "John Jones by E. C. C.," or the indorsement of the payee, "Jones Motor Company," without any officer's name below, can the drawee bank safely pay where the check bears the regular indorsement of a reputable bank? If the bank added, "All prior indorsements guaranteed," would this increase its responsibility? *Opinion:* The Negotiable Instruments Act provides that every indorser warrants "to all subsequent holders in due course" the genuineness of the indorsement, that he has good title, and that prior parties had capacity to contract. The indorsing bank, therefore, assuming it to be owner of the check, real or apparent, would be responsible if there was anything wrong in the payee's indorsement to any subsequent holder in due course, but technically the drawee bank is not a holder in due course as defined by the Act and it is doubtful whether these warranties provided by the Act would extend to the drawee which pays the check. However this may be, should the payee's indorsement be forged or unauthorized, the

drawee would have a right of recovery from the owner receiving payment on the ground of money paid without consideration under mistake of fact. The liability of a reputable bank owner, collecting the check, would doubtless be sufficient protection for drawee bank without any special guaranty. If, however, a check is indorsed to a bank for collection, it would not be so liable, being only an agent of the owner, and in that case it would be desirable to require that the prior indorsements be guaranteed. Such a guaranty, it has been held, would make the bank responsible to the drawee for the genuineness and sufficiency of the indorsements. (*Inquiry from Neb., July, 1913.*)

Special guaranty by collecting bank where prior bank makes no guaranty to it

1904. A bank acting as collecting agent received a check indorsed by Payee, "Pay to the order of bank A," then by banks, "Pay to bank B or order," and, "Pay to the order of any bank or banker." Can it safely specifically guarantee indorsement to the drawee bank? *Opinion:* As the collecting bank is a mere agent and not a holder in due course, the implied warranty of genuineness to subsequent holders in due course given by the second indorsement does not extend to it, nor is there any implied guarantee of prior indorsement running to it, because of third indorsement, which is not in title-conveying form. Having no title, therefore, should the drawee request it to guarantee prior indorsement as a prerequisite of payment, the bank would be justified in requiring its correspondent to guarantee to it the prior indorsement before doing so itself. As a rule, whether the check should be sent back for that purpose or protested depends upon circumstances. If the payee's indorsement is so defective as to justify the drawee bank in refusing to pay on that ground, it might be the correct procedure to send it back. But if the indorsement is sufficiently regular to authorize payment, and the drawee bank insists upon a special guaranty from the collecting bank, it would be the safer course to protest the check. See *Rossi v. Nat. Bank of Commerce*, 51 Mo. App. 150. *First Nat. Bank v. City Nat. Bank*, 182 Mass. 130, 65 N. E. 24. (*Inquiry from Ohio, March, 1911.*)

Legal effect of indorsement, "Pay any bank, banker or trust company, all prior indorsements guaranteed"

1905. What is the effect of the indorse-

ment, "Pay to any bank, banker or trust company," without "All prior indorsements guaranteed?" *Opinion:* The majority of courts (some contra) hold an indorsement "Pay any bank or banker," creates an agency in the indorsee and is not a title-conveying form of indorsement. Where a bank holds a check for collection as agent and the payee's or other prior indorsements have been forged or unauthorized and the payor bank, which cannot charge the amount against the drawer's account, seeks to recover the money back, the agent bank would not be liable to the payor, after it had remitted the proceeds to its principal unless it had specially guaranteed the prior indorsement. When a bank is the owner of the instrument, or apparently so, by reason of an unrestricted title-conveying form of indorsement to it, it would not make much difference whether or not it did so. But where a bank holding a check for collection as agent sends the same to another bank without express guaranty of indorsements, the payor will sometimes refuse to pay unless prior indorsements are guaranteed, and the bank to whom the check is sent will be unwilling to make such a guaranty unless the bank from which it received the item will also guarantee, and the check will consequently be sent back for special guaranty. Where a check is payable at a bank and after payment the bank discovers the payee's indorsement is a forgery, its recourse, where special guaranty of indorsements is omitted, would be against the owner of the instrument. (*Inquiry from Ill., May, 1911.*)

Collecting bank not liable to drawee for money collected on forged indorsement, unless guaranteed

1906. Is a bank liable to the drawee where it collects money on a check bearing a prior forged indorsement, unless it expressly guarantees the prior indorsement? *Opinion:* Where a bank is real or apparent owner of a check upon which a prior indorsement is forged, such bank would be liable to the drawee not by reason of any express guaranty of the prior indorsement, but because of having received the drawee's money without consideration, as to which the law raises an implied promise to refund. But where the bank holding the check bearing a prior forged indorsement is not the owner but agent for collection only, as is indicated by a restrictive indorsement to it, such bank would not be liable to the drawee to refund the money after it had paid the same over

to its principal unless it expressly guaranteed the prior indorsement. (*Inquiry from N. Y., Aug., 1916.*)

Owner bank liable to drawee for money collected on forged indorsement without guaranty

1907. Does the plain indorsement of a bank guarantee prior indorsements where words of guaranty do not appear? *Opinion:* The payor bank looks to the bank receiving payment in case there is anything wrong with the prior indorsements on the check. If the bank receiving payment appears from the indorsements to be the owner of the check, that is, if the prior indorsements including the indorsement to it are unrestricted or title-conveying, then, such bank, as owner, is responsible to the drawee bank for money received, in case where forgery of indorsement or other defect makes the payment invalid or not chargeable to the depositor. In such case there is no necessity for special guaranty of previous indorsements, as the responsibility of the receiving bank is sufficient. But in any case where the bank receiving payment has taken the check under restrictive indorsement, such as, "Pay any bank or banker," or, "For collection," etc., so that such bank appears as agent for collection, and not owner of the check, then it is necessary that the collecting bank expressly guarantee the previous indorsements, as, without such guaranty, it would not be liable for the money received on a check bearing a prior forged indorsement, after payment over of the proceeds to its principal. (*Inquiry from Tenn., Sept., 1914.*)

Guaranty of prior indorsements covers rubber-stamp indorsement

1908. Does the guaranty of "All prior indorsements" of a draft include a rubber-stamp indorsement by the payee, without the hand-written suffix of an officer's signature to indicate by whom the rubber stamp was affixed. *Opinion:* An indorsement by rubber-stamp is legal and valid. When proved to be stamped by one with authority it will pass title. The guaranty will cover the rubber-stamp indorsement. (*Inquiry from Ohio, Oct., 1918.*)

Liability of collecting bank on guaranty

1909. A certified check payable to the "Borough of X" was presented bearing the indorsement of the "Borough of X, by its attorney, John Smith," and payment was refused because of the improper indorse-

ment. The presenting bank then stamped the check, "Indorsement guaranteed," stating that it was satisfied that the attorney was duly authorized to indorse. The Borough of X claimed that John Smith's indorsement was unauthorized and that he misappropriated the funds. *Opinion:* The presenting bank is liable on its guaranty to the drawee who paid on faith of such guaranty, which covers the capacity of John Smith to indorse. Second Nat. Bk. v. Guarantee Tr., etc., Co., 206 Pa. 616. (*Inquiry from Pa., Oct., 1910, Jl.*)

1910. A check payable to John Doe & Co. was indorsed, "John Doe & Co., James Roe, Treasurer, per G.," and it was stamped, "Pay to the order of any bank, etc.; prior indorsements guaranteed," by the City Trust Company. *Opinion:* The indorsement by the City Trust Company, which is the customary bank indorsement, was a sufficient guaranty of the genuineness and validity of the prior indorsement, and would protect the paying bank in event the payee's indorsement was unauthorized. Sec. Nat. Bk. v. Guarantee Tr., etc., Co., 206 Pa. 616. (*Inquiry from Pa., Feb., 1911, Jl.*)

1911. A drawee bank paid a check upon which an indorsement was forged. Two banks had subsequently indorsed with the words "Previous indorsements guaranteed." *Opinion:* The words "previous indorsements guaranteed," are an express guaranty of the validity of prior indorsements and the bank which pays a check bearing a prior forged indorsement may recover of the guarantor. (*Inquiry from Okla., March, 1911, Jl.*)

Guaranty of prior indorsement—clearing-house stamp

1912. Section 8 of the constitution of the New York Clearing House Association reads as follows: "Members shall not send through the exchanges any checks, drafts, notes, bills of exchange, or other items having thereon any qualified or restricted indorsement, such as, 'For collection,' or 'For account of,' or 'Pay any bank or banker or order,' or other similar indorsements, unless all indorsements thereon are guaranteed by the member of the association sending such items through the exchanges." A committee, preparing a new constitution for the Seattle Clearing House, asks whether there is any legal advantage in having such indorsements specifically guaranteed, rather than having a clearing-house stamp carrying full guarantee of all prior indorsements.

Opinion: The quoted provision of the Constitution of the New York Clearing House followed decisions by the New York courts to the effect that where a check was raised or the indorsement forged and the item was indorsed to a bank for collection, the indorsee, appearing as agent only, was not responsible to the payor bank after it had paid over the proceeds to its principal. It appears that the Seattle committee has under consideration a provision to the effect that the clearing stamp placed on all items presented through the Clearing House by a member bank shall embrace a guaranty of prior indorsements. In such case there appears to be no necessity for adopting the provision quoted, for the stamp would embrace not only a guaranty of prior indorsements where the member using the stamp was an agent only—which is the whole situation covered by the New York rule—but it would also cover cases where the member bank received the item under restricted indorsement, by which it became the real or apparent owner of the paper. (*Inquiry from Wash., Feb., 1917.*)

Right of drawee to require guaranty from collecting agent

1913. A check was presented to the drawee bank by an express company, an agent for collection, which refused to guarantee the indorsements on the check. The drawee bank refused to pay the check until such guaranty was given. *Opinion:* The drawee bank has a right to require such guaranty as a prerequisite of payment, and its refusal will not subject it to liability to the drawer for dishonoring his check. Pratt v. Union Nat. Bk. (N. J.) 75 Atl. 313. Goodfellow v. First Nat. Bk. (Wash.) 129 Pac. 90. Mechanics Nat. Bk. v. Harter (N. J.) 44 Atl. 715. Murphy v. Met. Nat. Bk. (Mass.) 77 N. E. 693. Shipman v. Bk. State of N. Y., 126 N. Y. 328. Russell v. First Nat. Bk. (Ala.) 56 So. 871. Lieber v. Fourth Nat. Bk. (Mo.) 117 S. W. 672. (*Inquiry from Tenn., Nov., 1915, Jl.*)

Payment by drawee on guaranty

1914. A check drawn payable to "John Jones" is indorsed "John Jones Milling Company," and is indorsed by a bank, "Prior indorsements guaranteed," and mailed to the drawee. *Opinion:* The drawee can pay if it chooses, relying upon the guaranty. Due diligence or courtesy to the sending bank does not require paying bank to return the item for proper indorsement, as

presumably the item has been forwarded with knowledge of the irregularity, and in the hope that it will be paid upon the guaranty. Elias v. Whitney, 50 Misc. (N. Y.) 326. (*Inquiry from N. J., Oct., 1912, Jl.*)

Collecting agent not liable unless prior indorsements guaranteed

1915. What hold would a paying bank have on a bank which merely stamped its checks, and did not guarantee prior indorsements? The stamp carries simply the name of the bank and the date. *Opinion:* A bank collecting money upon a check bearing a forged indorsement, without guaranteeing prior indorsements, would be liable to the payor, provided it appeared as owner of the instrument. If the indorsement to it was merely as agent for collection, it might not be liable after turning over the proceeds to its principal, and in such case the payor should require guaranty of prior indorsements. (*Inquiry from Mass., Jan., 1919.*)

Guaranty of prior indorsements does not cover fraud of payee

1916. The bank guaranteed the prior indorsements and collected from the drawee. The payee obtained the check from the maker by fraud. *Opinion:* The guaranty of prior indorsements would not make the collecting bank liable. The indorsement does not warrant that the payee is free from fraud. (*Inquiry from Ala., March, 1912.*)

Guaranty covers unauthorized as well as forged indorsements

1917. A check payable to Mrs. John Doe is indorsed without authority, "Mrs. John Doe by John Doe," and the bank which cashed the item indorsed, "All prior indorsements guaranteed." The drawee bank paid the check and Mrs. Doe did not receive the money. *Opinion:* "All prior indorsements guaranteed" warrants genuineness of the payee's indorsement, not only where the name of the payee is forged, but also where the payee's name is signed without authority by another. Wellington Nat. Bk. v. Robins, 71 Kan. 748. Sec. Nat. Bk. v. Guarantee Tr., etc., Co., 206 Pa. 616. (*Inquiry from Kan., May, 1912, Jl.*)

1918. A check is indorsed by the payee, "Pay to the order of the treasurer of Alpha Chapter No. 134, J. A. Smith." The check bears the further indorsement, "John Doe," who is the treasurer of the chapter, and the presenting bank's indorsement, "Prior indorsements guaranteed." Is the indorse-

ment "John Doe" sufficient? *Opinion*: There is no absence of indorsement, as the treasurer of the chapter, to whom the check is by indorsement made payable, has indorsed the instrument. The most that might be urged against such form of indorsement is that it is incomplete, in that he fails to designate the capacity in which he acts as indorser. That simply resolves itself into the question of proof of authority of the treasurer to indorse and transfer the paper. A guaranty of prior indorsements covers not only genuineness of the prior indorsements, but also the authority of the prior indorser. The payee bank would be justified in paying this check, relying on the guaranty. As a matter of strict law, however, if the payor bank chooses to stand on its rights, it would not be compelled to pay if dissatisfied with the guaranty, but could send the check back for proper indorsement. A bank is obliged to pay only upon due presentment, and the presenting of an incompletely indorsed check would not be held as such. (*Inquiry from Mass., Oct., 1916.*)

1919. Does the customary guaranty of prior indorsements cover the authority of a person other than the payee to indorse the latter's name per his own? *Opinion*: The authority of such an agent is covered by the indorsement. *McKinnon v. Boardman*, 170 Fed. 920. (*Inquiry from Tex., Sept., 1919, Jl.*)

1920. A check is presented payable to A and bearing the indorsement of "A by B." It is also indorsed by the presenting bank, "All prior indorsements guaranteed." *Opinion*: The drawee is safe in paying the check. "All prior indorsements guaranteed" warrants the genuineness of payee's indorsement, not only where the name of payee is forged but also where payee's name is signed without authority. *McKinnon v. Boardman*, 170 Fed. 920. (*Inquiry from N. Y., Sept., 1912, Jl.*)

1921. A certificate of deposit payable to John Jones bore the indorsement of "John Jones by Mary Jones." The collecting bank indorsed it, "All prior indorsements guaranteed." *Opinion*: The payor would be protected in paying, as the guaranty by the collecting bank is sufficient to cover the authority of Mary Jones to indorse. (*Inquiry from Wis., Sept., 1913, Jl.*)

1922. Does the guaranty of "All prior indorsements" include the unauthorized indorsement of the payee, "A. K. Co. by

W. M. G"? *Opinion*: A guaranty of prior indorsements includes the authority of B to indorse "A by B," A being the payee. *McKinnon v. Boardman*, 170 Fed. 910. (*Inquiry from Fla., Dec., 1918.*)

Guaranty covers imperfections and irregularities

1923. What is the effect of the phrase, "Prior indorsements guaranteed," stamped on a check by an indorser? *Opinion*: The stamp guarantees the genuineness of prior indorsements, and covers imperfections and irregularities therein. *Jordan-Marsh Co. v. Nat. Shawmut Bk., (Mass.) 87 S. E. 740.* (*Inquiry from W. Va., May, 1909, Jl.*)

"*Indorsement O. K., James Smith*" is guaranty

1924. A check was indorsed, "Geo. Brown," and then indorsed "Indorsement O. K., Jas. Smith." What is Smith's liability? *Opinion*: Smith's indorsement is a warranty of the indorsement of payee Brown, which would render Smith liable to the bank that cashed the check for Brown on faith of Smith's indorsement. (*Inquiry from N. Y., Jan., 1915.*)

Successive guaranties of prior indorsements

1925. Is it safe for a drawee bank to pay a check indorsed as follows: (1) G. L. T. per W. R. T., indorsement guaranteed; (2) Prior restrictive indorsements guaranteed; (3) Previous indorsements guaranteed? *Opinion*: If the payee's indorsement was forged or unauthorized, the second and third indorsers would be liable. The second guarantees the prior one, and the third guarantees the second indorsement. It would be safe to pay the check. (*Inquiry from W. Va., July, 1917.*)

Guaranty of previous indorsement—Does it cover missing indorsement?

1926. Are the stamped words by indorsing bank, "All previous indorsements guaranteed," sufficient to cover a missing indorsement of the payee or indorsee? *Opinion*: It seems there are no decided cases wherein the specific question has been determined whether the words "Indorsement guaranteed" or "Previous indorsements guaranteed" operate as a guaranty of an absent or missing indorsement. In *McKinnon v. Boardman*, 170 Fed. 920, where there was an unauthorized indorsement of the payee's name, "Morgan J. O'Brien per Charles W. Morse," a guaranty of indorse-

ment was held to cover the authority to indorse and make the guarantor liable. But in the instant case there is no indorsement. In the absence of judicial precedent it seems safer to require a guaranty specifically worded, "Prior indorsements including missing indorsements, guaranteed," although it is possible that such guaranty, i. e., a simple guaranty of indorsement, would, if the question came up squarely for judicial determination, be construed as possessing equal strength. (*Inquiry from Mich., March 1919.*)

Guaranty, where indorsement missing, that payee's account credited

1927. A check is presented for payment which does not bear the indorsement of the payee. However, it contains a guaranty by the bank that the amount has been credited to the payee coupled with an indorsement of the bank. *Opinion:* It seems that the bank could safely pay the check because of the guaranty that the payee has received the money by credit to his account. (*Inquiry from Ind., April, 1920.*)

Guaranty of indorsement by owner as commercial indorsement

1928. A discount corporation purchases bankers' acceptances outright, then resells them to individuals, firms or corporations that take them without any guaranty or liability other than the words, "Indorsements guaranteed" and the corporation's signature. Is this simply a contract guaranteeing the indorsements, or does the corporation become an indorser and, as such, assume liability? *Opinion:* The United States Supreme Court (11 Otto, 68) once held that a bank, owning a note, which indorsed thereon a guaranty of payment and transferred it, did not indorse the note in the commercial sense, and that the contract was one of guaranty and not an indorsement. But the majority of courts hold the other way. See *Hendrix v. Banhard Bros.*, 75 S. E. (Ga.) 588 (and cases cited), where the payees of a note wrote a warranty on the back over their names, and the court held that this was not a mere contract of guaranty but operated also as an indorsement. The majority of jurisdictions would hold that the corporation placing its name upon negotiable paper owned by it under the words "Indorsements guaranteed," not only guarantees the indorsements but indorses the paper and is liable as indorser. (*Inquiry from N. Y., Feb., 1919.*)

The "paid" stamp

"Paid" stamp of collecting agent not a guaranty of prior indorsements

1929. Will a "paid" stamp on checks and drafts protect a drawee bank as to prior indorsements, and will it transfer title to a check indorsed "Payable to the order of any bank or banker?" *Opinion:* Where a bank is the owner or apparent owner of a check or draft, its "paid stamp," or the fact that it received payment without the "paid stamp," renders it liable in the event that a prior indorsement was a forgery, or that there was some defect or irregularity in the check; and this, on the ground that it received money to which it was not entitled and as to which the law raises an implied promise to refund. The indorsement "Pay any bank or banker" is not title-conveying, and after the money is paid over to the principal the bank agent is not liable to the payor bank. The "paid" stamp, put on by a collecting agent, does not guarantee prior indorsements. The payor bank should require an express guarantee of prior indorsements. (*Inquiry from Neb., Feb., 1919.*)

1930. Does a "paid" stamp guarantee all previous indorsements and the title of the indorsing bank to the check whether or not any of the previous indorsements are irregular? *Opinion:* The bank receiving payment which puts its "paid" stamp upon a check or certificate of deposit is responsible to the payor bank for a prior forgery, except as to the drawer's signature, or for an irregularity of indorsement, provided such bank is the real or apparent owner of the instrument, that is to say, where none of the prior indorsements have been restrictive. The courts hold that such owner impliedly warrants genuineness in all respects (save as to drawer's signature), including its own title and right to receive payment, and if this warranty is broken it is liable to the payor bank. If there is a restrictive indorsement so that the bank collecting the instrument is only an agent for collection and not the owner, no such implied warranties arise from the indorsement of such agent, and herein is the necessity for the special guaranty of indorsement stamp. The "paid" stamp of a collecting agent is simply an acknowledgment of receipt of payment and does not guarantee prior indorsements. (*Inquiry from Mont., Oct., 1915.*)

1931. A check is presented through a bank in regular course for clearance bearing

its paid stamp on the back. Should this be considered a legal indorsement or should it be stamped with indorsement stamp which guarantees all prior indorsements? *Opinion:* Where the presenting bank receives the money on a check bearing a forged indorsement from the paying bank, the presenting bank stamping the check with its paid stamp, it would be liable to refund to the paying bank in the event the indorsement to it was in title-conveying form so that it appeared as owner of the instrument. It would be so liable even though it did not indorse the check at all, but if the presenting bank received the check under a restrictive indorsement so that it did not appear to be the owner but only as agent for collection, it would not be liable after it had paid over the money to its principal; and in such case to create a liability it should especially guarantee the prior indorsements. It would then be liable upon its guaranty. The "paid" stamp of a collecting agent is not a guaranty of prior indorsements. See *White v. Continental Bank*, 64 N. Y. 316. (*Inquiry from Miss., Aug., 1919.*)

"Paid" stamp may constitute guarantee by clearing-house agreement

1932. Does the "paid" stamp of a collecting bank guarantee prior indorsements? *Opinion:* If the collecting bank holds a check under a restrictive indorsement, so that it is a mere agent, there is no responsibility to the drawee for money collected after the proceeds are paid over to its principal, where a prior indorsement is forged or unauthorized. In such a case a special guaranty to the drawee would be necessary and the word "paid" would not constitute such a guaranty unless it was made such by clearing-house rule. If the bank which receives payment owns the check, or holds it as apparent owner under an indorsement to it in full (i. e., unrestricted), then, in case the prior indorsement was forged or unauthorized, it would be responsible to the drawee for money received without consideration, and paid under a mistake of fact, and this responsibility would exist without any special guarantee of indorsement, or, in fact, whether it indorsed the check at all. (*Inquiry from Ohio, April, 1911.*)

Liability of bank stamping "Paid through clearing house" for irregularity of indorsement

1933. Where checks bearing irregular

indorsement are presented through the clearing house, does the bank using the stamp "Paid through the clearing house" make itself liable for all items so stamped by it? *Opinion:* If the item is indorsed unrestrictedly to the member bank, so that it holds title to item as apparent owner, then, in the event of any irregularity in the indorsement amounting to lack of authority to order payment, the presenting bank would be responsible for having received money to which it was not entitled; but if the item is indorsed to the bank restrictively, so that it holds the item as agent and not as owner, there have been decisions to the effect that the agent bank is not liable after it turns over the proceeds to its principal. The New York Clearing House has a rule that items bearing restrictive indorsements shall not be presented through the clearings unless all indorsements are guaranteed by the presenting bank. (*Inquiry from Ohio, March, 1920.*)

Restrictive indorsement

Restrictive indorsee cannot negotiate

1934. John Smith drew a draft on the Brown Manufacturing Company, payable to the X bank. The draft was cashed for Smith by the X bank but only upon the indorsement of John Jones, to whom Smith was known. Afterwards Jones, becoming suspicious of Smith, had him refund to the bank. The draft was returned to Smith, but through error it contained uncanceled indorsements of the X bank, "Pay to the order of any bank, etc.," and of John Jones. Smith succeeded in cashing the check at the Y bank, which regarded the indorsement of the X bank as a virtual certification. The draft having been dishonored by the Brown Manufacturing Company, the Y bank now seeks to hold the X bank and John Jones liable. *Opinion:* The indorsement placed upon the draft by the payee, the X bank, was restrictive. It did not purport to pass any title to the draft, but was simply an authority to any bank to collect it. The restrictive indorsement being first upon the draft, Jones, whose name appeared under that of Smith, could at most be regarded only as a successive agent to collect with no authority to negotiate. (*Inquiry from N. C., June, 1909, Jl.*)

"Pay bank of X only"

1935. A four months' sight draft after acceptance by the drawee is held by the collecting bank of Y, to whom it was trans-

ferred by an unqualified indorsement. The drawee desires to discount the draft before maturity and the collecting bank seeks advice as to the proper form of indorsement, to be made by it to the drawee to protect itself against any fraudulent transfer to a holder in due course. *Opinion:* The indorsement "Pay bank of X only", is a form which would transfer title and restrict the further negotiability of the instrument. (*Inquiry from Cal., June, 1917, Jl.*)

"Pay to order of A for collection on account of X"

1936. A note payable to the X Manufacturing Company was indorsed by the payee as follows: "Pay to the order of A for collection on account of the X Mfg. Co., X, Treasurer." B, the indorsee of A, presented the note to a bank for discount. *Opinion:* The bank should not discount the note. The indorsement is restrictive and conveys no right to the holder to negotiate the instrument. (*Inquiry from N. Y., Sept., 1914, Jl.*)

"Indorsed only for exchange of draft to order of A"

1937. A check payable to John Doe was indorsed by the payee, "Indorsed only for exchange of draft to the order of John Doe." The check was cashed and forwarded for collection, with the usual indorsement guaranty. *Opinion:* The drawee bank was safe in paying check so indorsed, especially where the indorsement was guaranteed. The indorsement is more likely a conditional rather than a restrictive one. The signature of the payee, John Doe, in the indorsement is sufficiently made without further subscribing his name. (*Inquiry from S. C., June, 1914, Jl.*)

Indorsement, "Cleared through Bank B"

1938. What is the effect of the indorsement, "Cleared through B National Bank, Feb. 5, 1914" on a check drawn on bank A? *Opinion:* The indorsement of the B National Bank would indicate that the check had been collected by bank B from bank A through the clearing house. It would protect bank A in any case where the bank presenting the check appears to be owner by any title-conveying form of indorsement to it. In other words, assuming the indorsement of the payee is in blank or in the unrestricted form, "Pay to B National Bank," that bank would be the apparent owner of the check, and, as such, responsible to bank A for the genuineness of prior indorsements.

If a prior indorsement was forged, bank A would have recourse upon the B National Bank. Should the payee, however, indorse the check to the B National Bank, "For collection," or that should bank receive it under a form of indorsement, "Pay to any bank or banker," or any other form which would indicate that it was a mere collecting agent for the prior indorser, the indorsement, "Cleared through", etc., would not be sufficient protection for bank A, and that bank should insist upon a special guaranty of the genuineness of prior indorsements. (*Inquiry from Ohio, March, 1914.*)

Forms of indorsement—Discussed and construed

1939. Three checks are drawn payable to the order of "John Jones & Co.," and bear three indorsements, as follows: (1) "John Jones & Co., per John Jones;" (2) "Pay to the order of 2nd Nat. Bk., St. Paul, Minn., John Jones & Co.;" (3) "For credit of John Jones—John Jones & Co." All three are in rubber stamps. *Quære:* Is No. 1 a proper indorsement? Are Nos. 2 and 3 both restrictive indorsements? *Opinion:* 1. The courts have held that an indorsement by rubber stamp is valid; however, where used to pass title there must be some outside evidence of genuineness. The indorsement, "John Jones & Co., per John Jones", is a proper form of indorsement, but before advancing value on such a check the purchaser should be satisfied that John Jones had authority to indorse for John Jones & Co. If it was deposited in bank to the credit of John Jones & Co., the use of rubber stamp would be sufficient. 2. The indorsement, "Pay to the order of Second National Bank of St. Paul, Minnesota, John Jones & Co.," is not restrictive but a special indorsement. The Negotiable Instruments Act provides that "a special indorsement specifies the person to whom or whose order the instrument is to be payable." The indorsement is a title-conveying form of indorsement. 3. The indorsement, "For credit of John Jones. John Jones & Co.," on a check payable to John Jones & Co., might or might not be held restrictive. The courts are not in accord as to whether an indorsement, "For deposit to the credit of," is or is not restrictive. This indorsement is analogous to an indorsement "For deposit, John Jones & Co." It is doubtful whether, under such form of indorsement, the bank could negotiate it or do more than collect it. (*Inquiry from Minn., Aug., 1914.*)

Indorsement "for deposit"

1940. Is an indorsement "for deposit to the credit of" the depositor restrictive? *Opinion:* The majority of the courts so hold. Under Section 37 of the Negotiable Instruments Act "a restrictive indorsement confers upon the indorsee the right (1) to receive payment of the instrument, (2) to bring any action thereon that the indorser could bring, (3) to transfer his rights as such indorsee, where the form of the instrument authorizes him to do so." A bank of deposit should have no particular objection to an indorsement "for deposit" except that, under the rules of certain Clearing Houses, such indorsements are declared to be restrictive and the instrument not payable through the Clearing House unless prior indorsements are guaranteed. *Neg. Inst. L. (Comsr's. dft.), Sec. 36. Ditch v. Western Bk., 79 Md. 192. Beal v. City of Somerville, 50 Fed. 647. Haskell v. Avery, 181 Mass. 106. (Inquiry from Wyo., Oct., 1915, Jl.)*

1941. What is the effect of the indorsement stamp: "For deposit in the ——— Bank to the credit of John Doe & Co.?" *Opinion:* There is a conflict of decision in the courts of different states as to whether an indorsement for deposit is restrictive. Some courts hold that it is not title-conveying, but only an agent-creating indorsement; other courts hold that, under such indorsements, title passes to the bank. While the courts have differed respecting such indorsements, none have directly condemned its use. (*Inquiry from D. C., Sept., 1919.*)

Indorsement "for deposit" not a direction to drawee but to immediate indorsee

1942. A drawee bank refuses to pay checks indorsed, "For deposit only to the credit of B. Co.," with several subsequent indorsements, in the belief that this is a direction to such drawee. The bank writes: "We do not believe we can safely pay them in any other way than directed, that is, to credit their account, which, of course, is not what they want." Does this form of indorsement convey title? Is the drawee liable for a loss through the failure of any of the indorsers? *Opinion:* There is a conflict of authority as to whether this form of indorsement is a title-conveying or an agent-creating form. *Ditch v. Western Nat. Bank, 79 Md. 192*, holds that it is the former, and that a holder in due course takes free from equities between the depositor and his bank. Neither the majority nor the dis-

senting judges construed the indorsement as a direction to the drawee to deposit the money in its own bank to the credit of the depositor, but rather as a direction to the immediate indorsee bank. This indicates that the drawee bank is erroneous in its construction. In *Haskell v. Avery, 181 Mass. 105*, the indorsement, "For deposit in the C bank to the credit of D," was held to authorize the transfer by the C bank of the legal title, subject to the trust, to the bank or person ultimately called upon to collect. Whether or not the bank of deposit is named in the indorsement, the drawee has no trust or accountability in connection with the proceeds; it is under no duty to deposit the proceeds to the credit of the indorser. The drawee is not liable for a loss through the failure of any of the indorsers. (*Inquiry from Ohio, Aug., 1913.*)

Restrictive indorsement disclaiming liability for genuineness

1943. A savings bank is frequently called upon to take checks and certificates of deposit for collection, wherein the drawer or payee is unknown, and it takes and indorses them as follows: "Pay any bank or banker," etc., and underneath, "Drawer of this instrument unknown to the ——— Savings Bank," or, according to the circumstances—"Payee herein named unknown to the ——— Savings Bank," or "Indorsement does not warrant the genuineness of payee's signature." What is the legal effect of such indorsements? *Opinion:* An indorsement that the drawer or payee is unknown to the bank, and that the bank does not warrant the genuineness of his signature, would probably be sufficient to relieve the bank from liability in case of forgery. It is an express disclaimer of liability. It might be well, however, to have such instruments indorsed to the bank "for collection" or drawn to the bank "for collection," as this would clearly indicate to the drawee or subsequent holder that the bank was agent only and not owner of the paper. The New York courts hold that an agent bank is not responsible for genuineness after the proceeds of the check are paid over to the principal. (*Inquiry from N. Y., June, 1920.*)

Necessity for guaranty of prior indorsements by restrictive indorsee

1944. May a drawee of a check require restrictive indorsements to be guaranteed? *Opinion:* A restrictive indorsement is one

which makes the indorsee an agent to collect the paper, and it has been held by the New York courts that one holding a check as agent, under restrictive indorsement, is not responsible to the payor, where the amount has been raised or a prior indorsement forged, after the proceeds are turned over to his principal. For this reason it would seem to be necessary where a check is presented for payment by an agent under restrictive indorsement, that the latter guarantee prior indorsements. If there is no restrictive indorsement on the check and the collecting bank holds as apparent owner, it is responsible without any express guaranty for the return of the money received without consideration where a prior indorsement turned out to be forged. (*Inquiry from N. Y., Aug., 1915.*)

1945. Note: Many inquiries have been made asking whether a drawee which pays to an indorsee under the indorsement, "Pay any bank or banker" should require a guaranty of prior indorsements. Because it has been held by a majority of courts that such indorsement is agent-creating and not title-conveying, advice has been given that it is necessary for such drawee to require a special guaranty of prior indorsements if it desires to rely upon the responsibility of the collecting bank which holds the instrument under such restrictive form of indorsement. However, this advice can be modified to this extent—namely, that, in those jurisdictions as, for example, in Nebraska, where the indorsement, "Pay any bank or banker," has been held to be title-conveying, the necessity of such special guaranty can technically be dispensed with, as it will not give added protection to the drawee. Under such circumstances the special guaranty of prior indorsements will do no harm. (*May, 1921.*)

"Pay any bank or banker"

1946. Can a drawee bank look for reimbursement to the bank to which the check was paid bearing "Any bank or banker" indorsement, unless the instrument bears a special guaranty of such indorsement? *Opinion:* A line of decisions holds that a bank which collects a check bearing a forged indorsement or raised amount is liable to refund to the payor where the form of the indorsement indicates that the bank receiving payment was real or apparent owner, but that where the collecting bank holds under an indorsement "for collection," or other non-title-conveying forms, it is not liable to the payor for money so collected,

after payment over of the proceeds to its principal. (See *Nat. Park Bank v. Seaboard Bank*, 114 N. Y. 28, 20 N. E. 632, 11 Am. St. Rep. 612. *Nat. Park Bank v. Eldred*, 90 Hun. 285 [aff'd. 154 N. Y. 769, 49 N. E. 1101]. *Nat. City Bank v. Westcott*, 118 N. Y. 468, 23 N. E. 900, 16 Am. St. Rep. 771 [Rev. 43 Hun. 637]). It has been held also that the "Pay any bank or banker" form of indorsement is not a title-conveying one, but creates merely an agency for collection. (See *Gregory v. Sturgis Nat. Bank*, [Tex. Civ. App.] 71 W. 66. *First Nat. Bank of Minneapolis v. City Nat. Bank of Holyoke*, 182 Mass. 130, 65 N. E. 24. *Bank of Indian Ter. v. First Nat. Bank*, 109 Mo. App. 665, 83 S. W. 537.) But there are a few cases contra. As a consequence, if the payor desires to rely upon the responsibility of the collecting bank which holds the instrument under such restrictive form of indorsement, special guaranty by that bank of prior indorsements is necessary. (*Inquiry from Ill., March, 1911.*)

1947. A drew a check payable to himself, which he indorsed and deposited for collection in the L bank. Before collection and at A's request the check was returned to him with the bank's uncanceled indorsement, "Pay any bank or banker, prior indorsements guaranteed." A merchant, relying on this indorsement, cashed the check for value and deposited it for collection in the J bank. The check is returned to J bank unpaid, and unprotested. *Opinion:* The L bank is not liable to the merchant on its indorsement, under which the merchant took no title. The J bank is not liable to the merchant for negligence as protest in this case was unnecessary to charge the indorser. The form of indorsement in this case is generally held to be agent-creating and not title-conveying. (*Inquiry from Ga., June, 1912, Jl.*)

May an indorsee for collection sell or transfer the instrument?

1948. Does the customary indorsement by a bank holding a negotiable instrument transfer title? *Opinion:* Where a note or draft is indorsed for collection the person receiving it has no power to sell or transfer same. (7 Cyc. 808). An indorsement on a draft by a bank to which it is made payable, "Pay to any bank or banker, or order," is an indorsement for collection and not a transfer of title. See *Bank v. First Nat. Bank*, 109 Mo. App. 665. (*Inquiry from Colo., Feb., 1914.*)

1949. Request is made for authorities holding an indorsement reading, "Pay any bank, banker or order," to be restrictive. *Opinion:* In *Bank of Indian Territory v. First National Bank of Buchanan County* (1904) 109 Mo. App. 665, 83 S. W. Rep. 537, the court said: "The indorsement of plaintiff, 'to pay to any bank or banker, or order' was not such an indorsement as to pass the title to the bill. It merely authorized any bank or banker into whose hands it might come, to collect and remit the proceeds. In other words, it was only authority to collect, therefore a *restrictive* and not an unconditional indorsement passing the title." In *First National Bank of Minneapolis v. City National Bank of Holyoke*, 182 Mass. 130, 65 N. E. 24, the court said: The Holyoke Bank "did not indorse the check in that sense of the word, that is to say, it did not enter into the contract of an indorser of a negotiable bill or note. It did write on the back of the check, 'Pay to any national bank or order, City National Bank of Holyoke,' and sent the check with that indorsement to the drawee named in the check for payment. This indorsement, if it can be properly called an indorsement, was not a transfer of the check, but was put on it when it was presented for payment. The indorsement of an indorser, using that word in its technical sense, imports a guaranty of previous signatures, because it is a transfer and sale; but an indorsement which is not made for the purpose of transfer is not an indorsement within the law merchant, and does not carry with it a guaranty of previous indorsements." (*Inquiry from Wis., May, 1914.*)

1950. The payee of an acceptance indorses it: "Pay to the order of any bank or banker. All prior indorsements guaranteed", and sends it to another bank for discount, which latter bank asks if this indorsement is sufficient to establish the negotiability of the drafts, and if in discounting paper, bearing such indorsements it has the usual recourse against the indorser? *Opinion:* The courts have frequently held that such form of indorsement merely creates an agent for collection, and does not transfer title; therefore, the discounting bank will not acquire full negotiable title. (*Inquiry from Cal., April 1917.*)

1951. Where the last indorsement of a check provides, "Pay to the order of any bank or banker," must the drawee bank deal directly with the bank with which the item was deposited in the first instance? *Opin-*

ion: The payor bank cannot look to the agent but must deal with the owner back of him and this owner might be the bank with whom the check was deposited in the first instance or it might be a subsequent bank. (*Inquiry from Ill., Oct., 1917.*)

1952. Is a bank using the stamp, "Pay any bank or banker," required to use the words, "Previous indorsements guaranteed," also? *Opinion:* The courts have held in a number of cases that the indorsement, "Pay any bank or banker," is not a title-conveying, but mere agent-creating one, and as such does not carry to an indorsee the warranties that attach to an unrestricted or title-conveying one. There is a conflict of authority, however, on this point. Whenever the indorsee bank is a mere agent and collects money upon a check bearing a prior forged indorsement, the agent, after turning over the proceeds to its principal, would not be responsible, and the payor bank would have to look to the principal further back; hence the necessity or desirability of an express guaranty by the agent of the genuineness of prior indorsements, upon which guaranty it would be liable. See note 1945. (*Inquiry from Okla., April, 1918.*)

1953. Is the indorsement, "Pay to the order of any bank or banker," a restrictive one under the clearing-house rules? *Opinion:* There are numerous state court decisions holding that such form of indorsement is restrictive, the indorsee being a mere agent to collect, clearing houses classing it with restrictive indorsements and many requiring the presenting bank to guarantee prior indorsements before presentation through the clearing house. See *Bk. of Indian Territory v. First Nat. Bk.*, 83 S. W. (Mo.) 537. *First Nat. Bk. v. Savannah B. & T. Co.*, 68 S. E. (Ga.) 872. *First Nat. Bk. v. City Nat. Bk.*, 65 N. E. (Mass.) 24. There is, however, a Federal decision holding the contrary, i. e., that such form of indorsement is not restrictive, but is a title-conveying rather than a mere agent-creating form of indorsement. The reason for the adoption of the New York Clearing House rule, to the effect that all checks sent through it bearing restrictive indorsement should be guaranteed, grew out of the case of *Nat. Park Bk. v. Seaboard Bk.*, 114 N. Y. 28. There a check drawn by an out-of-town bank on the Park Bank had been indorsed to the Seaboard Bank for collection, and paid through the clearings. Afterwards it was discovered that the check had been raised and the Park Bank sued the

Seaboard Bank. It was held that, as the Seaboard Bank was merely an agent for collection, it was not liable after paying over the proceeds. See note 1945. (*Inquiry from Ohio, May, 1918.*)

1954. A draft drawn to the order of the drawer was indorsed by the payee, "Pay any bank or banker." In due course of collection the bank at which the draft was payable paid it. It was apparently the intention of the parties that such bank should take title as owner. Is the drawer-payee liable to such bank for any unpaid balance due on the draft? *Opinion:* It would seem that the bank at which the draft was payable did not become a holder in due course, but was merely the payor, with sole recourse against the drawee. The indorsement, "Pay any bank or banker," is restrictive and not title-conveying; it creates a mere agency to collect the instrument. *Indian Territory v. First Nat. Bank, 83 S.W. (Mo.) 537. First Nat. Bank v. Savannah Bank, 68 S.E. (Ga.) 872.* The indorsee of the paper in question then was merely a collection agent; it was not an indorsee for value, which could indorse over full title to this instrument to any holder in due course. When the draft was paid through the clearing house, the transaction was not a purchase for value under unrestricted indorsement, but was simply payment as drawee, or as agent of the drawee to the agent of the holder. It would seem that the paying bank has not the enforceable rights of a holder in due course against the drawer-payee. (*Inquiry from Okla., May, 1919.*)

Indorsement of cotton draft, "Pay any bank or banker"

1955. Does a bank which cashes a 90-day cotton draft with b/l attached, and indorses it to another bank, "Pay any bank or banker, or order," receiving credit from such other bank for the amount, remain contingently liable after acceptance? *Opinion:* Such form of indorsement has been held, under the Negotiable Instruments Law, to be an unrestricted or title-conveying form of indorsement, under which the indorsing bank would be contingently liable in event of dishonor. (*Nat. Bank Commerce v. Bossemeyer, [Neb. 1917] 162 N.W. 503. Sec. 36 Neg. Inst. Law*), although the contrary has been held in earlier cases. *First Nat. Bank v. City Nat. Bk., 182 Mass. 130. Citizens Trust Co. v. Ward, [Mo.] 190 S.W. 364. Nat. Bk. of Com. v. Mechanics Amer. Nat. Bk., 148 Mo. App. 1. Nat. Bk. v.*

First Nat. Bk., 140 Mo. App. 719. Bk. of Ind. Ter. v. First Nat. Bk., 109 Mo. App. 665. Gregory v. Sturgis Nat. Bk., [Tex.] 71 S.W., 66. A modified form of indorsement, such as "This indorsement is without warranty or recourse against this bank when, as and if the within draft is accepted by the drawee thereof," or "without recourse after acceptance by the drawee," is suggested. (*Inquiry from Ark., Jan., 1920, Jl.*)

"Pay any banker with full recourse to" indorser

1956. What is the effect of the indorsement of a check, "Pay to the order of any national bank, state bank, banking or trust company with full recourse to?" *Opinion:* An indorser for value, (1), warrants genuineness and validity, (2), engages to pay if the maker does not, and the words, "without recourse," coupled to his instrument, relieve of the conditional engagement to pay, but not of the warranty of validity. If an indorser for value coupled "with full recourse" to his indorsement, it would not add anything to his liability. But the form of indorsement "pay any banker" is not for value, according to the weight of authority but appoints an agent for collection. No subsequent indorsee, under this, would give value, and the only one advancing value on the check is the bank of payment. It is doubtful whether the words, "with full recourse," put on by the indorser would guarantee the bank of payment in case a prior indorsement was forged, or a title was defective. If the bank making this indorsement was real or apparent owner, there would be liability for receiving the drawee's money without consideration, but if it appeared as agent there would be no liability to the drawee unless prior indorsements were guaranteed, or unless the words, "with full recourse," would be held tantamount to a guaranty of prior indorsements. These words in this connection are of uncertain meaning, and it is doubtful if they would be so construed. Where the bank of payment needs a guaranty, it had better rely on an express guaranty of prior indorsements, and not on the uncertain meaning of the words "with full recourse." See *Redden v. First Nat. Bank, 66 Kan. 747, 71 Pac. 578. (Inquiry from Conn., July, 1916.)*

Indorsement before payee

Person indorsing before payee liable as indorser

1957. A note payable to a trust company

is signed by a third person on the back before delivery to the payee trust company. Are both the maker and the indorser liable where the note is not paid at maturity, and protested at that time? *Opinion:* In the event of non-payment at maturity, the maker would be liable without demand, protest or notice, but the third person is an indorser and is discharged unless there were due demand and notice of dishonor. Holding the note in the bank at maturity is a sufficient demand. (*Inquiry from Del., Dec., 1917.*)

1958. What is the liability of a person indorsing a note before the payee? *Opinion:* Under the Negotiable Instruments Law in force in Maryland, the contract and liability is that of an indorser. (*Inquiry from Md., Jan., 1909, Jl.*)

1959. Where a note payable to a bank was signed on its face by John Doe and on its back by Richard Roe, is the latter a joint maker? *Opinion:* Under the negotiable instruments act, Richard Roe is liable as an indorser and is entitled to notice of dishonor unless the instrument contains a waiver. Vol. 6, p. 687, April, 1914. S. C. Neg. Inst. Act. Secs. 89, 112, 113, 114. Rouse v. Wooten 140 N. C. 557. (*Inquiry from S. C., April, 1914, Jl.*)

1960. A indorsed in blank a note payable to a bank without the words "protest waived and payment guaranteed." *Opinion:* A is liable to payee as indorser. Demand and notice (but not formal protest, which is necessary only in case of a foreign bill of exchange) are necessary to preserve the indorser's liability. Kan. Neg. Inst. Act., Secs. 4602, 4603, 4605, 4650. (*Inquiry from Kan., Feb., 1913, Jl.*)

Not necessary to first proceed against maker when indorser's liability fixed

1961. May an indorsee enforce a note against an accommodation indorser, who signs before delivery of the note, before exhausting the remedy against the maker and the payee? *Opinion:* Under the Negotiable Instruments Law such an accommodation indorser is liable as indorser. When his liability is fixed at maturity, it is not necessary to first proceed against the maker and payee until the remedy against them is exhausted; the indorsee can enforce payment of the note immediately from him. (*Inquiry from Md., March, 1921.*)

Liability where payee again indorses

1962. A note made by a firm payable to its own order, and indorsed by it, then has an individual indorsement, and then is again indorsed by the firm. What is the liability of the individual indorser to a subsequent purchaser before maturity who has taken the note from the firm? *Opinion:* The individual indorser would be liable as such. The fact that the firm again indorsed the note under the individual indorsement would not detract from his liability. The case would seem to be covered by Section 114 of the Negotiable Instruments Act, that where a person, not otherwise a party, places his signature to an instrument payable to the order of the maker before delivery, he is liable as indorser to all parties subsequent to the maker. See Randolph on Commercial Paper, Sec. 667. West Boston Savings Bank v. Thompson, 124 Mass., 506. (*Inquiry from N. Y., Aug., 1913.*)

Indorser liable for full amount of note

1963. A note drawn to the order of the payee bank for \$500, with an indorser and discounted as an accommodation to the maker, was protested for non-payment. Can the indorser be held for full payment, or does the payee become liable for one-half the amount of the note? *Opinion:* The indorser is liable to the payee bank for the full amount. The Negotiable Instruments Act Sec. 64 provides as to the liability of such an irregular indorser, as follows: "Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as indorser in accordance with the following rules: 1. If the instrument is payable to the order of a third person, he is liable to the payee and all subsequent parties." (*Inquiry from Conn., Oct., 1919.*)

Absence of payee's indorsement

Drawee not obliged to pay

1964. A check is indorsed by the payee to J. J. Taylor, who cashed it without indorsement with a merchant. The merchant forwarded the item for credit to his account. The drawee refused to pay or to give credit. *Opinion:* The drawee is not obliged to pay or give credit for a check where a necessary indorsement is lacking. (*Inquiry from Miss., July, 1912, Jl.*)

1965. Is the drawee bank justified in refusing to pay a check, without the indorsement of the payee but indorsed "Pay

to the order of any bank, banker, or trust company, indorsement guaranteed?" *Opinion:* Technically the bank acted within its rights in refusing to pay a check where the indorsement of the payee was lacking. However, it is customary, in order to facilitate business, to make payment in cases where the indorsement is supplied in such manner. (*Inquiry from Vt., May, 1917.*)

Certifying bank justified in refusing payment

1966. A certified check is presented by a bank for payment, without the indorsement of the payee, although it has the indorsement of the maker; no other indorsements outside of the bank indorsements appear thereon. Is the drawee bank protected in paying the check, even though the check had been delivered to the payee? *Opinion:* The certifying bank is within its rights and justified in refusing payment of the check, which lacks the payee's indorsement, unless the depositor should expressly authorize the bank to pay. Such a check is not within the definition of a bearer check under the Negotiable Instruments Act. The check may have been lost, in which case the holder would have no title. Of course, if the holder could prove that the check was acquired from the payee for value, he might make out a case where he would be entitled to payment, for under the Negotiable Instruments Act an instrument can be transferred without indorsement and the transferee acquires the title of the transferer and the right to have the latter's indorsement. But until clear proof is forthcoming that the holder has acquired good title from the payee, the bank may refuse to pay unless expressly authorized by the drawer. (*Inquiry from Mass., Nov., 1920.*)

Check with missing indorsement of payee indorsed in blank by drawer

1967. Should a bank pay a check lacking the indorsement of the payee, but indorsed in blank by the drawer? *Opinion:* The check is not payable to bearer. It is not safe for a bank to pay to the holder without express instructions from the drawer. (*Inquiry from Cal., Jan., 1912, Jl.*)

1968. A check was drawn payable "to the order of John Jones," and signed "S. A. Smith." It was not indorsed by the payee, but was indorsed in blank by the drawer "S. A. Smith." *Opinion:* The check is not payable to bearer. Bank should refuse payment until properly indorsed. (*Inquiry from Pa., Jan., 1909, Jl.*)

Drawer indorsing check to credit of his own account

1969. A check is drawn by John Jones payable to James Brown by whom the same was not indorsed. The check was indorsed "Credit to account John Jones, John Jones." Is the drawee bank warranted in placing the same to Jones' credit? *Opinion:* Such a transaction would, if seems, be futile. The amount was already to the credit of Jones, and the check had never been delivered to Brown, but remained in Jones' possession. Before delivery the check is incomplete and is not an effective contract. Jones having drawn his check to Brown and after doing so and before delivery having decided to retain the money and not pay Brown, all that was necessary for him to do was to destroy the check. (*Inquiry from Cal., June, 1915.*)

Check indorsed by drawer but not by payee

1970. Should the drawee bank pay a check, unindorsed by the payee, but indorsed by the drawer "Pay to the order of P. Bank," and indorsed and presented by the P. bank? *Opinion:* The point has never been decided, but it seems such an indorsement is irregular and does not convey good title, free from equities. Where A makes his check payable to B, it requires B's indorsement and it does not seem that A's indorsement, instead of B's, is the same as an indorsement by the payee, even though A is the drawer and originally issued the check. For all that appears, after A has issued and received consideration for his check, it may have been stolen by him from B, and while this is a far-fetched presumption, it illustrates the point made that it does not necessarily follow that because A is in possession of the check payable to B, he has never delivered same to B. Furthermore, assuming the most usual case of a check made payable by A to B but never delivered, still it does not appear how A can make this check negotiable in the hands of some other person than B, without the latter's indorsement, for it is irregular on its face. It appears, therefore, that a check so indorsed is not regularly or properly indorsed and that the bank upon which it is drawn is justified in refusing to make payment in the absence of the payee's indorsement. (*Inquiry from N. J., June, 1916.*)

Payment of draft to only authorized representative of non-indorsing payee

1971. What is the effect of the payment by the drawee of a draft, given to discharge

a debt from the drawer to a third person, which lacks the indorsement of the bank to which it is made payable where such draft is paid to a duly authorized collecting agent of the payee? *Opinion:* Under the circumstances stated, the drawee need not have paid the draft in the absence of the indorsement, but having waived the irregularity and made payment to an authorized collecting agent, the indebtedness of the drawer to the third person is discharged. (See *Daly v. Butchers & Drovers Bank*, 56 Mo. 94) (*Inquiry from Mo., April, 1920, Jl.*)

Payment by drawee on guaranty

1972. A check payable to two persons was indorsed by one and deposited. The bank stamped "indorsements guaranteed" and the check was paid by the drawee. *Opinion:* The indorsement would probably be held to guarantee the drawee against loss or injury caused by the absence of the indorsement. Assuming the transfer was without authority of the non-indorsing payee, the drawee could recover. *Lynch v. First Nat. Bk.*, 107 N. Y. 184. *Rowley v. Nat. Bk.*, 18 N. Y. S. 545. (*Inquiry from Mass., Nov., 1911, Jl.*)

Payment of unindorsed check to wrong person

1973. When the checks of a depositor were returned, he did not notice that one of them was not indorsed by the payee. Six months later the payee made the claim to the drawer that he had not received the check. Is the bank liable to the depositor? *Opinion:* A bank which pays a check to another than the payee cannot, ordinarily, charge the amount to the drawer's account. The only question would be whether the laches of the depositor in discovering the mistake would estop him from questioning the validity of the payment. The delay in this case was six months. In *Weinstein v. Nat. Bk. of Jefferson*, 69 Tex. 38, an action against the bank by a depositor to recover money paid on forged checks, the court charged that the bank would be liable unless plaintiff had neglected to examine his account and report the forgeries for such a length of time as worked injury to the bank. In the present case the check was not forged but payment was made without the indorsement of the payee, and in such a case it seems that the depositor might be entitled to assume that the payment was made to the right person, even without his indorsement, and that the delay of six months would not debar the depositor from recovering. (*Inquiry from Tex., June, 1920.*)

Payment of unindorsed check—Right of recovery where payee's title defective

1974. M—— C—— claimed to have lost a check payable to his order and received another check for the same amount, but payment was not stopped on the original check. C—— afterwards obtained cash on the original check from the customer of another bank, without, however, indorsing same, and the customer deposited same in the bank which received the amount from the drawee. C——, therefore, received payment twice. Who stands the loss? *Opinion:* Had C—— indorsed the original check before negotiating it to the bank's customer, the latter would have been a holder in due course, entitled to receive payment, or if not paid to enforce payment against all parties liable free from any defense. Had the check been indorsed by C——, there would be no recourse upon the bank or upon its customer by the drawee bank or by the drawer and the latter would be the ultimate loser. But unfortunately the check was unindorsed when negotiated to the customer. (See Sec. 49 Negotiable Instruments Act.) It seems, therefore, that the money paid on this check is recoverable by the drawee from the bank and by it from its customer. (*Inquiry from N. M., Feb., 1919.*)

Liability of bank receiving payment of unindorsed check

1975. What is the liability of a bank receiving payment from the drawee of a check, where the payee has not indorsed? *Opinion:* Title to a check can be transferred without indorsement, although the transferee takes no greater rights than his transferor, and when bank B presents a check lacking the payee's indorsement for payment, it impliedly warrants that it has good title and right to receive payment and if this warranty is broken it would be liable to the payor bank for breach of warranty and also upon the ground that it had received money to which it was not entitled. To the drawer of the check, bank A is liable in case of anything wrong, but it has right of recovery from bank B. (*Inquiry from S. C., June, 1915.*)

Indorsement by depositary bank "credit account of within named payee"

1976. The payee of a check deposits it unindorsed in his bank, which stamps on the back "deposited to the credit of the within-named payee," followed by the name of the

bank. What should the drawee do? *Opinion:* The drawee is not legally obliged to pay a check unindorsed by the payee, even upon guaranty of the missing indorsement. But in general the drawee would be justified in paying upon guaranty, as such payments in the large majority of cases would facilitate business. In a minority of cases where the payee had no title, or the check was raised, or other valid reason existed why the check would not be chargeable to the drawer's account, the guaranty would protect the drawee bank. In special cases where the drawer might desire the personal indorsement of the payee, payment even upon guaranty should be refused. Payment without guaranty would be at the risk of the bank in jurisdictions where an indorsement for deposit is held restrictive and to create a mere agency to collect in, and not to confer title, upon the bank of deposit, for a mere agent is not responsible after turning over the proceeds. The sufficiency and effectiveness of different forms of indorsement and of guaranty are considered in 4 A. B. A. Jl. 300. *Lynch v. First Nat. Bk.*, 107 N. Y. 184. *Rowley v. Nat. Bk. of Deposit*, 18 N. Y. S. 545. (*Inquiry from N. J.*, Nov., 1911, Jl.)

1977. The indorsement of the payee of a check was missing and the following indorsement was used: "Credited to the account of the within-named payee with the Blank National Bank." *Opinion:* For all practical purposes the drawee in paying the check would be as safe as it would where the payee had personally indorsed. (*Inquiry from N. J.*, Jan., 1910, Jl.)

1978. The payee of a check deposits it unindorsed in his bank which stamps on the back of check, "Credited to the account of the within named" and forwards it with its guaranty of indorsement. Should the drawee bank refuse payment because of lack of indorsement? *Opinion:* Technically the payor bank is within its rights in refusing to pay a check where the indorsement of the payee is lacking. But it is customary, in order to facilitate business, to make payment in such a case where the indorsement is supplied in some such form as stated supplemented by a guaranty of the prior indorsement. While this is customary, however, and a check so indorsed would generally go through, the drawee nevertheless would have the right to refuse payment in any particular case, if it was unwilling, on such forms of indorsement. (*Inquiry from Vt.*, May, 1917.)

1979. Should a drawee bank pay a check indorsed with rubber stamp on the back as follows: "Credited account of within-named payee or indorsee in First Nat. Bank ——— Pa.?" *Opinion:* It is not infrequent for a bank of deposit to place such an indorsement upon a check when it has been deposited to the credit of the payee, with his indorsement lacking. Frequently the stamp is coupled with the words "absence of indorsement guaranteed." The payor bank is under no obligation to pay upon such indorsement, but many banks do so. Others certify the check and send it back for indorsement. The drawer who relies upon the paid check as a receipt from the payee for money paid will not, of course, have the payee's indorsement, but he will have the indorsement of the bank of deposit showing that the money went to the credit of the payee's account and this should be sufficient. (*Inquiry from Pa.*, Feb., 1912.)

1980. A bank has an indorsement stamp as follows: "Credited to the account of the within-named indorsee or payee. Absence of indorsement guaranteed by the ——— Bank." *Opinion:* The payor bank is under no obligation to pay upon such an indorsement, but many do so. The drawer who relies upon the paid check as a receipt from the payee for money paid will not have the payee's indorsement, but he will have an indorsement showing that the money went to the payee's account, and, for all practical purposes, this should be sufficient. (*Inquiry from Pa.*, Nov., 1917.)

Indorsement of depositary bank supplying missing indorsement of payee

1981. Is the following a good indorsement, "Credited to the account of the within-named payee. Indorsement supplied and guaranteed by ——— Bank"? *Opinion:* It is not infrequent for the bank of deposit to use such indorsement upon a check when it has been deposited to the credit of the payee. The stamp is frequently coupled with the words "absence of indorsement guaranteed." There is no obligation upon the payor bank to pay upon such an indorsement, but many banks do so. Others certify the check and send it back for indorsement. (*Inquiry from Pa.*, March, 1920.)

President of depositary bank supplying missing indorsement of payee

1982. A drawee bank returned a check to the indorsing bank because of lack of

indorsement by the payee. The president of the latter bank, in the presence of the messenger, indorsed the name of the payee. Should the drawee pay the check? *Opinion:* The check may be safely paid by the drawee, provided the payee has authorized or ratified the indorsement. The knowledge of the messenger that the president indorsed the name of the payee on the check is immaterial. If the act of the president was unauthorized, the collecting bank would be responsible for receiving money, without authority of the payee, to which it was not entitled and would be obliged to refund. (*Inquiry from Iowa, Nov., 1915.*)

Transfer of note and mortgage security without indorsement

1983. Where A, the payee of a note secured by mortgage, transfers the note and security to C, for value, but without indorsing the note, A signing release deed and attaching same to mortgage, is the note negotiable? *Opinion:* C would not acquire any better title than possessed by A. In other words, if the maker of the note had a defense against A, such defense would be good against C. Further, if the assignment of the mortgage is not recorded and the maker of the note paid the same to A at maturity, without notice that it had been assigned to C, he would have a good defense against C. In the transaction stated, therefore, C would not take a full negotiable title, but only one subject to defenses. True, C takes the same title as A by this mode of transfer, and if A could enforce the note and security against the maker, so could C; but if there is any defense by the maker against A, C would take no greater rights. Webster v. Carter. (Ark.) 138 S. W. 1006. Gumaer v. Sowers, 31 Colo. 164. Simpson v. Hall, 47 Conn., 418. Haskell v. Mitchell, 53 Me. 468. Fitch v. McDowell, 80 Hun. (N. Y.) 207. (*Inquiry from Ill., April, 1917.*)

Indorsement by payee when check presented in person

Drawee's right to require indorsement by payee

1984. Can a drawee bank legally refuse payment of a check solely because the indorsee refuses to indorse it? *Opinion:* The law is not settled on this question. There are cases which hold that a bank cannot require the payee's indorsement where the payee presents in person; but there are other cases which support the view that by custom a bank may refuse payment if the payee declines to indorse, and this would

equally apply to the holder by indorsement from the payee. It would be better if the banks would take the stand that, by reasonable custom, they are entitled to indorsement of the payee or indorsee before paying the money. (*Inquiry from Ga., Sept., 1913.*)

1985. May a bank require the payee of a check drawn to "P or order" to indorse it when he personally presents it? *Opinion:* The majority of courts would be likely to uphold the rule established by custom that the bank may refuse payment if the payee declines to indorse. At common law, however, the debtor could not require a receipt as a condition of payment, and it has been held in some cases that a bank cannot require the payee's indorsement where the payee presents the check in person. The insertion in the check of "order of P," instead of "P or order," would not make any difference, as there is no legal distinction between the two phrases. Sanford v. Buckley, 30 Conn. 349. Durgin v. Bartol, 64 Me. 473. Meuer v. Phoenix Nat. Bk., 94 N. Y. App. Div. 331. Osborn v. Gheen, 5 Mackey (D. C.) 189. Pickle v. Muse, 88 Tenn. 380. Frederick v. Cotton, 2 Showers, 8. Smith v. McClure, 5 East, 476. Huling v. Hogg, 1 Watts & S. (Pa.) 418. Howard v. Palmer, 64 Me. 86. (*Inquiry from Ill., Feb., 1913, Jl.*)

1986. Should the drawee of a check indorsed in blank by the drawer pay it to the payee in person, without his indorsement? *Opinion:* Some courts hold the payee need not indorse when he presents the check in person, while others uphold the right of the bank to require, the indorsement. It is customary to require the payee's indorsement as evidence that he has received payment, and this requirement is none the less necessary because the drawer has indorsed the check in blank. The check is not payable to bearer. Osborn v. Gheen, 5 Mackey, (D. C.) 189. Pickle v. Muse, 88 Tenn. 380. McCurdy v. Society of Sav., 6 Ohio Dec. 1169. (*Inquiry from Ore., May, 1915, Jl.*)

1987. A check payable to John Jones or order was presented by him to the bank where payable, and same was paid without his indorsement. The paying bank asks whether it could be compelled to pay him again in the event he should claim he did not receive the money. *Opinion:* Some courts hold that when the payee presents a check in person, the bank has no legal right to require an indorsement; while other courts hold such requirement is customary and one which the bank can enforce. Should the

check be paid to the payee without an indorsement and some time after he should come to the bank and say he did not get the money, the question is asked whether the bank would be compelled to pay him again. Under the law, the possession of the check by the bank would be prima facie evidence that the bank had paid it even without the payee's indorsement, and it is doubtful whether the payee could overcome this evidence and affirmatively prove that he did not get the money, which he would have to do in order to recover. It is best, however, for the bank to insist on the payee indorsing the check. (*Inquiry from Ill., April, 1916.*)

1988. "Should a bank require the indorsement of a customer when he makes a check payable to himself and cashes it over the counter?" *Opinion:* Some courts hold that when the payee presents a check in person, the bank has no legal right to require an indorsement; while other courts hold such requirement is customary and one which the bank can enforce. Should a check be paid to the payee without an indorsement and some time after he should come to the bank and say he did not get the money, the question arises whether the bank could be compelled to pay him again. Under the law, the possession of the check by the bank would be prima facie evidence that the bank had paid it, even without the payee's indorsement, and it is doubtful whether the payee could overcome this evidence and affirmatively prove that he did not get the money, which he would have to do in order to recover. It would, however, be better for the bank to insist on the payee indorsing the check. (*Inquiry from Ore., Nov., 1916.*)

Drawer's check to order of "self"

1989. Is it necessary for the drawer of a check payable to the order of "self" to indorse the same where he gives it to a merchant in payment of a bill? Is it necessary for a drawer to indorse a check payable to the order of "self," "cash," or "bearer" where he presents it himself to the bank for payment? *Opinion:* A check payable to the order of "self" is not payable to bearer but to the drawer's order and requires the drawer's indorsement to enable the merchant to collect it. Where the drawer himself presents his check at the bank payable to order of "self," "cash" or "bearer," it is doubtful if indorsement can be required or is necessary. Where payable to "cash" or "bearer" no indorsement is necessary. Where payable to "self" or "myself," which is the

same as if drawer's name was inserted as payee, there is more reason for requiring the indorsement as it is not presented by any bearer, but by a specified payee to whom the check has been made payable. On this latter point the courts differ. (*Inquiry from S. D., Aug., 1914.*)

Payment by drawee to fraudulent payee without indorsement

1990. The payee of a check obtained it from the drawer by fraudulent means and received cash for it from the drawee bank which did not require his indorsement. Is the bank protected? *Opinion:* It has been held in some cases that there is no obligation on the part of the payee to indorse as a prerequisite of receiving payment. But in the case of *Pickle v. Muse*, 88 Tenn. 380, 7 L. R. A. 93, 17 Am. St. Rep. 900, the court said it was the custom for banks to require the payee's indorsement so as to constitute evidence as between the drawer and payee of such payment. In the present case, however, the bank would undoubtedly be protected without the indorsement of the payee, even though the payee did not come into the possession of the check in due course. The efficiency of the indorsement would be simply to prove that the payee got the money. If it was shown that he received the money, whether or not he indorsed the check, the bank would be protected, for the drawer has ordered the bank to pay the money to the payee or to his order and cannot complain because the bank has done so even though the payee has defrauded the drawer. (*Inquiry from Mo., Oct., 1914.*)

Indorsement of bearer paper

Bearer checks do not legally require indorsement

1991. A check was presented "pay to the order of bearer, ten dollars," and a bank refused to cash it until the bearer indorsed it. *Opinion:* The indorsement cannot legally be required. A check payable to "order of bearer" is the equivalent of one payable to bearer. *Frederick v. Cotton*, 2 Showers 8. *Smith v. McClure*, 5 East 476. *Huling v. Hogg*, (Pa.) 1 Watts & S. 418. *Howard v. Palmer*, 64 Me. 86. *Durgin v. Bartol*, 64 Me. 473. (*Inquiry from La., June, 1911, Jl.*)

Right to require indorsement before payment of bearer check

1992. Is a paying teller justified in requesting the indorsement on a bearer check

of the person to whom he pays the money?

Opinion: The holder is under no legal obligation to indorse a bearer check when presenting same for payment. It is customary for banks to request indorsement by the holder upon receiving payment, and the request is generally complied with; but if the request was refused, the bank would be held without legal right to require such indorsement and would not be justified in refusing payment for that reason. (*Inquiry from Conn., Feb., 1917.*)

1993. Can a bank legally demand an indorsement from a person who presents for payment a bearer check? Under Art. 3, Sec. 49 of Neg. Inst. Law, is an instrument payable to bearer considered an instrument payable to the order of the holder? *Opinion:* A bank cannot legally require the indorsement of a check payable to bearer. It is customary to request such indorsement before paying a bearer check, but it cannot be legally required. Sec. 49 of Neg. Inst. Law relates to the transfer of an instrument payable to order without indorsement; and it is clear that an instrument payable to bearer is not to be considered as an instrument payable to order. In earlier sections of the Act definitions will be found of when an instrument is payable to bearer and when it is payable to order, and it will also be seen by Sec. 30 of the Act that "if payable to bearer it is negotiated by delivery; if payable to order it is negotiated by the indorsement of the holder completed by delivery." Sec. 49 has no application to bearer instruments. (*Inquiry from Mass., Dec., 1920.*)

Check payable to "cash"

1994. A bank refused payment on a check payable to "cash" because it was not indorsed by the drawer, and inquires as to whether or not the drawer could be made to indorse it. The bank insists that the customer should insert the word "myself" or "bearer" and also indorse the check. *Opinion:* Indorsement by the drawer is not necessary. So far as the customer is concerned, if the bank objects to the form payable to "Cash" and insists that he insert the word "Bearer" or "Myself" and indorse the check, it is within the bank's power to close the account unless he complies with its requirements in this respect. But so far as the law is concerned, a check payable to "Cash" is legal and valid, being in law payable to bearer, and does not require indorsement either by the drawer or anybody

else as a prerequisite to payment. (*Inquiry from S. D., April, 1919.*)

1995. Does a check made payable to "Cash" require the indorsement of the party presenting it if other than the maker? *Opinion:* A check made payable to "Cash" is, in law, payable to bearer, and there is no legal requirement of indorsement where presented by a holder other than the maker. It is customary, however, for banks to request the presenter to indorse. (*Inquiry from Ohio, Dec., 1917.*)

1996. A bank followed the practice of paying checks drawn on it payable to "cash." Payment was made to the holders without indorsement of the drawer and the bank questions the safety of paying such check when not presented by the drawer in person. *Opinion:* A check drawn payable to "cash" is payable to bearer and can be safely paid by the drawee bank to a holder other than the drawer without the indorsement of the latter. The drawee is under obligation to the drawer to pay in the absence of evidence of circumstances indicating that the holder may have come by the check wrongfully. Neg. Inst. A., Sec. 9 (Comsr's. dft.). *Cleary v. De Beck Plate Glass Co.*, 104 N. Y. S. 831. (*Inquiry from Ala., Oct., 1917 Jl.*)

1997. A customer of a bank drew a check on it "Pay to the order of cash," and gave it to a stranger who presented it at the bank which refused payment on the ground that the bearer was a stranger who was unable to furnish identification. It is asked if this is not the proper course to take, because of the fact that the check was an order check instead of being made out to "Bearer?" *Opinion:* A check payable to the order of "Cash" is none the less payable to bearer because it contains the words "order of." The bank was not right in refusing to pay the check. It was not an order check which required indorsement or identification. While it is not infrequent for banks to request the holder of a bearer check to indorse it, indorsement or identification cannot be legally required. (*Inquiry from Pa., June, 1917.*)

1998. May a drawee bank refuse to pay a check payable either to "Cash" or "Bearer" if the holder refuses to indorse same? Would the same rule apply if the check was made payable to "A or bearer?" *Opinion:* In each case stated the check is payable to bearer, and the courts have held in a number of cases that a bank cannot compel the

holder of a bearer check to indorse same before making payment. While it is customary to request indorsement and for the holder to comply, it is not legally compulsory on the holder to indorse. As a consequence, if the bank refused to cash a check in either of the above instances because the holder refused to indorse, it would be a dishonor of the check and the bank would be liable in damage to the drawer for dishonoring his obligation. (*Inquiry from S. C., Jan., 1919.*)

Check payable to "A or bearer"

1999. Is it necessary in Idaho for check made payable to "A or bearer" to be indorsed by A as bearer? *Opinion:* The Negotiable Instruments Act expressly provides that a check is payable to bearer "when it is payable to a person named therein or bearer." An instrument payable to bearer may be negotiated by delivery and does not require indorsement. (*Inquiry from Ida., Feb., 1917.*)

2000. Richard Roe draws his check payable to "John Doe or bearer." Can the paying bank be compelled to pay the amount to a third party as bearer without the indorsement of the payee? *Opinion:* A check payable to "John Doe or bearer" is payable to bearer and does not require the indorsement of John Doe to entitle the bearer to receive payment. Neg. Inst. A., Sec. 9 (Comsr's. dft.). Sec. 187 So. Dak. Act. (*Inquiry from S. D., Jan., 1919, Jl.*)

Check indorsed in blank presented by subsequent holder

2001. Does a check indorsed in blank require further indorsements? May a drawee bank require the subsequent holder presenting a check in person to indorse it? *Opinion:* Where a check is indorsed in blank by the payee it is payable to bearer and does not require indorsement by each successive holder. Where a check is presented in person by a payee some courts hold that he cannot be compelled to indorse as a prerequisite of payment, others hold the contrary view, which is preferred. (*Inquiry from S. D., May, 1914, Jl.*)

Identification of holder of bearer check cannot be required

2002. Can a bank insist upon identification of a party presenting a check made payable as follows: Either "to bearer," "to order of bearer" or "to bearer or order?" *Opinion:* The forms of checks mentioned

are all payable to bearer and although it is customary for some banks to request identification or that bearer indorse the check, there is no legal obligation upon the holder to comply. The holder or bearer can demand payment and if refused cause the check to be protested. In such case there would be a wrongful dishonor which would render the bank liable to drawer in damages for injuring his credit. (*Inquiry from N. Y., March, 1917.*)

2003. A stranger presented at a bank a check drawn by a depositor which was made payable to cash. Has the bank a right to refuse payment because of lack of identification of the person presenting same? Because of such refusal has the holder a right of action against the bank? *Opinion:* 1. A check payable to bearer is negotiable by delivery and while it is usual for the holder to indorse at the time of receiving payment, so as to identify himself and indicate to whom the money has been paid, indorsement or identification is not necessary to give validity to the payment. 2. If the bank refuses to pay because of lack of identification, the holder has no right of action against the bank. 3. If the bank refuses to pay the check because of lack of identification and the maker of the check withdraws the balance of his account, and later the bearer presents the check with proper identification and finds the funds have been withdrawn, no responsibility rests upon the bank either to the holder or drawer. (*Inquiry from Cal., April, 1920.*)

Note to A or bearer transferred by A without indorsement

2004. Is the payee of a note payable to him "or bearer" liable to the holder upon non-payment, when he has transferred the note by delivery without indorsement? *Opinion:* The payee is not liable. The Negotiable Instruments Act provides that a person negotiating an instrument by delivery warrants its genuineness but it provides no liability to pay the amount if the genuine instrument is dishonored, which liability is provided in the case of an indorser. (*Inquiry from Miss., May, 1917.*)

Rights of purchaser of check received under blank indorsement

2005. The seller of a horse received in payment the check of the buyer, indorsed in blank by the payee, which without indorsement he cashed at a bank. Are the maker and the payee liable to the cashing

bank, where the former has stopped payment of the check? *Opinion:* A check indorsed in blank by the payee is payable to bearer and passes by delivery. The fact that a subsequent holder is not required to indorse it in procuring the cash from a bank which purchases such check does not deprive the purchasing bank of the status of a holder in due course, and it has a right to recover against the drawer of the check who has stopped payment and also against the indorser provided he is duly charged by demand and notice of dishonor. (*Inquiry from N. Y., July, 1915.*)

Special indorsement of bearer paper

Instruments payable to bearer on their face

2006. A check drawn payable to A or bearer was lost by A and a bank paid the amount to the bearer without A's indorsement, A not receiving any money. The check contained several special indorsements. *Opinion:* The check, being payable to bearer, could be negotiated by delivery, even if indorsed specially, and payment by the bank to the bearer was valid, and A was the loser. Neg. Inst. A., Secs. 9, 40 (Comsr's. dft.) (*Inquiry from Ill., Feb., 1912, Jl.*)

2007. A check drawn to the order of bearer is deposited in a bank, indorsed by the depositor, and is indorsed by the bank to its New York correspondent. The check is lost and later is cashed by another bank. *Opinion:* The bank which cashed the check is protected. Where an instrument is payable to bearer and is indorsed specially, it may, nevertheless, be further negotiated by delivery; but the person indorsing specially is liable as indorser to only such holders as make title through his indorsement. N. J. Neg. Inst. Act, Sec. 40. (*Inquiry from N. J., March, 1915, Jl.*)

2008. A check payable to "John Doe or bearer," is delivered by the payee, without indorsement, to Richard Roe, who supplied a restrictive indorsement. Does this indorsement so change the status of the instrument as to make it the same as if it had been made payable to order in the first instance? *Opinion:* The question is answered by Section 40 of the Negotiable Instruments Act, which provides: "Where an instrument, payable to bearer, is indorsed specially, it may nevertheless be further negotiated by delivery; but the person indorsing specially is liable as indorser to only such holders as make title through his indorsement." (*Inquiry from Miss., Feb., 1919.*)

Instrument indorsed in blank followed by special indorsement

2009. A check was indorsed in blank by the payee A and given to B, who indorsed specially to C. The check was lost and cashed for the finder by E without C's indorsement. *Opinion:* Under the existing condition of the law it is very doubtful whether E holds a check payable to bearer, or takes a good and enforceable title as holder in due course without C's indorsement. Daniel Neg. Inst., Sec. 696. (*Inquiry from Mont., July, 1911, Jl.*)

2010. What is the effect of a special indorsement following a blank indorsement? *Opinion:* Where an indorsement in blank is followed by a special indorsement, the instrument remained payable to bearer under the common law rule, but under the Negotiable Instruments Act the question is in doubt whether Section 9 (5) which provides that the instrument is payable to bearer "when the only or last indorsement is an indorsement in blank" deprives such instrument of bearer character, or whether Sections 34, 35 and 40 apply, under which the instrument would still be payable to bearer. Where the instrument is on its face payable to bearer, a special indorsement does not change its character. Smith v. Clarke, Peake, 225. Walker v. McDonald, 2 Exch. 527. Habersham v. Lehman, 63 Ga. 383. Johnson v. Mitchell, 50 Tex. 212. Neg. Inst. L. (Comsr's. dft.). Secs. 9, 34, 35, 40. (*Inquiry from Minn., Dec., 1915, Jl.*)

Special indorsement can be written over blank indorsement

2011. A note on its face payable to bearer and note payable to order indorsed in blank by payee are both payable to bearer and negotiable by delivery, but first cannot while second can be converted into order instrument by special indorsement written over blank indorsement. Whether special indorsement written under blank indorsement converts paper into order instrument is uncertain. Neg. Inst. Act (Comsr's. dft.), Secs. 9, 35, 40. (*Inquiry from Wash., Aug., 1917, Jl.*)

Bankruptcy of indorser

Liability of insolvent indorser upon note of corporation

2012. A trust company purchased as an investment the paper of a corporation which one of its officers personally indorsed. If the corporation should fail and the indorser

should become insolvent, would his individual creditors be able to prevent creditors of the corporation from realizing on his indorsement? *Opinion:* The holders of the corporation note, indorsed by an officer thereof, would be entitled to prove their claim against the estate of the indorser and share in any dividends declared by the assignee of the estate in equal proportion with the individual creditors of such indorser. The officer is to be regarded as an indorser in his individual capacity. (*Inquiry from N. J., May, 1918.*)

Collection of indorsed bills receivable from maker where indorser bankrupt

2013. A bank holds notes indorsed by a bank which is in the hands of a receiver, upon which the makers are not in position to pay at maturity and desire extensions. What is the proper procedure, having in mind especially the holding of the indorser? *Opinion:* The Negotiable Instruments Act provides that "A person secondarily liable on the instrument is discharged. . . . 6. By any agreement binding upon the holder to extend the time of payment or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved." It is questionable whether the receiver would have power to consent to such an extension without the authority of the court. The better way is to fix the liability of the indorsers by due demand and notice of dishonor and hold the paper without a formal renewal or extension as past due and use reasonable diligence in collecting from the makers. Mere delay in enforcing collection does not discharge indorsers. It has been held that statutes requiring the holder of paper to prosecute the maker to insolvency to hold the indorser were repealed by the enactment of the Negotiable Instruments Act. *Williams v. Paintsville Nat. Bank*, 137 S. W. (Ky.) 535.

Concerning notice of dishonor, the Negotiable Instruments Act provides that "where a party has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, notice may be given either to the party himself or to his trustee of assignee." (*Inquiry from N. C., April, 1921, Jl.*)

Discharge of indorser

Omission of demand and notice

2014. A note was made payable at and held by a bank. The indorser was not noti-

fied of the non-payment of the note at maturity. *Opinion:* Demand and notice of dishonor are necessary to preserve the indorser's liability unless waived. In the present case the holding of the note at maturity by the bank was sufficient demand, but the omission to notify the indorser discharged him from liability. Pa. Neg. Inst. Act, Sec. 89. (*Inquiry from Pa., Nov., 1914, Jl.*)

2015. A note was transferred by the payee, together with mortgage security, to a third party the original owner indorsing the note. The note when due was not presented or protested. The payee has since died, and the present owner is endeavoring to hold his estate. Should the note have been protested to hold the indorser, there being no waiver of protest? *Opinion:* The indorser's contract is conditional upon due demand and notice of dishonor, unless waived. The Negotiable Instruments Act (Sec. 72, Mich. Act) provides that, "except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers." Sec. 91 of the same act provides that, "except as herein otherwise provided, when a negotiable instrument has been dishonored by non-acceptance or non-payment, notice of dishonor must be given to the drawer and to each indorser, and any drawer or indorser to whom such notice is not given will be discharged." The indorser in this case is discharged by omission to make demand and give notice of dishonor at maturity. (*Inquiry from Mich., Sept., 1917.*)

Indorser of mortgage note discharged by failure of presentment

2016. A negotiable note, secured by a real estate mortgage, was not presented for payment at maturity. The note was payable in Kentucky and apparently all the parties resided therein. Is the indorser liable? *Opinion:* Under the Negotiable Instruments Act of Kentucky the indorser would be discharged by a failure of demand for payment and of notice of dishonor at maturity. If, however, the indorsement was governed by Indiana law, in which state the Negotiable Instruments Act was not passed until after this transaction, the rule would be the same under the law merchant. A knowledge of dishonor is not equivalent to notice, etc., so that, in absence of a waiver by the indorser, he would be discharged. (*Inquiry from Ind., March, 1914.*)

Indorser discharged by payment

2017. An agent of a grain company drew

a draft on it payable at a bank at which the company kept no checking account. The bank cashed the draft on the indorsement of the payee, and attached its own sight draft on the company for reimbursement. *Opinion:* The payment of such draft by the bank was not a purchase, but was a discharge of the draft and of the indorser thereon, so that there would be no recourse upon such indorser in the event the company failed to take up the draft. (*Inquiry from Iowa, Oct., 1914, Jl.*)

Payment by drawee to insolvent collecting bank

2018. A cashes a check for B drawn by C on bank D. It is deposited in bank E and sent to bank F which collects from C and fails. B refuses to settle with A, claiming check was paid. *Opinion:* The check having been paid, the liability of B as an indorser is at an end. His contract is conditional that he will pay the check if upon due presentment it is dishonored and he received due notice thereof. (*Inquiry from Tenn., April, 1915.*)

Partial payment of note

2019. Does the holder of a note, in accepting part payment thereof, release an indorser from further liability thereon? *Opinion:* A partial payment of the amount due on a note is not sufficient consideration for the discharge of the entire amount, under the general rules governing accord and satisfaction. (*Hart v. Strong, 183 Ill. 349. Fenwick v. Phillips, 3 Mete (Mass.) 87. Lathrop*

v. Page, 129 Mass. 19. Carraway v. Odeneal, 56 Miss. 223. Bliss v. Shwartz, 65 N. Y. 444.) Assuming the indorser's liability has been preserved by due demand and notice, he remains liable for the unpaid portion. (*Inquiry from Ala., May, 1920.*)

Consent of indorser to extension

2020. A bank submits a form of indorsement guaranteeing payment and also future payments of interest in renewal of the note and providing that indulgence to the maker does not release the indorser. Can the indorser agree at the time the instrument is executed to an extension without his knowledge which would not discharge him from his secondary liability? *Opinion:* The indorser's liability can be preserved by a proper clause or agreement under which he consents to extensions of the note. The Negotiable Instruments Act provides that a person secondarily liable on the instrument is discharged "by any agreement binding upon the holder to extend the time of payment or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved." The indorser, therefore, is discharged unless the agreement to extend is made with his assent. But where the extension is requested by the indorser he is not discharged. (*Arlington Nat. Bk. v. Bennett, 214 Mass. 352. (Inquiry from R. I., April, 1917.)*)

INTEREST AND USURY

Calculation of interest

Note due in leap year

2021. A gives his note for \$1000 to B, dated February 26, 1919, payable March 1, 1920, with 5% interest. What is the amount of interest due March 1st, 1920, and how many months and days is interest chargeable? *Opinion:* 1. A note dated January 30th payable one month after date, is due on the last day of February, which in a leap year, would be February 29th, and in other years, February 28th. 2. Where a note is dated February 26, 1919, and made payable March 1, 1920, with 5% interest as stated in the question, the interest should be computed at \$50 for the year ending February 26, 1920, and for the four remaining days interest should be computed for 4/30ths of

a month, which would make the total interest \$50.55. (*Inquiry from Ill., March, 1919.*)

Basis of 30 days to a month

2022. The custom of banks to compute interest on the basis of 30 days to a month is generally held valid by the courts and in some cases sanctioned by statute, but in a few states, including Iowa, such method is held illegal. (*Talbot v. First Nat. Bk., 106 Iowa 361. Pool v. White, 175 Pa. 459. Camp v. Bates, 11 Conn. 487. Patton v. Lafayette Bk., 124 Ga. 965. Planters Bk. v. Bass, 2 La. Ann. 430. Agricultural Bk. v. Bissell, 12 Pick. (Mass.) 586. Planters Bk. v. Snodgrass, 4 How. (Miss.) 573; Lafayette Bk. v. Findley, 1 Ohio Dec. (Reprint) 49. Merchants Bk. v. Sarratt, 77*

S. C. 141. *Parker v. Cousins*, 2 Gratt. (Va.) 372. N. C. St. Bk. v. Cowan, 8 Lehigh (Va.) 238. *Bradley v. McKee*, 3 Fed. Cas. No. 1784. (*Inquiry from Iowa, Jan., 1916, Jl.*)

Computation according to actual number of days

2023. A note in the sum of \$100,000, dated July 10, 1915, was executed payable to B "four months" after date with interest at the rate of eight per cent. per annum. B insisted that the interest be computed and paid for the actual number of days from the date of the note to maturity, to wit, 123 days, instead of on the basis of 4/12 of a year. *Opinion:* The strict legal rule is to calculate interest according to the actual number of days. In some states (not in Oklahoma) the custom to calculate interest on the monthly instead of daily basis has been legalized by statutes. *Pool v. White*, 175 Pa. 459. (*Inquiry from Okla., Aug., 1916, Jl.*)

New York rule requires computation for actual number of days

2024. Request is made for an illustration of the proper method of calculating interest on the following note: "New York City, Oct. 27, 1919. Amount, \$833.33. November 1st, 1920, after date, we promise to pay to the order of John Doe \$833.33, payable at ———Bank, New York City. Value received with interest * * *." *Opinion:* The rule in New York, in figuring interest on a note, is that 365 days, and not 360 days, should be allowed to a year; and in figuring interest for a fraction of a year, interest should be allowed for the actual number of days which shall have elapsed at the maturity of the note. (*Utica Bank v. Wager*, 8 Cow. [N. Y.] 398. *Utica Bank v. Smalley*, 2 Cow. [N. Y.] 770. *Firemen's Ins. Co. v. Ely*, 2 Cow. [N. Y.] 678. *Utica Ins. Co. v. Tilman*, 1 Wend. [N. Y.] 555.) Applying this rule to the present form of note submitted, interest should be computed for a year of 366 days (this being a leap year), plus 5 days, making 371 days from the date of the note, October 27, 1919, to the date of its maturity, November 1, 1920. (*Inquiry from N. Y., Oct., 1920.*)

2025. What is the method of calculating interest in New York? *Opinion:* The strict legal rule in regard to the calculation of interest is to compute it according to the actual time, 365 days to the year. But it is the custom of banks in some states where

calculations of interest are required frequently to compute it for the sake of convenience at 30 days to the month and 12 months to the year. In some states this custom to calculate interest on the monthly instead of the daily basis has been legalized by the statutes which provide that, in calculating interest, 30 days should be considered a month and 360 days a year.

In New York, however, there is no such statute and where the computation on the monthly basis exceeds 6%, as calculated on the daily basis, it has been held in early cases to work usury. Thus in *New York Firemen's Insurance Company v. Ely*, 2 Cow. (N. Y.) 678, the court said:

"The statute of usury speaks of years and not of months. Interest is to be at the rate 7% per annum: that is, at the rate of 7% for 365 days; the legal half of a year, 182 days; and the legal quarter, 91 days; the law paying no regard to the odd hours." The rule in New York, therefore, is that, in figuring interest on a note, 365 and not 360 days should be allowed to a year; and in figuring interest for a fraction of a year, interest should be allowed for the actual number of days which shall have elapsed at the maturity of the note.

(*Utica Bank v. Wager*, 8 Cow. [N. Y.] 398. *Utica Bank v. Smalley*, 2 Cow. [N. Y.] 770. *Firemen Ins. Co. v. Ely*, 2 Cow. [N. Y.] 678. *Utica Ins. Co. v. Tilman*, 1 Wend. [N. Y.] 555). (*Inquiry from N. Y., Oct., 1920.*)

Blank space for interest left in note

Promise to pay interest "at———per cent" means legal interest

2026. A promissory note is drawn payable after date "with interest at the rate of per cent. per annum until paid." *Opinion:* The note containing a blank space for the statement of the rate draws legal interest from date. But if a pen line is drawn through the blank after the words "at the rate of," this would indicate an intentional erasure of the entire interest clause. *Hornstein v. Cifuno*, (Neb.) 125 N. W. 136. *Holmes v. Trumper*, 22 Mich. 429. *First Nat. Bk. v. Carson*, 60 Mich. 437. *Hoopes v. Collingwood*, 10 Colo. 107. (*Inquiry from Pa., Oct., 1912, Jl.*)

Collection annually and at maturity

Three year note "with interest at 6% per annum"

2027. A three year note contains a provision "with interest from date at the rate of six per cent. per annum." *Opinion:*

The interest is not collectible annually, as no part of the interest is due until maturity of the principal. The words "payable annually" should be added to make the interest collectible annually. *Ramsdell v. Hulett*, 50 Kan. 440. (*Inquiry from Kan.*, April, 1914, *Jl.*)

Long term notes with interest at stated rate per annum

2028. A five year note provides "with interest at the rate of seven per cent. per annum from date until paid." *Opinion:* Interest is not collectible annually, as no part of the interest is due until maturity of the principal. See citation of cases in following opinion. (*Inquiry from Kan.*, Sept., 1909, *Jl.*)

2029. A three years' note contains a provision "with interest at the rate of eight per cent. per annum from date until paid." It further provides "interest to become as principal when due and bear the same rate of interest." *Opinion:* The provision does not call for interest payable annually but only at maturity of principal and therefore there can be no compounding of unpaid interest. *Ramsdell v. Hulett*, 50 Kan. 440. *Kochring v. Muemminghoff*, 61 Mo. 406. *Tanner v. Investment Co.*, 12 Fed. 648. (*Inquiry from Okla.*, Feb., 1912, *Jl.*)

2030. A mortgage note was made payable ten years after date "with interest at the rate of 5 per cent. per annum until paid." The mortgage securing the note contains a copy of the note and provides that payment of the note is made in accordance with its terms. The makers of the note refused to pay the interest annually. *Opinion:* The note does not call for interest payable annually but only at maturity of the principal. If the mortgage provided that interest should be payable annually this would probably govern the provisions of the note. See cases in Opinion No. 2029 and also *Johns v. Rice*, (Iowa) 145 N. W. 290. (*Inquiry from Ore.*, Sept., 1914, *Jl.*)

Compound interest

Unpaid interest does not draw interest in absence of contract

2031. A note for \$800 is dated August 15, 1917, payable six months after date, with interest at 8 per cent. from date. The entire \$800 has been paid, but no more. The amount of interest due at the date of the payment of the balance of the \$800 was about \$95. This was in February of this

year. Does the \$95 draw interest from then? *Opinion:* In the absence of contract providing for compound interest a bank is not entitled to charge and collect interest upon interest after the same becomes due, thus making a new principal upon which interest is to be allowed. It is competent, however, in Kansas to contract for the payment of compound interest. (*Gilmore v. Hirst*, 567 Kan. 626, 44 Pac. 603. See also *Clark v. Skeen*, 61 Kan. 526, and *Parker v. Plymell*, 23 Kan. 402.) In the instant case there is no agreement in the note or otherwise that the 8 per cent. interest should itself bear interest if not paid when due. Therefore, the \$95, being the amount of interest due at the date of payment of the principal, will not itself draw interest from that time. (*Inquiry from Kan.*, Dec., 1919, *Jl.*)

South Dakota statute as affecting collection of interest upon unpaid interest

2032. A note running for a number of years contains a provision "with interest payable annually at the rate of," etc., but contains no provision that upon the default in payment of any installment of interest, such interest shall itself bear interest. *Opinion:* It has been held in Missouri, Washington and West Virginia that without special agreement interest cannot be collected upon unpaid interest. (Kentucky and Texas contra.) The point has not been decided in South Dakota, but the statute providing "that interest is payable on all moneys at the rate of seven per cent. per annum after they become due on any instrument of writing" may be construed to include interest on unpaid interest. *Stover v. Evans*, 38 Mo. 461. *Cullen v. Whitham*, 33 Wash. 366. *Boggers v. Goff*, 47 W. Va. 139. *Hall v. Scott*, 90 Ky. 340. *Robertson v. Parrish*, (Tex. Civ. App.) 39 S. W. 646. (*Inquiry from S. Dak.*, Jan., 1910, *Jl.*)

Validity of contract that unpaid interest at maximum rate shall bear maximum rate

2033. A note is payable three years after date with interest at the highest legal rate allowed in Kansas, namely, 10 per cent., and contains a provision, "Interest payable annually and if not paid when due to bear the same rate of interest as the principal." The holder questions the validity of the provision. *Opinion:* (1) Some courts, for example, in Illinois, hold such a provision usurious; (2) the majority hold such provision invalid and unenforceable as contrary

to public policy; (3) while a few courts (Arkansas, Georgia, Mississippi, Oklahoma, South Carolina and Washington) hold such provision valid and enforceable. The question has not yet been decided in Kansas. An agreement made after interest is due to pay interest thereon is valid. If a note such as above provided in any case for such a rate of interest that the compounding thereof down to the time of maturity of the principal would not exceed the simple interest at the highest legal rate, the stipulation would in any event probably be valid. *Drury v. Wolfe*, 134 Ill. 294. *Brown v. Crow*, (Tex.) 29 S. W. 653. *Eslava v. Lepretre*, 21 Ala. 504. *Lee v. Melby*, 93 Minn. 4. *Hager v. Blake*, 16 Neb. 12. *Quackenbush v. Leonard*, 9 Paige (N. Y.) 334. *Jarrett v. Nickell*, 9 W. Va. 345. *Carney v. Matthewson*, 86 Ark. 25. *Union Sav. Bk. v. Dottenheim*, 107 Ga. 606. *Merchants, etc., Bk. v. Caston*, (Miss. 1910) 52 So. 633. *Covington v. Fisher*, 22 Okla. 207. *Newton v. Woodley*, 55 S. C. 132. *Blake v. Yount*, 42 Wash. 101. *Sanford v. Lundquist*, (Neb. 1908) 118 N. W. 129. *Telford v. Garrels*, 132 Ill. 550. *McGovern v. Union Mut. L. Ins. Co.*, 109 Ill. 151. *Craig v. McCulloch*, 20 W. Va. 148. *Young v. Hill*, 67 N. Y. 162. *Gen. St. Kan.*, 1909, Chap. 56, Sec. 4345. *Parker v. Plymell*, 23 Kan. 402. *Gilmore v. Hirst*, 56 Kan. 626. (*Inquiry from Kan.*, April, 1914, *Jl.*)

*Illegality of compound interest clause in
Minnesota*

2034. An opinion is asked as to the legality of the following clause in a note: "Should the interest not be paid as it becomes due, it shall be added to the principal and bear interest at the same rate." *Opinion:* The courts in many states hold that interest cannot be compounded in this way, but that an agreement to pay interest is only lawful where the agreement was made after the interest matured. The Minnesota Statute provides that "in the computation of interest upon any bond, note or other instrument or agreement, interest shall not be compounded, but any contract to pay interest, not usurious, upon interest overdue, shall not be construed to be usury. *Gen. St. Minn.*, 1913, Ch. 51, Sec. 5805. (*Inquiry from Minn.*, Oct., 1917.)

2035. A note contains an interest clause as follows: "With interest at _____ per cent. per annum after _____ until paid. Interest payable annually. Should the

interest not be paid as it becomes due, it shall be added to the principal and bear interest at the same rate." Would such clause violate the law against compound interest, and result in usury? *Opinion:* In Minnesota a contract in a note providing for compound interest is illegal and unenforceable as against public policy, even though the amount contracted for would be less than simple interest at the maximum contract rate. *Lee v. Melby*, 93 Minn. 4; *Gen. Stat. Minn.*, 1913, Sec. 5805. (*Inquiry from Minn.*, Jan., 1920, *Jl.*)

*Validity of compound interest clause in
Mississippi*

2036. Note bearing highest rate of interest with provision that unpaid overdue interest shall bear interest not usurious in Mississippi. *Palm v. Fancher*, 93 Miss. 785. (*Inquiry from Miss.*, April, 1914, *Jl.*)

Missouri rule as to compounding

2037. Is a provision in a note that if interest is not paid annually it is to compound annually valid? *Opinion:* The Missouri statute permits parties to contract in writing for the payment of interest, but prohibits compounding more than once in a year. The note conforms to the statute in this respect. *Rev. St. Mo. C. 62 Sec. 7185.* (*Inquiry from Mo.*, Jan., 1919.)

*Time certificate of deposit with compound
interest*

2038. A corporation desires to make a time deposit with a national bank, with interest to be compounded annually until the amount of interest is equal to the original deposit. Is this permissible? Can the bank give a letter to the beneficiaries of the deposit stating that there has been a time deposit made for their benefit and that the bank guarantees to pay this money to them at the expiration of the period described above? Is there any law or ruling limiting the rate of interest to be paid on a deposit of this character? *Opinion:* No law or ruling is known which would limit the rate of interest which a national bank can pay on a time deposit other than the general interest law of the state of Oklahoma, which provides a legal rate of 6% and a contract rate of 10%. No Oklahoma statute has been found which prohibits the compounding of interest oftener than a stated period. There seems to be nothing in the way of the issuing of certificates of deposit providing for payment of interest annually at a certain

rate within lawful limits, such annual interest to be added to the principal or compounded and itself draw interest, compounding to continue annually until the amount of interest is equal to the original deposit, and the certificate not to be payable until the amount of compound interest equals the original principal. (*Inquiry from Okla., Feb., 1921.*)

Negotiability affected by interest clause

Clause for 10% interest on unpaid interest and for lower rate if principal paid when due

2039. A note was drawn payable one year from date with ten per cent. interest, and contained provisions that if the interest was not paid annually it was "to become as principal and draw the same rate of interest" and the note to bear "only six per cent. interest if paid when due." *Opinion:* The note is negotiable under the decisions in *Kansas*. *Gilmore v. Hirst*, 56 Kan. 626. *Parker v. Plymell*, 23 Kan. 402. *Clark v. Skeen*, 61 Kan. 526. (*Inquiry from Kan., Feb., 1913, Jl.*)

Provision in interest bearing note waiving interest if paid when due

2040. A note, providing for interest from date until paid, contains the further provision "if paid when due no interest will be charged." *Opinion:* In *Kansas* a note with such provision is negotiable. In other states some courts hold it negotiable and some non-negotiable. *Parker v. Plymell*, 23 Kan. 402. (*Inquiry from Kan., Aug., 1910, Jl.*)

Unpaid interest added to principal drawing same rate

2041. A note contains a provision "if the interest be not paid annually when due, the same to be added to the principal and draw the same rate of interest." The question was raised as to the negotiability of the note. *Opinion:* That such provision does not destroy negotiability. *Brown v. Vossen*, 112 Mo. App. 676. *Randolph v. Hudson*, 12 Okla. 516. *Citizens Bk. v. Booze*, 75 Mo. App. 189. (*Inquiry from Okla., Sept., 1912, Jl.*)

Interest at five per cent. if paid in advance; otherwise, six per cent

2042. A bank encloses a form of note payable on demand "with interest payable semi-annually in advance at five per cent. If not paid in advance * * * six per cent.,"

and asks whether same would be non-negotiable because of the two conditions regarding interest. *Opinion:* Such a note is valid and enforceable and the fact that the agreement is to pay a higher but lawful rate of interest on contingency that the interest is not paid in advance will not affect its validity. *Bane v. Gridney*, 67 Ill. 388. The form of note submitted, however, is not negotiable because it is not payable to order. If made payable to order the question is whether the provisions to interest would make it non-negotiable. On this, the authorities are not in harmony. For example, in *Crump v. Berdan*, 97 Mich. 293, a provision for 7% interest, and if not paid when due to draw interest at 6% from date until paid, was held not to make the amount so uncertain as to render the note non-negotiable. On the other hand, in *Hegeler v. Comstock*, 1 So. D. 138, a provision "with interest from date until paid at 10% per annum, 8% if paid when due" was held to destroy negotiability. (*Inquiry from Conn., Oct., 1915.*)

Interest on deposits

Legality of agreement between banks as to uniform rate of interest paid on deposits or loans

2043. May the banks of a city agree as to the maximum rate of interest to be paid on deposits? *Opinion:* The opinion No. 1031, to the effect that the rules of the New Orleans Clearing House fixing minimum charges for the collection of out-of-town items was not a violation of the Federal Anti-Trust Act, is in point. It would seem that an agreement as to the maximum rate of interest to be paid on deposits would be even more of a local matter than the agreement in the New Orleans case, and that it might be maintained that it did not violate the Anti-Trust Act, although the contrary contention has also been made. (*Inquiry from Mich., Dec., 1915.*)

2044. May the banks of a city agree as to the minimum rate of interest to be paid on loans from banks? *Opinion:* The same considerations affect this agreement as one limiting the rate of interest on deposits. See Opinion No. 2043. (*Inquiry from Mich., Dec., 1915.*)

Savings bank pass-book rule stopping interest after ten years on dormant accounts

2044a. Is it legal to insert in a savings pass book in Missouri the following rule? "All accounts on which no deposit or pay-

ment shall have been made during ten consecutive years shall cease to draw interest thereafter." *Opinion*: Ordinarily such a rule would be legal and binding as a contract between the bank and the depositor, but in Missouri there is a possible question in view of the statutes. Chapter 12, Article IV, Revised Statutes Missouri, 1910, relating to savings banks provides, as part of section 1152: "Deposits shall be paid to depositors, or their representatives, when requested, under such regulations as the board of directors may prescribe, not inconsistent with the provisions of this article, which regulations shall be printed and conspicuously posted in all places where deposits are received, accessible and visible to all depositors; and it shall be lawful to require sixty days' written notice of the withdrawal of any deposit. Any account may be closed at any time upon such notice to the depositor, and after such notice the deposit shall cease to draw interest." Thus it appears that any regulations of the directors must not be inconsistent with the provisions of the article, which seem to contemplate that depositors are entitled to interest, as a matter of right when earned. See Secs. 1156-1161, Art. I of Chap. 12, Secs 21,55. Considering all these sections, they seem to indicate that the law contemplates that in case interest has been earned, all the depositors are entitled to share therein, except that the directors may classify depositors—with respect to the interest to be paid. The directors can clearly place all the deposits in question in one class and provide a small rate of interest, but it is questionable if they can provide for no interest at all. Section 1152, quoted supra, indicates a method by which a savings bank may escape paying interest on a dormant account, that is, by posting a written notice closing the account. The legality of the submitted rule is questionable. (*Inquiry from Mo., Sept., 1917.*)

Interest on savings accounts of national banks

2045. The directors of a national bank are considering the advertising of 4% on deposits (interest accounts); the bank having heretofore paid 3½% on its provident accounts. The bank desires to be informed whether it is necessary to do more than take a vote at its regular meeting, entering same in minutes, and advertising in local papers. *Opinion*: The payment of interest by a national bank upon its provident account is a matter of agreement between

bank and depositor. That is to say, the bank offers by public advertisement, or otherwise, to pay such and such a rate until changed and the depositor accepts the offer and makes his deposit. It does not seem necessary to do more than go through the procedure suggested. The advertisements should state the date at which the new rate is to take effect. (*Inquiry from N. Y., Aug., 1919.*)

Liability of bank for interest on public deposits

2046. The funds of a village in Ohio were kept in a bank the same as any other account. The law as to bidding for public deposits was not followed and there was no agreement as to interest. Is the bank liable for interest? If so, to what extent? *Opinion*: The case is governed by *Franklin National Bank v. Newark*, 118 N. E. (Ohio) 117, holding, where the facts were substantially the same as in the case submitted, that the Ohio statute (General Code Sec. 4294) applied and "that any bank receiving funds of a municipality under the circumstances disclosed by this record, knowing the same to be the funds of the municipality, becomes a trustee and must account to the municipality for the funds so deposited and all profits arising from such deposits." As to the amount of such profit to be repaid the court held that the bank must account "as a trustee of said fund and determine the amount of profit made by defendant thereon by crediting the average total deposit of the city with the rate of net profit realized by the bank upon its entire assets during the period said fund was on deposit." It would seem that the provision of the statute that "all profits arising from such deposit or deposits shall inure to the benefit of the funds" should be construed to mean that all profits derived by the depositor in the shape of interest shall go to the benefit of the public funds, but the supreme court has decided differently, and its decision is the law. (*Inquiry from Ohio, Feb., 1921.*)

Legal rate of interest on deposit in closed bank

2047. On July 2, 1913, a bank had a balance to its credit with another bank which was allowing interest at the rate of 3% per annum, credited monthly upon average daily balance. The account was an open account subject to order in whole or in part at any time. The debtor bank closed its doors on July 7, 1913, and they remained closed until April 27, 1914.

When the debtor bank re-opened its doors it refused to pay interest on the balance during suspension. The bank asks whether it is legally entitled to the legal rate of 6% during said period of suspension. *Opinion:* The bank, it seems, is entitled to interest at the legal rate of 6% from the time of the closing to the time of re-opening. It has been held that a depositor is entitled to interest from the time the bank suspends payment and it is not necessary that he should have made any demand on the bank. *Chemical Nat. Bk. v. Bailey*, 12 Blatchf. 460. See also *Richmond v. Irons*, 121 U. S. 27; *Ex parte Stockman*, 70 S. C. 31. (*Inquiry from Ohio, May, 1915.*)

Creditor's right to interest

For two added days when time note payable at bank where maker's account good falls due on Saturday

2048. Where an interest-bearing time note, payable at a bank, by its terms falls due on Saturday and is presented for payment on Monday, is interest collectible for the two added days, where the maker has funds ready on Saturday? *Opinion:* It would seem that the instrument does draw interest for the two added days. (1) Section 71 of the Negotiable Instruments Act provides that "where the instrument is not payable on demand, presentment must be made on the day it falls due." Section 85 provides that "instruments falling due on Saturday are to be presented for payment on the next succeeding business day." Taken together, these sections plainly indicate that the instrument falls due or matures on Monday. This being so, a tender of payment on Saturday, by having the money in bank, would be a tender before the note is legally due and would not stop the running of interest. (2) It is not reasonable to suppose that the legislature intended two days for payment; Monday for the purpose of presentment for payment but Saturday for the purpose of tender of payment by the maker to stop the running of interest. (3) Another reason for the opinion is the impracticability of two separate days of maturity with respect to maker and indorsers respectively and the peculiar and serious consequences which would follow therefrom as to the duty of collecting agents to make presentment on both days and as to the time for bringing suit upon a dishonored instrument against maker and indorsers respectively. (4) The force of the argument, that as by the terms

of the act, presentment for payment is not necessary to charge the maker and the provisions in regard to presentment relate solely to steps to charge the indorsers, therefore the provisions fixing maturity on Monday for purpose of presentment have relation to the indorsers only, and the instrument, as to the right of the maker to pay, falls due on Saturday, is not evident, for the rules as to non-necessity of presentment as to the maker but requiring presentment to hold the indorsers have no special significance with relation to holidays; they have equal application to instruments falling due on any day. (5) There seems to be nothing in the contrast pointed out between the second sentence of Section 85 relating to Sundays or holidays, which reads that "*when the day of maturity falls upon Sunday or a holiday the instrument is payable on the next succeeding business day*", and the third sentence, which reads that "*instruments falling due on Saturday are to be presented for payment on the next succeeding business day.*" Contrary opinions in 23 Harvard Law Review 603, not followed. (*Inquiry from N. Y., Dec., 1920, Jl.*)

Right to interest against corporation in receiver's hands

2049. By order of court, a receiver was appointed for the Barney & Smith Car Company, and the inquiring bank and the other creditors refused to accept the face of their claims without interest in full settlement. The bank asks whether they still have a right to look to and recover from said company the interest due on such claims. *Opinion:* The order of the court in *Josephs & Brothers v. Barney & Smith Car Company* provides: "2nd, That the Receiver shall pay to those creditors of the company who refused to accept the balance due on the face of their claims without interest in full settlement of said claims, amounting to \$45,171.26, the balance due on the face of said claims without interest." Even assuming the bank is a party to this proceeding and bound by the order, it should not be construed as an order that the receiver shall pay the face value due without interest in full settlement, but that the receiver shall pay those creditors who refused to accept the face without interest in full settlement, the balance due without interest, leaving to such creditors the right to recover from the corporation the interest still due. (*Inquiry from N. J., Dec., 1915.*)

Omission to charge interest-bearing note payable at bank to maker's account at maturity, stops running of interest

2050. A bank asks whether it is optional or obligatory on the part of the bank to charge on maturity date the amount of the note to the account of the maker under following conditions: The bank is the holder of the note payable at its bank, and at the time of maturity had a cash deposit in the bank exceeding the amount of the note, which amount was not applicable to a particular purpose. The bank asks whether, if the note is not charged up, interest will continue? *Opinion:* The bank should charge up the note against the maker's account at the maturity date, and upon failure thereof it would not be entitled to interest thereafter, assuming the account remained sufficient. See Sec. 70, 87 of the Negotiable Instruments Law; also *Mechanics & Traders Bk. v. Seitz*, 150 Pa. St. 632, to the effect that the bank is bound to charge up the note against the deposit. (*Inquiry from La., May, 1920.*)

Correction of mistake as to interest after account stated and settled

2051. A controversy has arisen between a bank and a trust company over an interest shortage claimed by the latter on an acceptance which was sent to the bank for collection. The item dated March 22, 1917, was accepted by J. M. C. to run four months bearing 8% interest and covered sale of five Overland cars, the arrangement being that C. was to make part payment as he sold the cars, or pay the full amount when due to G. Securities Corp'n. C. made one payment of \$650.25 on May 4th, and \$6.20 interest. When acceptance was about due the bank received word from G. S. Corp'n. as follows: "J. M. C. acceptance falls due on July 22nd, and is payable at the bank of A with interest at 8%. The balance on this acceptance is \$2,639.25." This balance was collected by the bank and remitted less exchange on July 30th, 1917. The trust company then advised bank that there was a shortage of \$70.32, but that they had received \$60.00 of this amount, leaving a balance of \$10.32 still due. The bank took up the matter with C., who said he did not think he owed any interest, but, upon being shown the trust company's letter, paid the bank \$10.32 which the bank remitted and the matter was considered closed. About four months later the trust company claimed there was a balance of \$58.88 due

thereon. *Opinion:* In the case submitted by the bank, it seems there was at first an "account stated" as to the transaction between the trust company and the bank, and then, upon the payment of \$10.32 by the bank, there was an "account settled." It appears from the facts of the case that there was a clear mistake of fact on the part of the trust company with respect to the amount of interest due their principal by C., the customer of the bank. And while there was an "account settled" yet according to the authorities, evidence may be adduced to show error in such account, and undoubtedly it can be done in this case to show that the statement of the trust company to the effect that there was only \$10.32 due as interest was a mistake of fact, and that upon the correction of this error there would still be due \$58.88 interest on said item. If it could be shown that the bank, acting upon this statement of account rendered by the trust company, had been placed in a different and worse position thereby, then a different question would be presented. (*Inquiry from Ariz., March, 1918.*)

Creditor cannot exact greater rate without consent of debtor

2052. A gave B in part payment for real estate two time notes bearing interest at the rate of six per cent. On A's default at maturity B wrote A that he would charge 7 per cent., because the payments were not met when due. A did not respond to the letter. B seeks to enforce the payment of seven per cent. interest, and until such payment refuses to give A a deed. The agreement was that deed should be delivered when notes were paid. *Opinion:* B has no right to enforce payment of seven per cent. interest, because there was no binding agreement between A and B changing the original contract, and has no right to refuse deed when balance of principal and six per cent. interest are tendered. Under the laws of Michigan it is lawful to contract for a seven per cent. rate. (*Inquiry from Mich., Dec., 1911, Jl.*)

Partial payments of principal and interest

Partial payment applied to reduce interest

2053. A gave B his note for \$435.50 for two years, dated March 2, 1914, interest, at 5 per cent., payable semi-annually. On March 8, 1915, A made his first payment of \$20, and B indorsed payment on the note as

follows: "Received on the within note \$20." B left the note with a bank for collection, with no explanation regarding the indorsement. *Opinion:* The partial payment of \$20 should be applied first to the reduction of interest before applying the surplus, if any, upon the principal. Compound interest cannot be charged unless contracted for. *Peebles v. Gee*, 1 Dev. (N. C.) 341. *Russian v. Lucas, Hempst.* (U. S.) 91. *Hammer v. Nevill, Wright* (Ohio) 169. *Smith v. Luse*, 30 Ill. App. 37. *Bowman v. Neely*, 151 Ill. 37. (*Inquiry from Ill., June, 1916, Jl.*)

2054. A bank states that it has been endeavoring to collect for a customer a note payable "on or before one year after date" with interest from date. The note had been running for some time during which there had been partial payments thereby reducing the principal to a considerable extent. The payments were always credited on the principal of the note which bears no interest indorsements. The bank asks whether the partial payment rule applies in this case. *Opinion:* The general rule with regard to partial payments of an interest-bearing note is that the payments must be first credited in reduction of interest, when the interest is due and any surplus in reduction of principal. The note submitted is payable one year from date. It has no provision that the interest shall be payable quarterly or semi-annually and the rule in such a case is that the interest becomes due and payable at the same time that the principal becomes due; in this case, at the end of the year. In this case, therefore, the partial payments should be applied in reduction of the principal. (*Inquiry from Okla., Nov., 1916.*)

Note due "one day after date"

2055. An interest-bearing note is payable "one day after date." At the end of nine months a partial payment is made on the principal. Should the holder collect interest at that time or wait until the expiration of a full year from the date of the note? *Opinion:* The holder has a right to collect the interest at the end of the nine months. The rule would be different were the instrument a long time note providing for interest payable annually, but where the note is payable "one day after date" the holder may demand payment of the principal and interest at any time he chooses. The holder of the past-due instrument has the option to demand, when a partial payment of principal is made, that

the interest down to that time also be paid or he may wait a year if he chooses. When he accepts part payment he has the right to prescribe the conditions thereof. (*Inquiry from Pa., March, 1921.*)

Rate of interest chargeable on bond sold on installment plan

2056. A bank's customer purchased a 7% \$1,000 bond on the installment plan, and the bank charged the accrued interest at the rate of 7% to the date of final payment, allowing interest at the rate of 7% on the various amounts paid to the date of each payment, the basis for figuring being that the customer was entitled to an equity in the bond only to amount paid, and that the bank was likewise entitled to its equity in the investment. The customer's claim is that, in making his first payment, title to the bond passed to him and, therefore, the bank should charge him only at rate of 6% on the balance due. An opinion is asked. *Opinion:* Whether title passed to the customer upon the first payment or not until final payment would depend upon the terms of the agreement between bank and customer. Where a broker buys stock for a customer upon deposit of margin, himself advancing part of the purchase price, the title immediately vests in the customer with lien for the amount advanced and power of sale in event of depreciation. But the stated transaction is different. The bank buys and owns a 7% bond and agrees to sell it on the installment plan. In the case of conditional sales of personal property where the price is payable in installments, it is the distinguishing feature of such sales that the title of the property remains in the seller until final payment of the price, although possession goes to the buyer upon the initial payment. It would seem, by analogy, that, in the case of a sale of a bond upon installments, unless there was an express agreement that title should go to the buyer upon first payment, title would remain in the seller until final payment; and it seems in this case not only title but possession remains with the bank. (*Inquiry from N. Y., Dec., 1920.*)

Payment of principal before maturity

Forfeiture by creditor of unpaid interest for unexpired term

2057. A promises to pay B \$6,000 one year after date with interest at five per cent.; in other words, a total of \$6,300. Six months before maturity A paid B \$3,000 by

consent of both parties, nothing being said as to rebate of interest, and at maturity in final settlement B demands the balance and full interest, \$3,300, while A claims that there should be deducted six months' unearned interest on \$3,000, or \$75, and all that he owes is \$3,225. *Opinion:* Although the precise question has never been decided it is probable that if B accepted partial payment of the principal in advance, he impliedly forfeited his right to future interest upon such prepaid amount. N. J. Pub. L. 1902, Sec. 56, p. 530. Greenville Bldg., etc., Assn. v. Wholey (N. J.) 59 Atl. 341. (*Inquiry from Ill., Aug., 1914, Jl.*)

Forfeiture by debtor of paid interest for unexpired term

2058. A person carries a note of \$5,000 with a bank, payable in 5 years. Interest at 6 per cent. is payable in advance for six months at a time, being due December 3rd and June 3rd of each year. The maker with the bank's consent paid the full amount of the note in the middle of March after having paid up the interest to June 3. The bank allows rebate of 3 per cent., but the maker demands the full 6 per cent. for the unexpired term. *Opinion:* Where a loan, upon which interest has been paid in advance is paid by the debtor to the creditor before maturity, the latter is not liable for rebate of the unearned interest, in the absence of an agreement to make such rebate, and the fact that he voluntarily rebates part does not make him liable for the remainder. A prepayment of the principal by the debtor, with the consent of the creditor, would be deemed a voluntary relinquishment of the interest for the unexpired period. Cooke v. Young, 89 S. C. 173. Pub. St. N. C., Sec. 1951. (*Inquiry from N. C., May, 1919, Jl.*)

Payment of interest in advance

Prima facie evidence of agreement to extend

2059. Where a note is executed to bank, payable on demand with interest, and at the time of execution the maker pays three months' advance interest, which the bank indorses upon the note, such transaction is prima facie evidence of an agreement to extend the time of payment during the period for which the interest is paid, which will prevent the bank, unless it can prove a contrary agreement, from enforcing payment before the end of the extended period. Note payable at bank can be charged to maker's account at maturity without notification or his consent and bank owning note has right

of set-off at maturity. Bk. British Columbia v. Jeffs, 18 Wash. 135. Crosby v. Wyatt, 10 N. H. 318. Mosely v. Robinson, 10 Barn. & Cres. 729. Skelly v. Bristol Sav. Bk., 63 Conn. 83. Fla. Comp. L., 1914, Sec. 3018. (*Inquiry from Fla., Dec., 1917, Jl.*)

2060. The maker of a demand note pays interest for three months in advance to the bank holding the note. The bank wishes to enforce payment on demand before the date to which the interest is paid. *Opinion:* Such payment does not of itself constitute an agreement extending the time of payment of the principal for three months. In some states such payment is, and in others is not, prima facie evidence of agreement to extend, but it is in no case conclusive evidence. Kellam v. Brode, (Cal. 1905) 82 Pac. 213. Amberg v. Natchway, 92 Ill. App. 608. Preston v. Henning, 69 Ky. 556. (*Inquiry from N. J., Nov., 1912, Jl.*)

2061. Does the payment of interest in advance automatically renew a demand note? *Opinion:* The weight of authority is to the effect that payment of interest in advance is prima facie evidence of an agreement to extend the time of payment to the end of the period for which interest has been paid. Skelly v. Briston, 63 Conn. 83. (*Inquiry from N. J., Nov., 1917.*)

Prepayment of interest not conclusive evidence of agreement to extend and real agreement may be shown

2062. A bank made a loan to its depositor upon a judgment note payable one day after date under an agreement by which he can pay off the loan at the rate of \$50 per month unless future conditions require the bank to call for its immediate payment. As evidencing this agreement the bank received 20 post dated checks of \$50 each payable one month apart and also payment of the full interest in advance. The bank's inquiry is whether its receipt of interest in advance and the taking of the post dated checks has changed the time of maturity of this debt in accordance with the contention of its depositor. *Opinion:* So far as the prepayment of interest is concerned, the rule is quite generally recognized that such prepayment is not conclusive evidence of an agreement to extend or postpone the time of payment of the instrument. See, for example, the following cases: Mechanicsburg Second Nat. Bk. v. Graham, 246 Pa. St. 256; Brest v. Brooks, 38 Pa. Co. Rep. 522. But that such payment is prima facie evidence of such an agreement: Bank of

York v. Webster, 242 Pa. St. 128, holding that payment of interest in advance is a strong circumstance showing a renewal credit. In the present case the prima facie evidence of agreement to extend would be rebutted by the real agreement that the bank had the right to call for immediate payment, if needed, assuming such agreement can be proved. (*Inquiry from Pa., May, 1917.*)

Interest on demand notes

Demand note does not draw interest unless provided

2063. Does a demand note draw interest where it contains no provision to that effect? *Opinion:* The rule in New York is that where a demand note makes no provision for interest it does not draw interest before demand or commencement of an action. Van Vliet v. Katner, 124 N. Y. Supp. 63. Ledyard v. Bull, 119 N. Y. 62, 23 N. E. 444. Lawrence v. Church, 128 N. Y. 324. Bishop v. Sniffen, 1 Daly (N. Y.) 155. Chester v. Jumel, 125 N. Y. 327; In re Williams Est., 118 N. Y. Supp. 562. (*Inquiry from N. Y., June, 1919, Jl.*)

2064. A bank inquires whether a note drawn "on demand after date" would draw interest from date, or from the date of demand. *Opinion:* According to the weight of authority a note payable merely "on demand" does not bear interest until demand is made, or if no demand is made prior to suit, until such suit is instituted, although in a few states it has been held that such a note bears interest from its date. In view of the diversity of authority, it would be better to make a demand note read "on demand with interest from date." Then there would be no question but that the note would carry interest from the date of its execution and delivery. (*Inquiry from Okla., Oct., 1917.*)

Interest from date on demand note

2065. A note is submitted bearing the words "on demand after date * * * with interest at six per cent. per annum after date," and the bank asks whether the note actually bears interest from its date. *Opinion:* In Webber v. Webber, 146 Mich. 31, a note was made in the following terms: On demand after date we promise to pay * * * with 6% interest from date. The instant note provides: On demand after date * * * with six per cent. per annum after date." Under the above decision which appears to state the prevailing rule, the note

would draw interest from its date and if the concluding words "after date" were omitted, the effect would be the same. (*Inquiry from Okla., Oct., 1917.*)

Interest on demand notes secured by collateral

Matured time notes equivalent to demand notes

2066. A time note of \$5,000 duly secured has become due and remains unpaid, and thereafter demand is duly made for payment thereof and payment is not made, would the bank be acting within its rights in treating the note from the time of the demand as a demand note; and would the bank be justified in raising the rate from time to time above the 6% limit? Would the note then take the form of a regular demand note with collateral? *Opinion:* Under the law merchant a time note, after maturity, is equivalent to one payable on demand. Most frequently it has been so asserted with reference to the reasonable time of presentment in order to charge an indorser after maturity. The Negotiable Instruments Act expressly provides that "where an instrument is issued, accepted or indorsed when overdue, it is, as regards the person so issuing, accepting or indorsing it, payable on demand." The New York statute in any case in which "advances of money repayable on demand" to an amount not less than \$5,000 are made upon specified collateral securities, allows interest at any rate "agreed upon in writing by the parties to such transaction." (*Inquiry from N. Y., Aug., 1917.*)

The New York call loan statute

2067. What is the law with respect to interest upon advances of money repayable on demand upon the security of negotiable collateral? *Opinion:* The New York statute first enacted in 1882 (chapter 237) and now constituting section 379 of the General Business Law, which allows interest at any rate upon advances of money repayable on demand to an amount not less than five thousand dollars upon the security of negotiable collateral, is still the law and has not been repealed. (*Inquiry from N. Y., March, 1920.*)

Legal rate collectible after maturity

Rate of interest under extension clause

2068. A bank submits a note for \$500, dated November 7, 1914, payable April 1, 1915, with semi-annual interest at 6% until

maturity and thereafter 10%, and the note contains the agreement: "The above note at the request of makers may be extended six months from maturity." The note was extended six months and the makers contend that the debt only bore 6% interest for the extended period. *Opinion*: Where such a note is extended at request of makers, in pursuance of the quoted agreement, the extension carries with it all the terms of the note for the extended period; and consequently the maturity of the note was extended for six months and the debt only bore 6% interest for the extended period. (*Inquiry from Iowa, Oct., 1915.*)

One year note at four per cent. carries six per cent. after maturity

2069. A note was issued in 1906 for \$1,000 payable one year after date and bearing four per cent. interest. Interest was regularly paid at the rate of four per cent. until 1910. *Opinion*: The legal rate of interest (six per cent. in Pennsylvania) governs after maturity, whether the rate fixed by contract be greater or less than the legal rate. The holder of the note should claim the extra two per cent. not paid by the maker after maturity, unless he has waived his right to collect. *Ludwick v. Huntzinger*, 5 Watts & S. (Pa.) 5. *Wright v. Hanna*, 210 Pa. 349. *Kauffman v. Kauffman*, 239 Pa. 42, 60. (*Inquiry from Pa., Jan., 1916, Jl.*)

Interpretation of interest clauses

2070. Where a demand note in Ohio provides for interest at eight per cent. "payable semi-annually after maturity," such semi-annual interest is collectible running from date. Where the note is drawn for three months with eight per cent. interest payable semi-annually "after date," it is doubtful if more than the legal rate (six per cent. in Ohio) is collectible after maturity, for where the contract does not fix the rate after maturity, the law fixes the legal rate. If the interest clause were changed to read: "with interest at the rate of eight per cent. per annum, payable semi-annually from date until paid," the eight per cent. would be collectible throughout. *Page & Adams Ohio Gen. Code*, Sec. 8122, 8303. *Cook v. Courtright*, 40 Ohio St. 248. *Hobbs v. Insurance Co.*, 40 Ohio St. 543. *Taylor v. Hiestand & Co.*, 46 Ohio St. 345. *Hickok v. Rounds*, 51 Ohio St. 564. *Firestone v. Dellenbaugh*, 10 Ohio Cir. Ct. (N. S.) 153. *Wilson v. Neal*, 23 Fed. 129. (*Inquiry from Okla., May, 1915, Jl.*)

Rate on loans outside of state

Loan by national bank to borrower outside state

2071. The National Bank Act allows bank to charge interest (1) at the rate allowed by the laws of the state where a bank is located and no more, (2) except where a higher rate is charged by state banks of issue they can charge such higher rate, and (3) where no rate is fixed by the state law, not exceeding seven per cent. This state rate applies even though money is loaned to borrowers outside the state where a higher rate is allowed. U. S. Rev. St., Sec. 5197. Fed. Res. Act, Secs. 24, 25. *Tiffany v. Nat. Bk.*, 18 Wall. (U. S.) 409. (*Inquiry from Mo., July, 1916, Jl.*)

2072. The state rate of interest applies, even though money is loaned to borrowers outside the state where the higher rate is allowed. A national bank in North Carolina where the rate is 6 per cent. would be subject to the penalties for usury where it loaned funds to South Carolina parties at 8 per cent., the legal rate in that state, even though the note is made payable in South Carolina and suit was brought thereon in the South Carolina courts. *Roberts v. Mc-Neeley*, 52 N. C. 506. *Meroney v. Atlanta Nat. Bldg., etc., Co.*, 112 N. C. 842. U. S. Rev. St., Sec. 5197. (*Inquiry from N. C., June, 1918, Jl.*)

Loan by New Jersey bank on Canadian note

2073. A note drawn and payable in Canada for \$106.84 is presented to a bank in New Jersey. The note contains a statement of the consideration for which it was given, as follows: (Being \$105.00 plus 7 per cent. per annum.) The New Jersey bank raises the question of invalidity by reason of usury. *Opinion*: The note is not invalid by reason of the statement. In Canada the legal rate of interest is 5 per cent., but banks may stipulate for and take not exceeding 7 per cent. (*Inquiry from N. J., Aug., 1914, Jl.*)

Rate of interest on note payable in another state

2074. A note drawn in New York payable in another state, with interest but without specifying the rate, carries interest at the legal rate of the state where it is payable. *Pomeroy v. Ainsworth*, 22 Barb. (N. Y.) 118. *Wood v. Kelso*, 27 Pa. 241. *Hunt v. Hall*, 37 Ala. 702. *Bent v. Lauve*, 3 La. Ann. 88. (*Inquiry from N. Y., May, 1917, Jl.*)

Purchase of commercial paper not affected by usury law

Distinction between purchase and loan at greater than legal rate

2075. Where a national bank buys a note from a broker acting directly for the maker at a discount of eight per cent., the excessive discount of the note for the maker is usurious, but if the note has legal inception and is acquired from an indorser without recourse, the question of usury is doubtful. Where the note is discounted at an excessive rate with recourse on the indorser, the transaction is usurious as to the indorser but recoverable in full from the maker. Authorities on subject collected in Nat. Bk. of Gloversville v. Johnson, 104 U. S. 271. 39 Cyc. 932. Bramhall v. Atlantic Nat. Bk., 36 N. J. L. 243. Importers, etc., Nat. Bk. v. Littell, 47 N. J. L. 233. Smith v. Exch. Bk., 26 Ohio St. 141. Rahway v. Carpenter, 52 N. J. L. 165. Stirling v. Gogebic Lumber Co., (Mich.) 131 N. W. 109. Union Nat. Bk. v. Union Ry. Co., 145 Ill. 208. (*Inquiry from N. J., Dec., 1915, Jl.*)

Purchase of acceptance at greater than legal rate

2076. A bank asks whether its purchase from the payee at a discount of six per cent. of John Doe & Co.'s 90 days' acceptance payable to S. & Co. and indorsed by the latter without recourse would be a violation of the usury law of Minnesota. *Opinion:* Under the decisions and the Minnesota statute (Minn. Laws 1899 Ch. 66 Sec. 3), the transaction contemplated would not be held usurious, while the bank would have no recourse upon S. & Co. if John Doe failed to pay their acceptance. It would seem that such a transaction would be an out-and-out purchase of the acceptance of Doe & Co. from S. & Co. at the figure which it was worth in the market, and not a usurious loan. (*Inquiry from Minn., July, 1916.*)

Purchase of commercial paper at greater than legal rate for loans

2077. A bank asks in what manner "commercial paper can be floated at $6\frac{1}{2}\%$ and 7% as is being done at the present time." *Opinion:* The highest legal rate of interest in New York is 6% , and if a loan is made at a greater rate than 6% , this constitutes usury. It seems where commercial paper is floated at $6\frac{1}{2}\%$ or 7% , that it is in the form of a purchase and sale, as distinguished from a loan and, therefore,

does not come within the usury law; otherwise, the transaction would be usurious. Of course, a man cannot make his own note to a bank and sell it to a bank at a greater rate than 6% as this would only be a form of borrowing money; but where commercial paper is purchased in the market from others than the maker, the transaction is a purchase and not a loan and does not come under the usury law. (*Inquiry from N. Y., March, 1920.*)

Purchase of commercial paper as distinguished from loan—Federal Reserve banks exempt from usury law

2078. 1. A bank states that it has been receiving offerings of commercial paper from time to time at higher than the legal rate, and desires to know whether banks are permitted to accept rates of discount higher than the limit allowed by law. 2. The bank also states that the Federal Reserve Bank is collecting from the member banks in New York State and other states 7% discount where the usual rate is only 6% . *Opinion:* 1. Where commercial paper is negotiated at higher than the legal rate, it is, presumably, in the form of a purchase and sale as distinguished from a loan and, therefore, does not come within the usury law; otherwise the transaction would be usurious. 2. The National Bank Act limits the national banks to the rate allowed by the laws of the state, "and no more," except that when no rate is fixed by the state law they may charge 7% . It is doubtful, however, whether this statute is applicable to the Federal Reserve Bank, and as there is no limit in the Federal Reserve Act to the amount of interest or discount a Federal Reserve Bank may charge, it seems it is lawful for such banks to charge higher than the legal rate allowed by the law of the state. (*Inquiry from Ind., June, 1920.*)

Purchase of commercial paper at discount at greater than legal rate

2079. Is the purchase by an Illinois national bank of commercial paper of a broker in Illinois at 8% discount usurious? *Opinion:* If the purchase money for the commercial paper, less 8% discount, went directly to the maker, the transaction would be usurious, as it would be in effect a loan to the maker at a greater rate of interest than that allowed by state law. If, however, the paper was bought from a third person and not directly from the maker, the usury law would not be violated. See

opinion No. 2075. Where the note is discounted at an excessive rate with recourse on the indorser, the transaction is usurious as to the indorser, but recovery may be had in full from the maker. (*Inquiry from Ill., Dec., 1920.*)

Minimum charge for small loans

Minimum charge of \$1 for interest and service

2080. A national bank in Massachusetts follows a custom of making a minimum charge of \$1 to cover both interest and service in small loans. The bank seeks to avoid the liability for usury because the comptroller contended that the whole charge should be counted as interest and that so counted it would constitute a usurious charge in the case of small loans. *Opinion:* Under the Massachusetts statute, which allows parties to contract for any rate of interest or discount, a minimum charge of \$1 deducted by a national bank as an interest and service charge upon a small loan is lawful, and within the permission granted by the National Bank Act to charge and receive interest at the rate allowed by the laws of the state. Where a national bank in Massachusetts makes a small loan and deducts \$1 as an interest and service charge by oral agreement with the borrower, the conclusion seems warranted that such rate of interest and charge is lawful under the law of Massachusetts, although the amount deducted exceeds 6 per cent. interest on the amount of the loan, and that such deduction is within the permission granted by the National Bank Act that a national bank may deduct interest at the rate allowed by the laws of the state. Rev. L. Mass., 1902, Ch. 73, Sec. 3. Lamprey v. Mason, 148 Mass. 231. U. S. Rev. St., Sec. 5197. Winchester v. Glazier, 152 Mass. 316. (*Inquiry from Mass., March, 1917, Jl.*)

Minimum interest charge of 50 cents where above legal rate

2081. A bank asks whether it is usury to make a minimum charge of fifty cents for discounting small notes where the interest is less than that amount. *Opinion:* Morally the making of a minimum charge of fifty cents for discounting small notes where the legal interest on the amount of the note would not amount to that sum is proper, as otherwise the transaction is not worth entering into. But from a strict legal standpoint it might be held usury as the plain provision of the New Jersey statute is that "No person or corporation shall, upon contract, take directly or indirectly, for

loan of any money * * * above the value of six dollars for the forbearance of one hundred dollars for a year, and after that rate for a greater or less sum or for longer or shorter time." On the other hand, such a charge might be justified as a service charge. There seems to be no case in which such a point has been raised or decided (*Inquiry from N. J., Nov., 1915.*)

50 cents minimum charge

2082. A bank charges a straight rate of 10%, bank discount, on all notes with minimum charge of fifty cents. The bank asks whether, under the laws of Texas this minimum charge is usurious. *Opinion:* It has been claimed that such charge on a small loan is not usury but compensation; but the matter is still in the realm of argument. There seems to be no ruling or court decision which holds that it is not usury. It seems, however, a good argument could be advanced that a trivial minimum charge does not violate the spirit of the usury statutes and is justifiable on considerations of custom and convenience, or as compensation for service rendered in connection with the loan. (*Inquiry from Tex., Feb., 1916.*)

Legality of minimum charge of 50 cents

2083. A bank asks whether the laws of the State of New York permit banks to make a minimum discount charge and whether a minimum charge of fifty cents can be made for discounting a note irrespective of what the actual rate of discount would be. *Opinion:* The New York Legislature has not passed any law as yet legalizing a fixed rate such as fifty cents or one dollar for small loans which rate would otherwise technically be usurious. (*Inquiry from N. Y., June, 1919.*)

Slight excess interest

Slight excess interest taken for convenience of calculation

2084. A bank charged \$7.67 interest on a note for \$500, payable in three months. At this rate three renewals of the note would produce a year's income from interest of \$30.42, whereas the straight interest for one year would be \$30. *Opinion:* The slight excess interest is not usurious. Where, for convenience of calculation, interest is taken slightly in excess of the legal rate, the transaction is not usurious. Taking the interest of a note in advance by way of discount is not usurious. Conger v. Tradesman's Bk., Lalor (N. Y.) 34. Keckley v.

Winchester Union Bk., 79 Va. 458. Parker v. Cousins, 2 Gratt. (Va.) 372. Neal v. Brockhan, 87 Ga. 130. St. Bk. v. Cowan, 8 Leigh (Va.) 238. Crump v. Nicholas, 5 Leigh (Va.) 251. Stribbling v. Bk. of Valley, 5 Rand. (Va.) 132. Camp v. Bates, 11 Conn. 487. Patton v. Lafayette Bk. 124 Ga. 965. Planters' Bk. v. Bass, 2 La. Ann. 430. Agricultural Bk. v. Bissell, 12 Pick. (Mass.) 586. Planters' Bk. v. Snodgrass, 4 How. (Miss.) 573. Lafayette Bk. v. Findley, 1 Ohio Dec. (Reprint) 49. Merchants', etc., Bk. v. Sarratt, 77 S. C. 141. Bradley v. McKee, 3 Fed. Cas. No. 1784. (*Inquiry from Va., March, 1915, Jl.*)

Discount greater than legal rate

Oral agreement for higher rate than 6% in Connecticut

2085. A bank asks whether the law of Connecticut would permit it to loan its customers at a higher rate than six per cent., taking the usual form of discount at the time proceeds of their notes are credited their account, without having some agreement in writing. *Opinion:* Section No. 4795 of the General Statutes of Connecticut fixes six per cent. as the legal rate "in the absence of any agreement to the contrary," and it has been held that any rate agreed upon is lawful. Section No. 4798 prohibits loans at a greater rate than twelve per cent., but under Section No. 4803 the provisions under that section do not affect any loan made by a national bank or state bank or trust company. There is no provision in the Connecticut statute that the agreement for the greater rate must be in writing. It follows, therefore, that an oral agreement between the bank and borrower that the bank would discount the borrower's note at a fixed rate higher than six per cent., taking out the interest in advance and crediting the balance to the customer's account, would be valid, though not in writing. (*Inquiry from Conn., June, 1920.*)

Discount of note for indorser without recourse at excessive rate

2086. A makes his note to B for value, and B indorses it to C without recourse at a discount greater than the legal rate of interest. *Opinion:* The rule in Tennessee is that the note is not usurious in its inception and that an indorser, who has transferred a note at a discount greater than legal interest and has paid the same to the holder, has no right of recovery of the excess over the legal interest. There are different views held by

courts as to the usurious nature of the transaction. Campbell v. Read, 8 Tenn. 391. May v. Campbell, 26 Tenn. 450. (*Inquiry from Tenn., June, 1916, Jl.*)

Discount at maximum legal rate

Discount at maximum legal rate not usurious in Arkansas

2087. A note for \$100 having ten months to run was discounted by a bank by taking \$10—representing 10 per cent.—from its face value. The Arkansas statutes with respect to usury provide that all contracts for greater rate of interest than 10 per cent. per annum shall be void as to principal and interest, and further that all notes whereupon there shall be reserved any greater sum than is prescribed shall be void. Is the note in question usurious? *Opinion:* It has been held in Arkansas that the taking of the highest legal rate of interest in advance on a negotiable note payable twelve months after date does not constitute usury. In the case under consideration interest was collected in advance for one year, whereas the note actually matured in ten months. This plainly amounts to usury. Kirby's Dig. Stat. Ark., 1904, Secs. 5389, 5390. Newport Bk. v. Cook, 60 Ark. 288. First Nat. Bk. v. Waddell, 74 Ark. 241. Vohlberg v. Keaton, 51 Ark. 534. (*Inquiry from Ark., March, 1917, Jl.*)

Conflict of decision

2088. In Florida and Georgia deduction of interest in advance at highest legal rate is usurious but in Texas, North Carolina, North Dakota and some other jurisdictions such deduction is permissible. Ga. Civ. Code, 1910, Secs. 3427, 3436. Loganville Bk. Co. v. Forrester, 143 Ga. 302. Sayles Tex. Civ. St., Vol. 3, Art. 4979. Geisberg v. Mutual Bldg., etc., Assn., (Tex. 1900) 60 S. W. 478. Webb v. Pahde, (Tex. 1897) 43 S. W. 19. Fla. Comp. L., 1914, Vol. 2, Ch. 5, Secs. 3103, 3104, 3105. Purvis v. Frink, 57 Fla. 519. Maxwell v. Jacksonville Loan, etc., Co., 45 Fla. 425, 34 So. 255. Lyle v. Winn, 45 Fla. 419, 34 So. 158. (*Inquiry from Fla., Aug., 1917, Jl.*)

Deduction of interest in advance on five year loan

2089. A bank made a loan on real estate on a basis of five years at 8%, 2% of which is payable in advance, the bank retaining 2% of the loan when made; the outside legal rate being 8% upon written

contracts. The bank asks whether such loan is usurious. *Opinion:* While a number of decisions hold that the taking of interest at the highest legal rate, in advance, by way of discount on short loans, in the ordinary course of business, is not usurious, a reservation of interest in advance, in an ordinary transaction of lending money for a period of five years, is usurious when the amount reserved and the amount contracted to be paid aggregate a sum in excess of the highest legal rate for the term of the loan. *McCall v. Herring*, 116 Ga. 235. *Union Sav. Bk. v. Dollenheim*, 107 Ga. 614. *Mackenzie v. Flannery*, 90 Ga. 590. (*Inquiry from Iowa, Jan., 1916.*)

2090-2091. (These headings transferred to other sections.)

Discount at maximum rate not exceeding one year legal in Oklahoma

2092. In Oklahoma the maximum rate of interest, not exceeding one year's amount, may be deducted in advance without incurring liability on the part of the lender for usury. *Rev. L. Okla., Secs. 1004, 1007. Covington v. Fisher*, (Okla.) 97 Pac. 615. (*Inquiry from Okla., Jan., 1917, Jl.*)

Deduction in advance at highest legal rate in Texas

2093. Under the Texas statute regarding the legal rate of interest which provides that "the parties to any written contract may agree to and stipulate for any rate of interest not exceeding ten per cent. per annum on the amount of the contract," it is not usury to deduct interest in advance at the highest legal rate of ten per cent. *Vernon's Sayles' Tex. Civ. Stat. Vol. 3 Art. 4979. Geisberg v. Mut. Bldg. Assn.*, (Tex. 1900) 60 S. W. 478. *Webb v. Pahde*, (Tex. 1897) 43 S. W. 19. *Crowell v. Jones*, 167 N. C. 386. *Sundahl v. First St. Bk.*, 32 N. Dak. 373. *Contra., Loganville Bank. Co. v. Forrester*, 143 Ga. 302. (*Inquiry from Tex., June, 1917, Jl.*)

Usurious loans

Consent of borrower does not make usurious loan lawful

2094. Is a bank justified in charging as much as one or two per cent. per month in advance on notes when the maker understands he is making such payment and makes no objection? Would the maker have a right of action against the bank? *Opinion:* The legal rate of interest in Missouri is 6% and parties may agree in writing for the payment of not exceeding 8% per annum.

It would, therefore, be illegal and usurious to charge the maker as much as 1% per month. The fact that the maker understands he is paying it and makes no objection does not make it lawful nor constitute a waiver by the maker of his right of action. (*Inquiry from Mo., Nov., 1915.*)

Requirement that certain amount be kept on deposit

2095. A bank loans money at 6% interest, the maximum rate, on condition of the borrower's agreement to keep a stated amount on deposit during the period of the loan. Is this usury? *Opinion:* The transaction stated is usurious. *East River Bank v. Hoyt*, 32 N. Y. 119, and *Butterworth v. Pecare*, 8 Bosworth (N. Y.) 671, are exactly in point. In the case submitted the borrower would be paying interest on the full amount but would be given the use of only a portion of that amount; therefore the amount of interest charged on the sum actually applied to the use of the borrower would be above the legal rate and an agreement to that effect would be corrupt. Were there no binding agreement requiring that a portion of the borrowed money be kept on deposit, but this was a purely voluntary action on the part of the borrower, the transaction would not be usurious, although the borrower expected that this course would enable him to obtain money from the bank more readily. *Appleton Bank v. Fiske*, 90 Mass. 201, which case, however, recognizes that there would be usury, were there a binding agreement. *Doster v. English*, (N. C.) 67 S. E. 754. *Butterworth v. Pecare*, 8 Bosw. (N. Y.) 671. *East River Bk. v. Hoyt*, 32 N. Y. 119. *Appleton Bk. v. Fiske*, 90 Mass. 201. (*Inquiry from N. C., July, 1912, Jl.*)

Usury in Tennessee

2096. A loan was originally made at the legal rate of six per cent. After maturity the lender increased the rate to eight per cent., which was received for subsequent indulgence and forbearance of the debt. *Opinion:* The taking of the eight per cent. was usurious under the law of Tennessee. *Shan. Code Tenn., 1896, Chap. 6. Art. 1, Secs. 6732, 3492, 3493. Richardson v. Brown*, 9 Baxt. (Tenn.) 242. *Hamilton v. Fowler*, 99 Fed. 18. (*Inquiry from Tenn., April, 1915, Jl.*)

Note: The Tennessee legislature in 1921 raised the legal contract rate of interest from 6% to 8%.

Usurious note payable at bank

2097. A note promising payment with interest at an usurious rate is made payable at a bank. When it is presented for payment the maker has on hand sufficient funds. In the absence of specific instructions from the customer, should the bank pay the note with the specified rate of interest or should it refuse to pay and protest the note? Would the bank be liable if it did pay and charge the amount to the customer's account? *Opinion:* Sec. 87 of the Negotiable Instruments Act provides: "Where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon." The duty of a bank under the statute to pay presupposes that the note is not illegal or irregular. Here the note is tainted with usury and under the New York statute (Gen. Business Law Secs. 370, 371, 373) it is absolutely void. The Negotiable Instruments Law did not affect this rule; the note is unenforceable even by a holder in due course. *Sabine v. Paine*, 223 N. Y. 401; *Clafin v. Boorum*, 122 N. Y. 385, 388. Hence, payment by the bank in the case submitted would be unwarranted and would render it liable to the customer. In such a case the bank should return the note which, being void for usury, does not call for protest. (*Inquiry from N. Y., Feb., 1921.*)

Power of Congress to fix interest rates*Power of Congress to fix 7% interest rate for national banks*

2098. A bank inquires regarding the constitutionality of a proposed amendment to the Federal Reserve Act which would make it possible for national banks in any state to charge seven per cent. on loans when the legal rate fixed by the state is six per cent. *Opinion:* It is safe to assume that an amendment such as above indicated would not be unconstitutional. Congress now fixes a 7% rate when no rate is fixed by the laws of the state. It is within the power of Congress to allow the national banks to charge any rate it sees fit, notwithstanding state laws might provide a different or greater rate. It has been the policy, however, of Congress, heretofore, to make the rate of interest that allowed by the law of the state. (*Inquiry from Va., June, 1920.*)

Question of constitutional power in Congress to regulate state interest rates

2099. A bank asks whether it would be

unconstitutional for Congress to pass a law regulating the rates of interest in the various states. *Opinion:* The Supreme Court of Illinois in *Beach v. Peabody*, 118 Ill. 75, held that the provision of the U. S. Constitution, Art. 1, Sec. 8, giving Congress the power to coin money and regulate the value thereof, has no reference to the rate of interest to be charged for the use of money and does not deprive the states of the power to regulate the same by statute. It is generally held that the State legislatures have entire control over the subject of interest, restricted only by State constitutional limitations. (*Inquiry from Va., Feb., 1917.*)

Usury by national banks*Payment of interest on greater amount than loan*

2100. On February 27, 1918, the comptroller of the currency issued a circular letter to all national banks, a portion of which is as follows: "Your attention is called to a recent order of the Supreme court of Erie County in the State of New York, overruling a demurrer to a bill of complaint brought to recover usurious interest under Sec. 5198 U. S. R. S. The bank had not openly charged interest in excess of 6 per cent., the legal rate, but had required the borrower to carry a deposit balance as a condition of the loan of the money." Several national banks requested information as to just what was decided in the case referred to. *Opinion:* In the case referred to, the complaint alleged that the plaintiff owed the bank \$85,000 on notes, but was compelled to execute notes to a total of over \$100,000, and to pay 6% interest on the full amount of the notes. To make it appear that there was a consideration for the increased amount of notes, the bank executed its certificates of deposit for such increased amount of notes above \$85,000, but retained them itself. The decision was that, admitting for the purpose of the demurrer all the facts stated in the complaint were true, the complaint stated a cause of action for the recovery of usurious interest under U. S. Rev. St. 5198. The bank subsequently settled the suit by paying the plaintiff nearly the full amount demanded. In view of the form of the complaint the holding amounts to this: that a binding agreement that the customer keep a certain amount on deposit, represented by a certificate of deposit, constitutes usury, where thereby he pays more than the

legal rate of interest on the amount actually owing, and the device is one to evade the usury statute. A decision that such a transaction is usurious is nothing new. (*Inquiry from N. Y., April, 1918.*)

Usury by national bank in Georgia

2101. The Comptroller of the Currency urged by circular letters that a national bank in Georgia refrain from making further loans or discounts bearing a rate of interest greater than 8%. The bank asks whether the Comptroller has power to compel such course. *Opinion:* Under the law of Georgia, the legal rate of interest is seven per cent. and eight per cent. may be stipulated for by contract. Any greater rate is usury. The National Law allows a national bank to charge the rate allowed by the law of the state, and, if a greater rate is charged provides a penalty of forfeiture of the entire interest, or if a greater rate is paid, then double the interest at the suit of the borrower. A further penalty for violation of any of the provisions of the Act is forfeiture of charter at the suit of the Comptroller. (*Inquiry from Ga., April, 1916.*)

Attorney's fee as cover for usury

2102. A national bank loaned B \$100 for ninety days and charged \$6 interest, making the note \$106. The note also provided for the payment of an attorney's fee of \$15 and ten per cent. additional. *Opinion:* In this case usurious interest was charged but not paid. Under the National Bank Act the entire interest is forfeited and the principal alone is recoverable. The usurious element does not vitiate the entire contract but the provision for the attorney's fee might be regarded as excessive and as a cover for usury, so that such amount would be non-recoverable. U. S. Rev. St., Sec. 5198. *Oates v. Montgomery First Nat. Bk.*, 100 U. S. 239. *Meador v. Johnson*, (Okla.) 112 Pac. 1121. (*Inquiry from Okla., May, 1913, Jl.*)

Usury pleaded as a defense

Defense of usury by surety

2103. A national bank loaned A \$100, taking his note for \$106 signed by B as surety. The loan, being for a period less than one year, was usurious, and in a suit against B to collect the note, B pleaded usury. *Opinion:* The surety may defend on the ground of usury to the same extent as the principal debtor. If the defense was

successful, the bank could recover the principal sum loaned, but no interest. *Gray v. Brown*, 22 Ala. 262. *Austin v. Fuller*, 12 Barb. (N. Y.) 360. U. S. Rev. St., Sec. 5198. (*Inquiry from Okla., Jan., 1914, Jl.*)

Parol evidence to prove usury

2104. A made his note payable to a bank for \$193 due in ten months, with interest from maturity at ten per cent. The bank collected the note and thereafter A sued the bank for usurious interest to the amount of double the interest paid at time of loan. A introduced note as his material allegation and bank objected to any other parol evidence being introduced to alter terms of note. *Opinion:* Where an action is brought for usurious interest and the note, pleaded as the material allegation in support of the usury, does not itself indicate that the transaction was usurious, parol evidence would be admissible to prove the usury. 39 Cyc. 1054, and cases cited. *Scott v. Lloyd*, 9 Pet. (U. S.) 418. *Whildon v. Milledgeville B. Co.*, 3 Ga. App. 69. *France v. Munro*, 138 Iowa 1, 7. *Roasenda v. Zabriskie*, 18 La. 346. (*Inquiry from Okla., April, 1913, Jl.*)

By a Tennessee corporation

2105. Under the laws of Tennessee usurious interest paid on a loan is first applied to the payment of the principal and legal interest, and until such debt is paid, the claim for usury does not arise, and the action is barred in two years. There is no statute in Tennessee forbidding a corporation from pleading usury. *The Vigilancia*, 73 Fed. 452. *Binghamton Tr. Co. v. Auten*, 68 Ark. 299. *Hartford Fire Ins. Co. v. Hadden*, 28 Ill. 260. *Lane v. Watson*, 51 N. J. L. 186. *Frazier v. Trow's Print., etc., Co.*, 90 N. Y. 678. *Smith v. Isle of Wight Co.*, 3 N. Y. S. 300. *Danville v. Pace*, 25 Gratt. (Va.) 1. *Weatherhead v. Boyers*, 7 Yerg. (Tenn.) 545. *Threadgill v. Timberlake*, 2 Head (Tenn.) 395. *Wood v. Todd*, 3 Baxt. (Tenn.) 89. *Boyers v. Boddie*, 3 Humph. (Tenn.) 666. *Laws Tenn.*, 1903, Ch. 439. (*Inquiry from Va., June, 1914, Jl.*)

Penalty for usury

Penalty under Georgia law of 1916

2106. A bank asks whether the penalty imposed by the law of 1910 is changed by the Act of 1916. *Opinion:* The law of 1916 changes the usury penalty. The former law

(Sec. 3438 Code of 1910) provides that a person guilty of usury should "forfeit the excess of interest" charged or taken or contracted to be, and also provided (Sec. 3442) that "all titles to property made as a part of a usurious contract or to evade the laws against usury was void." The Act of 1916 repealed these two sections but enacted in lieu thereof that "any person violating the law against usury should forfeit the entire interest so charged or taken or contracted to be reserved, charged or taken" and further that no further penalty or forfeiture should be suffered for taking usury. The law of 1910, therefore, increases the penalty from forfeiture of the excess of interest to forfeiture of the entire interest; but repeals the penalty avoiding titles to property. (*Inquiry from Ga., Oct., 1917.*)

Penalty for usury by national bank

2107. When a usurious rate of interest is charged, is the interest only forfeited? *Opinion:* Under the present National Bank Law the penalty for usury by a national bank is forfeiture of the entire interest or if the greater rate of interest has been paid, liability for double the amount of such greater rate at the suit of the borrower within two years from the time the usurious transaction occurred. (*Inquiry from N. Y., Feb., 1916.*)

Usury penalty in Oklahoma

2108. The usury laws of Oklahoma apply equally to individuals and to firms and corporations, but in the case of the national banks the penalty for usury is provided for in the national and not in the state law. Rev. Laws Okla., Ch. 12, Art. VI, Secs. 1004, 1005. *People's Bk. v. Dalton*, 2 Okla. 476. *Seawell v. Hendricks*, 4 Okla. 435. U. S. Rev. St., Sec. 5197. (*Inquiry from Okla., Feb., 1914, Jl.*)

Proposed Oklahoma usury penalties inapplicable to national banks

2109. The provisions of the proposed

Oklahoma usury law (1) making usury a misdemeanor, (2) making it a misdemeanor for the original holder to sell or transfer a usurious instrument, (3) prohibiting the filing of a mortgage or other security given for a usurious loan, and (4) prohibiting suit in court upon a usurious contract will not, if enacted, be applicable to national banks. *Bk. v. Dearing*, 91 U. S. 29. *Railway Co. v. Bk.*, 106 Ala. 346. *Peterborough First Nat. Bk. v. Childs*, 133 Mass. 248. *First Nat. Bk. v. Garlinghouse*, 22 Ohio St. 492. *St. v. Clark First Nat. Bk.*, 2 S. Dak. 568. *Slaughter v. First Nat. Bk.*, 109 Ala. 157. *Easton v. State of Iowa*, 188 U. S. 220. U. S. Rev. St., Secs. 5197, 5198. (*Inquiry from Okla., July, 1913, Jl.*)

Rights of holder in due course of negotiable instrument void under usury statute

2110. A bank asks whether the Negotiable Instruments Act gives an enforceable title to a holder in due course to a note or bill which is made void by state statutes against usury and gaming. *Opinion:* There has been a conflict in the decisions of the courts of the different states upon this question. At common law where a statute declared void an instrument founded upon a gaming consideration, or because of usury, a bona fide purchaser for value was not protected. But the Negotiable Instruments Act provides that a holder in due course holds the instrument free from any defect of title of prior parties free from defenses available to prior parties among themselves and it declares that the title of a person who negotiates an instrument is defective when he obtains the instrument, among other things "for an illegal consideration." Some courts have held that said act virtually repeals, as to bona fide holders, state statutes making notes void when given for a gambling debt or when tainted with usury, but other courts hold to the contrary. (*Inquiry from Va., Feb., 1917.*)

LEGAL TENDER

Provision for payment in gold coin

2111. The customer of a bank holds a bond and mortgage which provides for payment at maturity in gold coin. At maturity he insists upon specific performance of the contract, although gold is unobtainable at the banks. *Opinion:* Where a note and

mortgage provide for payment in gold coin, the creditor is entitled to payment, specifically in gold, and can recover and enforce judgment payable specifically in that medium. Should it become physically impossible to obtain gold, the promisor would be liable in damages for non-performance but it

is difficult to see how badly damaged he would be, since paper legal tender is on a par with gold. *Bronson v. Rodes*, 7 Wall. (U. S.) 229. *Butler v. Horwitz*, 7 Wall. (U. S.) 258. *Trebilcock v. Wilson*, 12 Wall. (U. S.) 687. U. S. Rev. St. Sec. 3014. (*Inquiry from Minn., Nov., 1918, Jl.*)

Legal tender substitute for gold coin

2112. A bank desires to eliminate from all notes payable to it the words "Principal and interest payable in gold coin of the United States," and substitute the words "Principal and interest payable in lawful money of the United States." *Opinion:* A note promising to pay so many dollars is payable in lawful money, *i. e.*, legal tender, and there is no necessity for a provision specifically making it so payable. A note payable in "gold coin of the United States" is specifically payable and enforceable in that medium. *Miller v. Lacey*, 33 Tex. 351. *Opin. Atty. Gen.*, Vol. 17, p. 123. *Carpenter v. Northfield Bk.*, 39 Vt. 46. *Sanford v. Hays*, 52 Pa. 26. *Bronson v. Rodes*, 7 Wall. (U. S.) 229. (*Inquiry from Cal., Aug., 1918, Jl.*)

Legal tender qualities of money

2113. Gold coins and standard silver dollars of the United States are legal tender at their nominal value; subsidiary silver coins smaller than one dollar are legal tender up to ten dollars; minor coins (nickel and copper) are legal tender up to twenty-five cents; United States notes, demand treasury notes and interest-bearing treasury notes are legal tender in payment for all debts public and private except for duties on imports and interest on the public debt; treasury notes are legal tender in payment of all debts public and private and are receivable for customs, taxes and all public dues; gold and silver certificates, national bank and Federal reserve notes are not legal tender, but gold and silver certificates are receivable for all public dues; national bank notes are receivable for all public dues except duties on imports; federal reserve notes are receivable by national and member banks and federal reserve banks and for all taxes, customs and other public dues. For detailed statement showing exceptions to above, see 10, A. B. A. Jl., 125. Rev. St. U. S., Secs. 3584, 3585, 3587, 3589, 3590. (*Inquiry from Colo., Aug., 1917, Jl.*)

Deposit in gold coin payable in legal tender

2114. A man deposited \$1,000 gold in his

bank and at the end of the year wishes to withdraw this amount and demands gold from the bank. *Opinion:* A bank which receives gold coin as a general deposit is not obliged to pay gold on demand of depositor, but only legal tender, but if gold was placed with the bank as a special deposit, the identical thing must be returned. *Carpenter v. Northfield Bk.*, 39 Vt. 46. (*Inquiry from Vt., Aug., 1917, Jl.*)

Standard silver dollars

2115. Standard silver dollars are legal tender for any amount. U. S. Rev. St., Sec. 254 (Act Feb. 28, 1878). (*Inquiry from S. D., May, 1912, Jl.*)

Payment of check in legal tender

2116. A private bank has been paying certain checks drawn on itself in minor coin, and inquires if it can lawfully pay such checks in cents and nickels to any extent it desires, or if it is limited to making payments in subsidiary silver to the extent of \$10 or in minor coins to the extent of 25 cents, and whether the latter applies to the total amount of checks presented or to each individual check. *Opinion:* Subsidiary silver coins of smaller denominations than \$1 are legal tender up to \$10. Minor coins (nickel and copper) are legal tender not exceeding 25 cents in any one payment. Therefore, in paying a check, the bank cannot lawfully make payments in these coins beyond the legal-tender limit, if objected to. If checks presented represent separate debts, it seems this limit could be tendered upon each check; but if the checks are all payable to the same holder so as to constitute one debt the case would be different. (*Inquiry from Mo., Sept., 1918.*)

2117. A bank asks whether a person presenting a check can require payment in currency or silver at his option. *Opinion:* The bank, and not the presenting checkholder, has the option to say the kind of legal tender in which payment shall be made. That is to say, standing strictly on legal rights, the holder has a right to demand legal tender, but the bank has a right to make payment in any kind of legal tender, gold coins, silver dollars or United States notes. Subsidiary silver coins are not legal tender for more than \$10. (*Inquiry from Tex., Sept., 1915.*)

National bank notes legal tender to other national banks

2118. A bank inquires whether it is obligatory upon national banks "to receive

the notes of every other national bank at par." *Opinion*: The answer may be found in the plain wording of the statute. Section 5196 of the United States Revised Statutes provides: "Every national banking association formed or existing under this title shall take and receive at par, for any debt or liability to it, any and all notes or bills issued by any lawfully organized national banking association. But this provision shall not apply to any association organized for the purpose of issuing notes payable in gold." (*Inquiry from Minn., April, 1917.*)

Obligation of bank to pay deposits of Mexican funds in U. S. legal tender

2119. It is stated by a Texas bank that the banks along the border have around \$10,000,000 in Mexican deposits, of which it has a very fair share, and is in doubt as to advisability of continuing to receive deposits in Mexican money. The bank requests wire as to what would be considered legal tender in paying Mexican depositors where deposits are made in Mexican currency, payable in Mexican money; that it would be impossible to cover deposits in Mexican gold or silver, but they are covered by bills issued by Banco Londres and Banco Nacional. Should this issue later on not be acceptable, would the bank be forced to pay

in Mexican gold, silver or American money at any rate of exchange? *Opinion*: A bank which receives a deposit of Mexican coin or currency and gives credit therefor as for so much United States money must pay the depositor the amount credited in United States legal tender and, therefore, takes the risk of loss in case of depreciation. It was formerly held in case of deposit of state bank bills that, notwithstanding their depreciation to the point of worthlessness, payment must be made in full in good money and even the identical bills deposited could not be repaid, and the same principle applies. The bank cannot pay the deposit in Mexican bank bills if the depositor objects, as they are not legal tender, and, furthermore, in any event would be subject to Federal tax of ten per cent. It seems, therefore, if there is danger of loss or depreciation, Mexican coin and currency should not be received on general deposit at all, but only as a special deposit to be specifically returned, or a special agreement should be made under which the bank takes as agent to collect the bills or convert the coin and give credit for the proceeds only when received in United States money. As to the deposits in Mexican money which the bank now has, no specific advice can be given. If there is danger of loss the bank should proceed to readjust the credit by agreement with its depositors. (*Inquiry from Tex., Oct., 1913.*)

LETTERS OF CREDIT

Revocation of banker's letter of credit

2120. A letter of credit issued by a New York bank reads: "Our correspondents at Paris have requested us by cable to inform you that they open a confirmed credit in your favor..... available against your drafts on us at sight accompanied by shipping documents." May the bank cancel such letter of credit merely upon instructions from its foreign correspondent, and leave the person in whose favor the credit was opened to his remedy against the bank's correspondent in Paris? Would the New York bank be held as would an American bank issuing a letter on its own initiative? *Opinion*: Recent decisions are to the effect that a bank issuing a letter of credit on behalf of a depositor to a third person who acts on it cannot justify its refusal to honor its obligation because of contract relations between it and the depositor (*American Steel Co. v. Irving National Bank, 266 Fed.*

41); and that where a bank issues a letter of credit at the buyer's instance, the letter of credit is irrevocable and the buyer cannot enjoin the bank from honoring or paying any drafts thereon nor can it enjoin the seller from drawing or negotiating drafts upon such letter. *Frey & Son v. E. R. Sherburne & Co., 184 N. Y. Supp. 661*. In the latter case the court said: "Interests of innocent parties who may hold drafts upon the letter of credit should not be made to suffer by reason of rights that may exist between the parties to the contract of sale in reference to which the letter of credit was issued." In the case submitted, the New York bank would be equally bound as if it had issued a letter of credit on its own account; it is more than a mere agent for a known principal, whose acts and contracts involve no contractual liability on the part of the agent. The bank has superadded a contract of its own to the effect that it holds a credit in

favor of the person addressed and its statement that such credit is available against such person's drafts is a promise to pay the drafts drawn against the credit upon which it is personally liable. An agent may pledge his own credit in the transaction or superadd it to that of the principal in such a way as to render himself personally liable. *McCauley v. Ridgewood Trust Co.*, 79 Atl. (N. J.) 327. *Jones v. Gould*, 29 N. E. (N. Y. 1071.)

Negotiable Instruments Act, Sec. 135 (N. Y. 223) provides that "an unconditional promise in writing to accept a bill before it is due is deemed an actual acceptance in favor of every person who, upon faith thereof, receives the bill for value." Under the terms of this provision, the letter of the New York bank would bind it as acceptor of drafts drawn against the credit in favor of bona fide purchasers for value.

There is a certain analogy to the binding nature of a certified check, payment of which the depositor cannot stop, except as concerns the original payee, in which case the decisions are somewhat conflicting whether the bank can interpose equities of the depositor against him.

Gelpcke v. Quentell, 74 N. Y. 599, is very similar to the case submitted. In that case the New York correspondent was held justified in accepting and paying drafts drawn before notice of revocation of the letter of credit had reached the person in whose favor the credit was extended, and was held to have the right of reimbursement from its foreign correspondent. Although in this case the court seems to think that the letter was binding as an acceptance only of such drafts as were drawn before the drawer had notice of the withdrawal of the credit, later decisions seem to go further and uphold the absolute irrevocability of letters of credit, not only in favor of bona fide holders of drafts, but also in favor of the person to whom the letter is issued. The above discussion does not apply to conditional letters of credit, but only to absolute promises. (*Inquiry from N. Y., Jan., 1921.*)

Payment of overdrawn letter of credit

2121. A bank issued a letter of credit for \$100, promising to honor drafts to that amount. The letter required that the amount of each payment be indorsed on the letter and negotiation of the draft to constitute a guaranty that the requisite indorsement was made and that all drafts "be drawn against our letter of credit No. 101." Five drafts of \$25 each were drawn and paid,

creating an overdraft of \$25. The first draft stated it was drawn against the letter; the next three did not so state and the letter was attached to last draft drawn. *Opinion:* The bank has recourse upon its customer for the overdraft but will have no recourse against any of the cashing banks unless it can prove the drafts were negotiated against the letter and the requirements not complied with. The bank should have refused payment of drafts not indorsed as drawn against the letter, for otherwise such drafts could be negotiated without showing the letter. (*Inquiry from Kan., Feb., 1914, Jl.*)

Liability of issuing bank for overdraft where credit exhausted by previous drafts not indorsed on letter

2122. A bank issued a general letter of credit authorizing drafts to a certain amount to be indorsed upon the letter of credit. The question is raised as to who would be the loser if another bank making a payment on the letter of credit neglected to make a notation of this payment and through this neglect gave the holder an opportunity to draw more than the face of the letter of credit. *Opinion:* The bank issuing the letter of credit is liable to the innocent purchaser of a draft drawn against the latter and within its amount, notwithstanding the holder of the letter has previously exhausted the credit by drafts not so indorsed. It would be liable for an amount within the unindorsed total of the letter of credit, although it had paid the full amount of the letter upon drafts which had not been indorsed thereon. In order to safeguard the issuing bank from being misled into paying an ordinary draft by the drawer of the letter but not indorsed there, the only protection would be to require that drafts drawn against the letter should specify upon their face that they were so drawn and that their amount had been indorsed upon the letter; the bank refusing to pay such drafts as did not contain this statement. The draft might contain a clause: "Drawn against your letter of credit No. and the amount of this draft has been indorsed thereon." If the draft itself contained such statement, this would be an express warranty by the purchaser to the drawee of a material fact which, if false and the drawee relied thereon to his injury, would entitle him to recourse upon such purchaser. *Bk. of Seneca v. First Nat. Bk.*, 105 Mo. App. 722. *Omaha Nat. Bk. v. First Nat. Bk.*, 59 Ill.428. (*Inquiry from Okla., March, 1919, Jl.*)

LIBEL AND SLANDER

Derogatory statements affecting banks

Legislation

2123. Note: The following statute, recommended by the American Bankers Association, which punishes the wilful and malicious circulation of statements, written or oral, derogatory to banking institutions, has been passed either in the recommended form or with modifications in the following states: Arizona, Arkansas, California, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Michigan, Missouri, Nevada, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Washington, West Virginia, Wisconsin, Wyoming:

An Act to punish derogatory statements affecting banks.

Be it enacted, etc.

Section 1. Any person who shall wilfully and maliciously make, circulate or transmit to another or others any statement, rumor or suggestion, written, printed or by word of mouth, which is directly or by inference derogatory to the financial condition or affects the solvency or financial standing of any bank, savings bank, banking institution or trust company doing business in this State, or who shall counsel, aid, procure, or induce another to start, transmit or circulate any such statement or rumor, shall be guilty of a (felony or misdemeanor), and upon conviction thereof, shall be punished by a fine of not more than five thousand dollars or by imprisonment for a term of not more than five years, or both.

Statement

This proposed act was drafted by General Counsel in December, 1907, to punish persons who maliciously make or circulate derogatory statements or stories affecting the standing and credit of banking institutions—a kind of evil to which banks are peculiarly subject, and which often causes great injury not only to the bank or banks affected but to the general public. Existing criminal laws are inadequate to obtain the conviction and punishment of offenders.

As originally drafted, following a law of New Jersey, enacted in the spring of 1907, the act provided for the punishment of persons who "wilfully or maliciously" circulated stories "untrue in fact." The later

draft aims at one who "wilfully and maliciously" circulates such stories, without the necessity of proving they are "untrue in fact," making the gist of the crime depend upon the maliciousness rather than upon the untruth of the injurious utterance. The new draft was made as the result of expert criticism demonstrating the unwisdom of bringing in the untruth as a material element of proof, which might require dragging a bank's entire financial condition into court before conviction could be obtained, the impracticability of which might defeat the ends of justice. (*April, 1921.*)

Circulation of false stories concerning national bank

2124. A bank inquires as to whether there is any penalty for circulating false and malicious stories about a national bank. *Opinion:* At common law, slander is not a criminal offense unless it is written so as to constitute libel, and a national bank which has been injured by the circulation of malicious and derogatory statements would be confined to its civil action for damages in case the slanderer is worth suing. In 1913 the legislature of Connecticut passed an act to make criminal, derogatory statements affecting banks, the extreme penalty therefor being \$500 fine and the term of imprisonment one year. (*Inquiry from Conn., July, 1915.*)

No federal statute punishing derogatory statements affecting banks

2125. A bank asks whether there is a Federal law to punish derogatory statements affecting banks. *Opinion:* There is no federal law on the subject. A law to cover cases of this kind has been enacted in a number of states, including Kansas. It is Chapter 183 Laws of 1919. It provides in substance that whenever any person maliciously and without probable cause circulates any rumor with intent to injuriously affect the financial standing or reputation of any bank in the state, either verbally or in writing, or makes a statement or circulates a false rumor to injure the financial standing of a bank, or seeks to start a run upon the bank, or connives or conspires with any person to injure the standing or start a run on any bank, such person shall be deemed guilty of a misdemeanor and upon conviction shall be fined not more than \$500 or

imprisoned for not more than three months or both. (*Inquiry from Kan., May, 1920.*)

False derogatory statements published by editor of newspaper

2126. The editor of a newspaper willfully published a statement concerning two banks that "the deposits of the First National are falling off and of the Citizens are slowly increasing," such statement being contrary to fact. *Opinion:* To establish the editor's criminal liability for libel, the test is, was the publication not only untrue but malicious and did such publication have a tendency to injure the bank in its business? It is doubtful if the editor can be convicted. *Cady v. Brooklyn Union Pub. Co.*, 23 Misc. Rep. (N. Y.) 409. *Ostrom v. Calkins*, 5 Wend. (N. Y.) 263. (*Inquiry from N. Y., Aug., 1912, Jl.*)

2127. A state bank published this advertisement: "Think this over. Some banks are stronger and more carefully managed than others. Savers are discriminating more keenly and intelligently every day. The ——— Bank welcomes this tendency toward careful investigation knowing the more exacting the comparison the greater will be the growth. Every year we make not less than four sworn statements to the Treasury Department of the United States and are examined by experts at least twice yearly. More effective than this is our own plan of audit. Every transaction of each officer and employee is doubly checked by the experts of the A——— Guaranty Company who report daily to our Board of Directors. A service given you in addition to the insurance of your deposits. Think this over. The ——— Bank." A national bank inquires whether any action can be taken against the rival bank, the only other bank in the city, because of such publication. *Opinion:* It is doubtful that there would be any basis in this advertisement for an action for libel, but if an untrue advertisement is published by a bank it would seem to come within the provision of the Ohio statute defining fraudulent advertisement. *Ohio St.*, Sec. 13194, Sec. 1 (Vol. 4 Supp. to Page & Adams' Ohio Gen. Code.) Apart from any possible legal action, the national bank might publish an answering advertisement, saying that the complaining bank is the only bank in ——— subject to the Federal law or required to make reports to the Treasury Department. (*Inquiry from Ohio, April, 1917.*)

Malicious reports of unsoundness of bank

2128. Certain unscrupulous persons circulated malicious reports of the unsoundness of a bank, and such statements injured the bank but not to a great extent. *Opinion:* Under a Pennsylvania statute such persons can be punished. The bank should lay the facts before the county prosecuting officer for the proper action. *Pa. Pub. L.*, 1909, No. 121. (*Inquiry from Pa., Nov., 1910, Jl.*)

False statement by banker that rival would "bust"

2129. A rival banker made a derogatory and untrue statement to the effect that a certain national bank was not safe and would "bust" and advised his friend to withdraw his money therefrom. *Opinion:* The making of the derogatory statement would render the banker punishable under the statute enacted in Pennsylvania in 1909, and also liable in a civil action for slander. *Pa. Pub. L.*, 1909, No. 121. (*Inquiry from Pa., Aug., 1912, Jl.*)

False statement by hotel man that national bank has closed

2130. A hotel man made a public utterance of the derogatory and untrue statement that a certain national bank "has closed," thereby causing loss to the bank. *Opinion:* The person can be prosecuted criminally under the "derogatory statement" act, in force in Pennsylvania. The bank can also maintain an action for slander. For the Derogatory Statement Act advocated by the American Bankers Association see 6 A. B. A. Jl. 432. *Pa. Pub. L.*, 1909, No. 121. *People's U. S. Bk. v. Goodwin*, (Mo.) 128 S. W. 220. *International, etc., Co. v. Leader Print. Co.*, 188 Fed. 86. (*Inquiry from Pa., Dec., 1913, Jl.*)

False statement that bank in bad shape

2131. A person tells several customers that the bank is in bad shape. This statement, which is untrue, causes the depositors to become frightened and to withdraw their funds. The bank wants the offender punished criminally. *Opinion:* Slander or oral defamation is not a crime at common law and a person uttering derogatory and untrue statements affecting the solvency of a bank cannot be punished criminally in the absence of a statute making such offense a crime. The "Derogatory Statement" Act drafted on behalf of this Association has been enacted in a number of states but not,

as yet, in Tennessee. A civil action for slander will lie. *St. v. Wakefield*, 8 Mo. App. 11. *Bailey v. Dean*, 5 Barb. (N. Y.) 297. *Ohio & M. Ry. Co. v. Press Pub. Co.*, 48 Fed. 206. (*Inquiry from Tenn., Feb., 1914, Jl.*)

False statements by former president affecting bank's credit

2132. The former president of a bank circulated derogatory and untrue statements affecting its credit and solvency by advising customers to withdraw their money, as the bank was going to "bust" and also causing publication of untrue state-

ments in the local newspaper. *Opinion:* The bank may maintain an action in libel and slander for damages. The offender is probably not punishable criminally under the existing statutory law of Virginia, and legislation covering this case similar to that of other states is necessary. 25 Cyc. 326. *People's U. S. Bk. v. Goodwin*, (Mo.) 128 S. W. 220. *Internat., etc., Co. v. Leader Print. Co.*, 188 Fed. 86. (*Inquiry from Va., Oct., 1912, Jl.*)

Note. Since this opinion was rendered the Derogatory Statement Act has been passed in Virginia and undoubtedly the former president would have been held liable.

LOST AND STOLEN PAPER

Lost and stolen checks

Liability of collecting bank for delay in reporting loss

2133. A bank asks whether a delay of a month and a half in giving notice of the loss of a check would be sufficient to make the correspondent liable. *Opinion:* It is the duty of a collecting bank to promptly send a tracer for lost items when they do not receive returns or return advices by due course of mail, and failure for the period of one or two months to notify of the loss makes the collecting agent responsible to its principal. But where prompt notice of loss is given the collecting agent is not responsible in the absence of negligence. Where a correspondent receives and mails an item and it is lost in the mail, there is, of course, no negligence on its part which makes it responsible; but if lost in the bank by one of its own clerks the case would doubtless be different, if such loss could be proved. (*Inquiry from N. Y., Feb., 1914.*)

Title of finder

2134. A bank's customer, a young lady, wrote out a check at the bank for \$20, payable to self. She made a mistake in the date and at once drew another check putting in the correct date, and left the discarded one on the desk. Soon after, another lady customer came in and picked up the discarded check, indorsed the same and brought it to the cashier's window with her own check, and the same were placed to her credit, and thereafter the amount thereof was charged back to her account. The bank asks whether it acted properly in so doing. *Opinion:* The lady who picked up the check had no right

to the money and the bank had a perfect right to charge the amount back to her. The check itself belongs to the first stated customer who drew it and then discarded it. The bank's second customer found and misappropriated a check to which she had no title but which belonged to the drawer. She received credit of the amount from the bank under false claim of title and when the bank made the discovery it very properly charged the check back to her account. (*Inquiry from Wash., Jan., 1919.*)

Checks misplaced by bank before credit

2135. A customer mailed to his bank several checks for deposit. The bank acknowledged receipt by regular card but the checks were misplaced by the bank before they were entered in the books to his credit. After seven months the customer claimed credit for these items, which the bank refused to give without receiving duplicates of the lost checks. The bank had forwarded monthly statements of the depositor's account, in each of which there was an omission of the credit. *Opinion:* The bank cannot refuse to give the customer credit before obtaining duplicate, but there is an equitable obligation on his part to give the bank all the information in his power to enable the bank to frame duplicates or written particulars upon which presentment for payment can be made, and the drawer ultimately looked to for payment. (*Inquiry from N. C., Feb., 1912, Jl.*)

Negotiation to bank by thief of check indorsed by depositor to bank

2136. A depositor opened an account by mail and indorsed and mailed to the bank

checks payable to his order, accompanied by his pass book. The bank had never seen the depositor personally. A thief stole from the depositor his pass book and a check so indorsed and on presentation to the bank received part in cash, the rest being credited to the depositor's account. Upon the question of responsibility for the loss as between bank and depositor, *Opinion*: That the bank, while a purchaser for value of the check, would nevertheless be the loser unless it was a holder in due course, which would depend upon whether the Colorado courts will hold (1) that a payee can be such a holder, which is a question conflict in other jurisdictions and if so held (2) will also hold that, notwithstanding the relation of depositor and banker, the bank under the circumstances was under no duty to inquire as to the identity of the holder as its depositor, before purchasing the check. The outcome of such a case is uncertain although there is some ground for maintaining that the bank is a holder in due course. (*Inquiry from Colo., April, 1921.*)

Depositor denying issue of check, returned as paid voucher and lost in mail

2137. A bank paid the check of its depositor of \$96, charged the same to his account, and mailed same to him with a statement of account and other paid vouchers. The statement, however, was lost in the mail and never reached the depositor who claims that this particular item of \$96 was never drawn by him and that, if the bank paid same it must have been a forgery. Is the depositor justified in his demand for \$96? *Opinion*: The depositor claims that he never drew a check for \$96, and the bank claims that it has paid a check for that amount. If the parties cannot agree upon the facts and neither is willing to stand the loss, an appeal to the courts must result. The depositor will bring an action against the bank for the amount of the deposit and the bank will allege payment. The only proof the the bank can offer in support of payment is the entry upon its books, and the result would depend upon whether a jury believed the bank's statement or that of its depositor. (*Inquiry from Idaho, June, 1917.*)

Burden of proof of payee's indorsement upon holder, where denied

2138. If the payee of a lost check testifies that it was not indorsed when lost, will the burden of proof fall upon the holder to

establish that the check was indorsed when lost and that the payee's indorsement was not forged? *Opinion*: The burden seems to be on the holder. The Negotiable Instruments Act provides that "Every holder is deemed prima facie to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as holder in due course * * * ." See, for example, *Jones v. Miners' & Merchants' Bk., 128 S. W. (Mo.) 829. (Inquiry from Pa., June, 1916.)*

Checks lost in the mail

Loss falls on owner

2139. A check was lost in the mail in the process of collection, after it had gone through three banks. What are the rights and liabilities of the bank originally crediting the item to its depositor's account? *Opinion*: The general rule is that where a check is lost in the mail, the loss and the burden of procuring a duplicate fall on the owner unless there has been negligence on the part of some agent in connection with the loss. Assuming that the first bank received the check for collection and did not become owner, then it would be a collecting agent and would have the right, when the check was lost without any fault on its part or on the part of any subsequent correspondent, to charge the amount back to the owner—the depositor—and it would be his burden to procure another check or copy upon which he could demand payment and hold the drawer of the original check liable. But if the bank purchased the check at the time of deposit, i.e., gave absolute credit for it, so as to take title, then the depositor would be liable only as indorser and in case of loss in the mail, the burden would be upon the bank as owner to procure a duplicate or a copy and make presentment of same and if not paid give due notice of dishonor to the depositor, thus holding him liable as indorser. The delay in presentment caused by loss in the mail would seem to be excusable and this would permit of a reasonable time for obtaining a duplicate or copy so as to make due presentment and charge indorsers, if unpaid, by due notice of dishonor. (*Inquiry from Wyo., Feb., 1921.*)

Burden of obtaining duplicate falls on owner

2140. A check was lost in the mail after the payee had deposited it in his bank.

Opinion: Where the bank takes the check as owner, it has the burden of obtaining a duplicate and the duty of presenting the item in order to charge the indorser in case of dishonor; but if the bank received the item for collection, its duty is simply to notify the customer of the loss without unreasonable delay. The legal right of the bank to immediately charge back to a customer a check lost in the mail depends on where title to the check rests, which must be determined by the rule of law in the state where the bank is located, or may depend upon agreement or custom. (*Inquiry from Colo., Oct., 1909, Jl.*)

2141. A customer deposited a check in an Illinois bank payable to some one else, but indorsed by the depositor, the same being drawn on another bank, and the same was sent by the receiving bank for collection, and is lost in transmission. The bank desires to know upon whom the loss falls. *Opinion:* There are no decisions in Illinois on the subject but upon the facts, as presented, the loss and the burden of obtaining a new check would fall upon the owner of the lost check. That is to say, if the check was deposited in bank for collection, the bank being agent and the depositor retaining the title, the loss en route to the place of payment would be the loss of the owner, assuming there was no negligence on the part of the collecting bank. On the other hand, if the check was deposited as cash and the bank acquired title immediately upon deposit, the bank would be the owner and the loss and the burden of obtaining a duplicate would fall upon it. (*Inquiry from Ill., Nov., 1913.*)

Owner bank must procure duplicate and charge customer as indorser

2142. A bank cashed several checks on out-of-town banks for a customer. In forwarding these checks to its correspondent bank for collection the letter and checks became lost in the mail. Because of such loss the forwarding bank charged the checks against the customer's account. What recourse has the bank upon its customer? *Opinion:* It appearing from the statement that the bank "cashed" the checks indorsed by its customer and did not receive them as a deposit, the courts would probably hold that the bank took title to the check and that the only liability of its customer was as indorser. The burden would, therefore, be upon the bank, as owner, to procure a duplicate or cause presentment to be made

upon a copy or written particulars of the originals and to hold its customer liable as indorser by demand and notice. In such a case the courts would allow a reasonable delay in giving notice. (*Inquiry from N. J., April, 1917.*)

Recovery by owner on duplicate or written particulars

2143. A check was given by a drawer in Florida upon a Florida bank payable to the inquirer's customer who withdrew the proceeds. The bank forwarded the check to its city correspondent who gave the sending bank credit for the same, but afterwards charged back the amount, stating that the check had been lost in transit. The forwarding bank is unable to procure a copy and there is some doubt whether or not the check has been paid, for the drawer "claims to have the same." *Opinion:* In case of a lost check, the law provides that demand of payment can be made upon a copy or written particulars and upon refusal of payment the drawer can be sued. In the present case, if the bank cannot procure a copy, the loss will fall upon it, as it purchased the check from its customer. If, however, it develops the check has been paid, then whoever received the proceeds would be liable to to the bank. (*Inquiry from Conn., April, 1918.*)

Bond of indemnity

2144. A bank states that a check was received from out-of-town by a local merchant who deposited same in one of the local banks for the credit of his general account. The local bank remitted the same to its correspondent for credit, but the letter was lost in transit. The maker asked for an indemnity bond before issuing a duplicate check. The local bank was the last party holding the check. The bank asks who should furnish the indemnity bond. *Opinion:* The burden of obtaining a duplicate of the lost check and furnishing an indemnity bond would fall upon the owner of the check. In other words, if the local merchant was the owner and the bank in which he deposited the same took the check for collection as agent, then the burden of obtaining a duplicate would fall upon the merchant. If, on the other hand, the local bank in which he deposited the check took title and became owner, the burden would be upon it. (*Inquiry from Minn., June, 1919.*)

Burden of procuring duplicate of lost express company money order

2145. A bank, when cashing an express order for Smith, without compensation, said to him that if the order should be lost in the mail he would be required to reimburse the bank and secure a duplicate from the express company. The order was lost in the mail, and the bank asks who, under those circumstances, would be regarded as the owner of the express order. *Opinion:* If, when cashing the order for Smith without compensation, the bank stated it would look to him for reimbursement and procurement of a duplicate from the express company, this would indicate that the bank was collecting this order for Smith as a matter of accommodation as his agent and merely advancing the proceeds before collection. The bank may fairly take this position and look to Smith for reimbursement in view of the agreement. Under the facts stated by the bank, it seems fair to conclude that the transaction was not a sale of the express order to the bank, but rather an instrument to it for collection, the bank advancing the proceeds as a matter of accommodation. (*Inquiry from Miss., June, 1914.*)

Bank receiving check as collection agent can charge back

2146. A bank states that it had a remittance letter lost in the mail containing twenty-six checks payable in several cities. Immediately upon learning of the loss thereof, the bank charged back the amounts of the various checks to the last indorsers. The bank's pass books state that it acts only as agent in making collections. The bank asks whether it was justified in charging back said checks. *Opinion:* It has been held where a depositor indorses in blank and deposits to his credit a check on another bank and afterwards draws against the credit, the transaction constitutes a sale of the paper to the bank and vests title to the same in the bank, and that the bank does not have the right to charge back the amount of the check against his account because it had been lost in the mail. *Sponner v. Bank of Donaldsonville*, 82 S. E. (Ga.) 625. But if the bank receives the check for collection it is not the owner of the paper but only agent of the owner for its collection, and if the check is lost in the mail the bank would probably have the right to charge it back, provided it was not guilty of negligence. In the instant case, the bank clearly establishes the fact that it handles out-of-town checks as

agent and not as owner by the statement in its pass book. (*Inquiry from Tex., May, 1918.*)

2147. A bank charges a customer's account with amount of check returned "not good" from bank on which it is drawn. The check with notice of charge is mailed to the bank's customer, and lost in the mail. Upon whom would the loss fall? *Opinion:* Assuming in this case that the bank did not take title to the check upon deposit so as to become owner, but was mere agent for collection, the loss in the mail would be that of the owner-customer upon whom the burden would fall of giving notice to and proceeding against the drawer and prior indorsers, if any, upon a copy of written particulars. (*Inquiry from Ill., Sept., 1920.*)

2148. Bank A cashed a check indorsed to it by its customer and the check was forwarded by mail for collection to correspondent bank. The check was lost in the mail. *Opinion:* The right of the correspondent bank to charge the amount of the check back would depend on whether prompt inquiry was made and Bank A was notified. In the event the amount was charged back Bank A would have recourse upon its customer as indorser, by causing substituted presentment to be made by means of a copy or description of the check, and upon refusal to pay by giving due notice to the indorser. Had Bank A taken the check as collection agent, its duty would be to notify its principal without unreasonable delay and the burden would be upon the customer of procuring a duplicate or a copy upon which to make a substituted presentment. *Aebi v. Bk. of Evansville*, 124 Wis. 73. *Shipsey v. Bk.*, 59 N. Y. 485. *Bk. v. Bk.*, 4 Dill. (U. S.) 290. *Sec. Nat. Bk. v. Merchants Nat. Bk.*, 111 Ky. 930. (*Inquiry from Ind., May, 1910, Jl.*)

Duty of bank of deposit to keep record of description of deposited checks

2149. A bank asks whether in receiving a check for collection it is necessary to keep a complete record of the same so as to have the right to charge the amount back when lost in the mail. *Opinion:* Assuming the check was received by the bank for collection and that it did not become the purchaser at the time of the deposit, the bank would have the right to charge the amount back when lost in the mail, assuming it gave prompt advice of the loss. In such case the burden would be on the customer to procure

a duplicate and it would not be incumbent on the bank to keep a complete record of the check as to drawer, payee, date, number and amount in order to furnish a complete description thereof. (*Inquiry from Tex., May, 1917.*)

Payment of lost check by drawee without authority

2150. A check was lost in the mail and never reached the correspondent and who-ever presented it and received payment did so without authority. It was drawn on the M—— Bank by L. O., in favor of A. M. V., and indorsed "Cr. A. M. V." and bears the indorsement of the "W. National Bank," and also the additional indorsement of "J. C. J." It is marked "Paid" by the M. Bank. The W—— National Bank which lost the check holds the M—— Bank responsible and demands the full amount, which is refused. *Opinion:* If the indorsement by the payee and subsequent indorsement were blank, the check when lost would be in negotiable form and the M—— Bank would be protected, although it paid the amount to the finder of the check, as the check would be in legal effect payable to bearer. But the indorsement by the payee is "Cr. A. M. V.," which would indicate not an indorsement in blank but an indorsement for the purpose of receiving credit. This according to some cases would be held a restricting and not a title-conveying indorsement, in which event the check when lost would not be in negotiable form and a finder would have no right to collect it. In this case the M—— Bank would be responsible to the drawer, and the W—— National Bank would have recourse upon the drawer. (*Inquiry from Va., Aug., 1917.*)

Right of holder against indorser

2151. A, who is not a customer of B, a bank not in the same town in which A resides, cashes with B a check drawn on C, a bank in the town in which A resides. A indorses the check in blank. This check with others is sent to D, the correspondent bank of B, which remittance is lost in transit. The records of B do not show who drew the check on C, but only that the last indorser was A. The bank asks whether B can recover from A the money paid on the check. *Opinion:* In such case the only liability of A is as indorser, and to preserve that liability there must be due demand and notice of dishonor to A. The check having been lost in the mail, the Negotiable In-

struments Act provides: "Where a bill is lost or destroyed or is wrongly detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof." As the bank of B has no copy of the check it should make a written statement of particulars describing the check, cause same to be demanded and protested and then notice of dishonor given A. The Negotiable Instruments Act provides that, "delay in giving notice of dishonor is excused when the delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, notice must be given with reasonable diligence." When A is charged as indorser he can then be held liable by B; until then, not. Presumably in this case B bank indorsed the check restrictively to D, so that no question of title would arise of a holder in due course under blank indorsement of A. Assuming a case where a check was indorsed in blank by A, so as to be payable to bearer, and lost, without further indorsement, payment to an innocent purchaser for value would discharge drawer and indorser; but such is not this case. (*Inquiry from Mich., July, 1919.*)

Check credited as payment on note and lost in mail

2152. A bank holds a chattel mortgage on a customer's cattle, the customer afterwards sold a number of them and accepted, in payment thereof, a check drawn on an out-of-town bank. The customer brought the check to the bank which credited the amount on his note after he had indorsed the check, and the bank gave him a receipt for the payment. The bank cleared this check the same day it was received, and thereafter the bank to which the check was forwarded sent notice that their cash letter was lost in the mail and they were charging back the amount of the check to the forwarding bank. It appears that at the time the original check was written the drawer did not have money in the bank on which the check was drawn to pay it, and had the check gone though in due course, there would not have been money on deposit to meet it. The customer refuses to make payment of the check for the reason (1) That it was not returned to him by his bank; (2) That he held a receipt for the amount of the check, and that it stated that the bank had applied the amount to his credit. *Opinion:* It seems, in the case stated, that the bank has re-

course upon its customer for the amount represented by the check which it credited on the note. It is a general rule that when a check is tendered to a creditor it is received as provisional payment only, and where the check is not collected it does not operate as payment, assuming there has been no negligence on the part of the holder. In the present case there was due diligence in notifying the customer of the loss in the mail. With respect to the right of a bank to re-transfer or charge back checks to its customers' accounts, the general rule, with few exceptions, is that all checks which are credited to depositors are entered with the express or implied right to charge them back if they are not paid. *Beal v. Sumerville*, 50 Fed. 647. *Bailie v. Augusta Sav. Bk.*, 95 Ga. 277. *In re State Bk.*, 56 Minn., 119. *Midland Nat. Bk. v. Brightwell*, 148 Mo. 358. *Nat. Butchers, etc., Bank v. Hubbell*, 117 N. Y. 384. *Big Cabin Bk. v. English*, 29 Okla. 334. In the present case the check was not credited to his account, but credited on the customer's note; but it seems clear that there would be an ultimate right to cancel the credit upon non-payment and hold the customer for the full amount of his note, although, assuming the bank took the check as owner, it would have to procure and proceed upon a copy or written particulars to preserve the liability of its indorsing customer. (*Inquiry from Okla., March, 1919.*)

Collecting bank not negligent in using un-registered mail

2153. A bank asks whether, if a check is received on an out-of-town bank and it uses diligence in its dispatch, taking a record of the bank on which it is drawn, the amount and the indorser's name, sending it in the regular mail, not registered, the bank would be liable if it failed to reach its destination for any cause beyond its control. The bank has a clause on its deposit slip disclaiming responsibility for items lost in the mail. *Opinion:* In the case as stated, it seems the bank is sufficiently protected against liability. The collecting bank must use due diligence, but the sending in the regular un-registered mail, as is customary with banks, is sufficient diligence. Should there be a loss the bank is only collecting agent and not owner, and burden of obtaining a duplicate would fall on the customer to whom the check could be charged back. Not only is this the general rule, but the bank expressly fortifies itself by contract disclaiming

responsibility for loss of mail. In view thereof the bank is fully protected. (*Inquiry from Cal., June, 1916.*)

Delay of two months prevents charging back

2154. Bank A sent Bank B a draft on Bank C, which Bank B credited to Bank A. The draft was drawn by a stranger and had been indorsed to Bank A by one of its customers. Two months later Bank B notified Bank A that the draft was lost in the mails and charged the amount back against Bank A. *Opinion:* Bank B in delaying two months is guilty of such negligence as to make the draft its own, and cannot charge the amount back to Bank A. *Shipsey v. Bk.*, 59 N. Y. 485. *Bk. v. Bk.*, 4 Dill. (U. S.) 290. *Sec. Nat. Bk. v. Merchants Nat. B.*, 111 Ky. 930. (*Inquiry from Tex., Oct., 1910, Jl.*)

Lost bearer checks

Rights of innocent purchaser of stolen check

2155. A check on a bank in another town was made payable to A or bearer and indorsed by A. The inquiring banker paid the money without identification to a stranger. In due course the check was protested because of insufficient funds. A, when notified, claimed that the check had been stolen from his safe. Who is liable? *Opinion:* The banker would be entitled as an innocent purchaser of the check to enforce same against A for the full amount upon his indorsement and also enforce payment from the drawer of the check; this, notwithstanding the banker purchased the check from a stranger without identification. (*Inquiry from Miss., Feb., 1917.*)

Holder in due course of lost bearer check

2156. The payee of a check endorsed it in blank and mailed it to his bank for deposit. It, however, did not reach its destination, and the payee had the drawer stop payment. Thereafter the check was presented for payment with the indorsement of a merchant, who took the check for goods and cash, and the indorsement of a bank. Payment was refused. Has the merchant any recourse; if so, against whom? *Opinion:* This check indorsed in blank was payable to bearer. The title of the merchant then depended on whether he was a holder in due course. The fact that he took the check from a stranger in payment for goods and cash would not, of itself, be an act of bad faith or deprive him of his status of holder in due course. See opinion No. 2199 ("Banks

as Purchasers of Stolen Liberty Coupon Bonds"). If there were any circumstances of suspicion surrounding the taking of the check by the merchant, this would raise a question for the determination of a jury whether he acquired the check in good faith and was a holder in due course. Presumably in the case submitted the merchant would be a holder in due course and in such event the merchant would have recourse on the drawer and prior indorsers of the unpaid check. (*Inquiry from W. Va., Feb., 1921.*)

Lost counter checks payable to bearer

2157. A bank asks whether an innocent holder could enforce payment of a lost check, the same reading as follows: "Pay to _____ or bearer" certified "good when properly indorsed." *Opinion:* The form of the check indicates that it is a counter check, which seems to be used only at the counter when the drawer comes to the bank and not intended for circulation. Some such checks are stamped "non-negotiable counter check" or they provide "pay to myself only" or "to be used only at the counter of the bank by the drawer personally." In all these cases the counter-check would be non-negotiable. In the instant case the counter check is made payable to "_____ or bearer." This is a bearer check under the Negotiable Instruments Act which provides that the instrument is payable to bearer "when it is payable to a person named therein or bearer;" and a bearer check is negotiable. Whether the fact that such a check is made on a counter-check form and also is certified "good when properly indorsed" (although the check does not require indorsement, being payable to bearer) would put an innocent purchaser on notice is an uncertain question. The finder of this check might insert the name of a payee and negotiate it on forged indorsement of the payee and yet, the instrument being payable to bearer, the courts might hold the innocent purchaser took enforceable title by delivery and that indorsement was not necessary to his title. On the other hand, it might be held that the words "counter check" put the person on inquiry. There is no judicial precedent on a precise case of this kind. (*Inquiry from S. C., Jan., 1917.*)

Lost certified checks

Certifying bank entitled to bond of indemnity

2158. A bank's customer deposited with

it a certified check which was sent with a letter to its correspondent which claimed that the check was not enclosed. The bank asks whether a bond of indemnity is necessary. *Opinion:* If this check was certified for the payee after delivery by the drawer, the drawer was absolutely discharged and the certifying bank became sole debtor thereon to the payee. If, on the other hand, the check was certified for the drawer who delivered the certified check to the payee, then the drawer remained secondarily liable thereon. In either event the certifying bank is primary debtor and would probably be entitled to a bond of indemnity from the payee, who is owner, before paying the amount. Presumably the check was indorsed in blank by the payee and, although it bore the subsequent restrictive indorsement of the sending bank, there might be some question, whether notwithstanding such indorsement, the check might not be negotiated under blank indorsement of the payee so as to give an innocent purchaser good title. However this may be, the certifying bank is not obliged to accept the statement of facts as to the indorsement of the check but has a right to assume that when lost it was in such form as to be further negotiated; therefore, as said, the certifying bank would seem entitled to a bond of indemnity before paying the amount to the payee. (*Inquiry from Ohio, Dec., 1913.*)

Bond of indemnity for duplicate of lost certified check.

2159. A bank mailed a certified check to the payee in an envelope bearing the bank's return address. Although the bank has not received back the letter sent, the payee claims that he has not received the check. What should the bank do in order to pay the payee and at the same time protect itself against paying the certified check? *Opinion:* The bank is entitled to a bond of indemnity as a prerequisite to the issuing of a duplicate check. No one but the payee could negotiate the certified check, but if he did negotiate it the bank would be liable. The payee should have no objection to furnishing such a bond, for, unless he negotiated the check, he could not be liable thereon. The majority of decisions are to the effect that where an instrument is lost by the payee before indorsement he can recover thereon without tendering indemnity; but there are also decisions the other way. (*Inquiry from Mo., April, 1921, Jl.*)

No statutory requirement for bond of indemnity

2160. A bank inquires whether there is a statute in any of the states, compelling banks to secure bonds of indemnity from persons applying for duplicates of lost checks, either certified or uncertified. *Opinion:* There is no such compulsory legislation in any of the states. The question comes up in any given case on a lost certified check or certificate of deposit, whether the bank is entitled to indemnity before issuing a duplicate or paying the money and the decision as to indemnity or no indemnity depends upon the facts of the particular case. (*Inquiry from N. J., April, 1916.*)

Lost and stolen certificate of deposit
Bank entitled to indemnity before issuing duplicate

2161. A depositor, who claimed he had lost his certificate of deposit, instructed the bank to stop payment thereon and applied for a duplicate certificate, although he could not afford an indemnity bond. The bank was not well acquainted with the depositor. *Opinion:* Where a depositor claims that his negotiable certificate of deposit has been lost or stolen, the only safe course for the bank is to require a bond of indemnity before issuing a second certificate. But if the amount of certificate is small and the bank believes the statement of the depositor, it can waive the bond and take the depositor's affidavit. In re Cook, 86 N. Y. App. Div. 586. (*Inquiry from Neb., Nov., 1912, Jl.*)

2162. A bank received a request from a depositor who claimed to have lost several certificates of deposit, for new ones, or for payment of the money. Would it not be the right course for the bank to let the depositor sue and have the court decide the matter? *Opinion:* The bank could pay the money or issue new certificates of deposit but only upon receiving a satisfactory bond of indemnity to save it harmless in case the certificates duly indorsed should turn up in the hands of an innocent purchaser. (*Inquiry from Kan., Feb., 1916.*)

Bank's right to indemnity

2163. A bank issued a certificate of deposit to one of its customers which he transferred to another person, and the bank has been informed by the transferee thereof that the same was lost. The bank has been requested to stop payment of the certificate

and a duplicate has been applied for. The bank requests advice as to the proper course to pursue. *Opinion:* Before issuing a duplicate of certificate of deposit which the holder alleges to have lost, the bank should require a sufficient bond of indemnity to protect itself in event the original should turn up in the hands of an innocent purchaser who acquired same under proper indorsement. The courts generally hold the right of a bank to require the owner of a lost certificate to give a bond of indemnity before issuing a duplicate. (Welton v. Adams, 4 Cal. 37 [holding that the maker of a lost or destroyed certificate of deposit may require indemnity against all future claims under it before payment can be enforced by law.] Frank v. Wessels, 64 N. Y. 155. Devine v. Unaka Nat. Bk., 125 Tenn. 98.) (*Inquiry from Fla., April, 1918.*)

Reasons why indemnity necessary

2164. A bank issued a certificate of deposit and the same was lost. The bank asks if it would be liable for the amount of its certificate if it should turn out that the same had been stolen, the indorsement forged, and later came into the hands of an innocent holder for value. *Opinion:* Concerning necessity for indemnity before issuing a duplicate or paying the money upon a certificate claimed to be lost, it is customary for banks to require such indemnity to guard against the following contingencies: (1) that the certificate was indorsed in blank when lost; (2) that the certificate has not been lost and payee makes false claim of loss; (3) the certificate even though lost may be afterwards found and indorsed by the payee. In all these contingencies if the certificate should get in the hands of an innocent purchaser for value, the bank would be liable on the original certificate. (*Inquiry from Okla., Dec., 1919.*)

Bank takes risk in issuing duplicate without indemnity

2165. A customer of a bank had a certificate of deposit stolen from him and is unable to give a bond. The bank inquires as to what means it can take to protect itself in issuing duplicate. *Opinion:* Where a negotiable certificate of deposit has been lost, banks generally require the owner to give a bond of indemnity before paying him the amount called for in the certificate. This is because there may be a false claim of loss or the certificate may have been indorsed in blank when lost and may be in the hands of

an innocent purchaser who can enforce payment from the bank. If the bank is willing to take the risk that the certificate was undorsed in blank when stolen, and that the depositor is telling the truth when he claims it has been stolen, it might issue him a duplicate and take an affidavit from him that the certificate had been stolen and that he had not signed his name in blank on the back thereof. But if the certificate should turn out to have been indorsed in blank and negotiated to an innocent purchaser, the bank would be held liable on the original as well as on the duplicate, if that had been negotiated. The bank might make the duplicate non-negotiable so that depositor could not transfer it, and make it payable at some future time. It would be protected during that time in case the original turned up in the hands of an innocent holder. But even then there might be a remote chance that the original was in the hands of an innocent holder with enforceable rights. If the bank issues a duplicate without requiring indemnity, it takes the risk, and it is a matter for its own judgment whether there is any great risk in the particular case. (*Inquiry from Ill., April, 1919.*)

2166. What course should a bank follow when a customer who has no financial responsibility, and is unable to furnish the bank with a proper bond, loses a certificate of deposit? *Opinion:* A bank cannot safely pay a lost certificate to its depositor without indemnity if the certificate is in negotiable form, for there is always the danger of the customer's dishonesty and his actual negotiation of the certificate to an innocent purchaser to whom the bank would be liable. It is incumbent upon the customer to furnish indemnity and if he is unable to do so it is his loss. This seems a hardship on the customer, and, if in any particular case the bank is convinced of his honesty and the amount is not large, it might be willing to take the risk upon his making affidavit that the certificate has been lost and at the time of loss was not indorsed by him. But the only absolutely safe way is to require indemnity. (*Inquiry from Panama, Jan., 1917.*)

Customary procedure as to indemnity

2167. A reliable and responsible customer of a bank lost a time certificate of deposit for a considerable amount, which he claimed he had not indorsed, and the bank inquires as to what is the customary bank proceeding in such cases. *Opinion:* The

customary procedure in case of claim of loss of a negotiable certificate of deposit is to require a satisfactory bond of indemnity from the depositor before issuing him a duplicate or making payment. The depositor may claim that it has been destroyed or that he has lost it, and it was not indorsed, and what he says may be true, but there is always the risk that the depositor has negotiated the certificate and made a false claim of loss or destruction, or that it was indorsed by him when lost although he may have forgotten the fact, or he may find it and fraudulently negotiate it. It is to protect the bank against these contingencies, should the certificate turn up properly indorsed in the hands of an innocent purchaser, that it is the practice to require sufficient bond of indemnity. Of course, if the bank in any case is satisfied, of the responsibility and veracity of its depositor, it may take the risk and issue a duplicate and make payment without a bond of indemnity, but the practice is to require such bond, which in many cases is furnished by surety companies. (*Inquiry from Wash., Feb., 1919.*)

Necessity for indemnity in Pennsylvania

2168. A bank issued a certificate of deposit "payable on return of this certificate properly indorsed," and the payee, having lost it, asked for a duplicate. The inquiry is as to the negotiability of the instrument and whether or not the bank should require a bond of indemnity to be given. *Opinion:* By repeated decisions of the Pennsylvania courts rendered before the passage of the Negotiable Instruments Act in 1901, a certificate of deposit "payable on return of this certificate properly indorsed" was held not a negotiable instrument but only a special agreement to pay the deposit on the return of the certificate; such a promise was held not absolute and unconditional, but contingent. The Negotiable Instruments Act 1901 provides that to be negotiable the promise to pay must be unconditional and there have been no Pennsylvania decisions on the subject since the passage of the Act. The decisions of the courts of most of the other states, however, are to the effect that such a certificate is negotiable. The Federal courts also so hold. See *Bank of Saginaw v. Title & Trust Co.*, 105 Fed. 491, where it was held that such a certificate issued by a Pennsylvania bank was negotiable and that the Federal courts were not controlled by the decisions of the state

court on questions of general commercial law. It would follow, therefore, even assuming that the Pennsylvania courts will adhere to their former ruling and hold such certificates non-negotiable, that this ruling would not apply to or bind an innocent purchaser for value in another state who should sue the bank upon such certificate in the Federal courts. Consequently there is a real necessity to require a bond of indemnity, before making payment or issuing a duplicate for a lost certificate, to guard against liability upon the original should it be sued upon by an innocent indorser in the Federal courts. (*Inquiry from Pa., March, 1918.*)

Necessity for indemnity and statute of limitations

2169. On July 15, 1918, an Oklahoma bank issued its certificate of deposit to order of S, payable January, 1919. About the time of the maturity of the certificate it was lost. Does the statute of limitations run against certificates of deposit, and if so, how long a time must elapse? Is there any way the bank can safely pay this certificate without requiring a bond? *Opinion:* (1) There is no safe way in which the certificate could be paid or a duplicate issued without indemnity. If the certificate was indorsed in blank when lost, or should be afterwards recovered and indorsed by S, or has not been stolen but has been negotiated, the bank would be liable to an innocent purchaser. Therefore, unless the bank is willing to trust S, indemnity is necessary to its safety before payment or issue of a duplicate. (2) In some states it is held that the statute of limitations on a time certificate of deposit begins to run from the date of its maturity (*Bank v. Harrison*, [N. M. 1901] 66 Pac. 460; *In re Gardner's Estate*, 228 Pa. St. 282) while in other states the statute does not begin to run until actual demand, and the certificate is not outlawed until the statutory period after demand. (*Thompson v. Farmers' State Bank*, 159 Iowa 662, 140 N. W. 877. *Maupin v. Morbridge State Bank*, [S. Dak. 1917] 161 N. W. 332.) There are no cases in point in Oklahoma, and the question is, therefore, an open one in that state. (*Inquiry from Okla., Feb., 1921.*)

Right of innocent purchaser of certificate indorsed in blank and stolen

2170. A bank purchased in good faith before maturity and for value a negotiable certificate of deposit, indorsed in blank by

the payee. The seller from whom the certificate was acquired had stolen the same from the payee. The issuing bank refused payment because of a stop payment order. *Opinion:* The purchasing bank is a holder in due course and may enforce payment from the issuing bank. The certificate indorsed in blank is payable to bearer and good title could be acquired, even through one who had stolen it. *Rev. St. Ariz., 1913, Sec. 3360. Mass. Nat. Bk. v. Snow*, 187 Mass. 160. *Jefferson Bk. v. Chapman*, 122 Tenn. 415. *Schaffer v. Marsh*, 90 Misc. (N. Y.) 307. *City of Adrian v. Whitney Central Bk.*, 180 Mich. 171. (*Inquiry from Ariz., June, 1918, Jl.*)

Indemnity not necessary where lost certificate not negotiable

2171. Is there any liability attaching to the bank where it issues duplicate non-negotiable certificates of deposit and pays these duplicates to the payee who claims to have lost the originals? *Opinion:* The bank would be perfectly safe. It would be a defense against payment to any subsequent holder to whom the certificates had been transferred, that duplicates had been issued to the original payee. If the certificates claimed to be lost were negotiable, indemnity would be necessary. (*Inquiry from La., Jan., 1917.*)

Payee's affidavit of loss of unindorsed certificate as substitute for indemnity

2172. Bank A issued to B a negotiable demand certificate, and the latter, claiming that it had been stolen, asked for a duplicate. This the bank refused to give unless B furnished a good and sufficient bond, but B claimed that his affidavit, to the effect that certificate was lost or stolen and that it did not bear his indorsement, would be sufficient, and that the bank could only be compelled to pay the duplicate. It is asked if B's contention is correct. *Opinion:* Bank A took the correct position in requiring a satisfactory bond of indemnity before issuing a duplicate for a certificate of deposit claimed to have been lost. While the payee's affidavit that the certificate when lost did not bear his indorsement would have made him criminally liable if the fact was otherwise, this would not protect A in case the certificate had been indorsed when lost, or had not been lost at all and was subsequently negotiated by him after he had received the duplicate. In other words, the certificate being a negotiable instrument,

bank A would be liable both on the certificate and on the duplicate in case both were negotiated to innocent parties. (*Inquiry from Okla., Aug., 1914.*)

Delay of one month by collecting bank in notifying of loss

2173. A sent to B for collection and credit a certificate of deposit. The latter promptly acknowledged receipt, but a month later notified A that the item was lost in transit and that the same would be charged back to A's account. The latter claims that there is no justification for this, because of the unreasonable delay. *Opinion:* The courts hold that a collecting bank must use due diligence in tracing items which are not heard from in due course, and if this action is not taken within a reasonable time, the collecting bank is liable to its principal. It was incumbent upon B when the item was not heard from in due course to send a tracer and ascertain what had become of it. The question as to whether the delay in notifying A was unreasonable would be one of fact; if so, B would be liable to A for the amount, and the burden would be upon it to procure a duplicate or written particulars of the certificate of deposit and make collection thereon, with obligation probably to give indemnity to the issuing bank before receiving payment of the lost item. *Hobart Nat. Bank v. McMurrough*, 24 Okla. 210, 103 Pac. 601. *First Nat. Bank v. First Nat. Bank*, 4 Dill. 290. (*Inquiry from Ohio, April, 1918.*)

Lost cashier's check

Bond of indemnity as prerequisite to paying lost cashier's check

2174. A bank issued to A its cashier's check which was lost. Before issuing a duplicate, the bank requested an indemnity bond in double the amount. A refused to give the bond, but produced an affidavit that the check was lost without indorsement. *Opinion:* The bank is entitled to require indemnity as a prerequisite to paying the cashier's check alleged to be unindorsed when lost, for, notwithstanding the affidavit, the bank would not be relieved from liability to pay an innocent purchaser should the affidavit prove false or should the payee thereafter find and negotiate the original cashier's check. *Code Mo., Secs. 1983, 1984. Eans v. Bk.*, 79 Mo. 182. *Citizens Nat. Bk. v. Brown*, 45 Ohio St. 39. *Means v. Kendall*, 35 Neb. 693. *Clinton Nat. Bk.*

v. Stiger, 67 N. J. Eq. 522. (*Inquiry from Mo., Feb., 1916, Jl.*)

2175. A bank states that one of its depositors has lost a treasurer's check mailed to her about six months ago, and that the bank has been requested to issue another and hesitates to do so without receiving a surety bond. The bank asks whether it is necessary or customary for banks to require such a bond in like cases. *Opinion:* When the payee loses a cashier's check or certificate of deposit it is customary to require a bond of indemnity before issuing a duplicate in order to guard against the possibility that the holder has made a false claim or that the check, when lost, was indorsed in blank so as to be in negotiable form. If the claim was false and the check was afterwards negotiated the bank would be liable to an innocent purchaser of both original and duplicate; hence, the necessity of indemnity to guard against this possibility. (*Inquiry from N. Y., March, 1918.*)

Lost cashier's check indorsed in blank purchased from gambler

2176. A cashier's check indorsed in blank by the payee was lost and purchased by the proprietor of a drug store from the finder. The purchaser knew the seller to be a gambler, and that he was not the person named as payee. Payment of the check was stopped and the bank seeks to know whether it must reimburse the payee and also whether it can demand a return of the check. *Opinion:* Where a cashier's check is indorsed in blank by the payee and lost and is purchased by a merchant from the finder, in good faith and for value, the latter is a holder in due course with right to enforce payment of the instrument, and the fact that the purchaser knew the seller to be a gambler is not, of itself, sufficient to deprive him of his status as holder in due course, in the absence of knowledge of facts which would make his taking the instrument an act of bad faith. (*Inquiry from Okla., Nov., 1918, Jl.*)

Lost bank draft

Bank entitled to indemnity before issuing duplicate

2177. Inquiry is made whether payment can be stopped on a New York draft in case same is lost, and whether duplicate may be issued without having purchaser furnish a bond. *Opinion:* A bank which issues its New York draft to a payee has, of course,

the right to instruct the drawer to stop payment on claim of the purchaser that the draft has been lost. But it is not safe to issue a duplicate without requiring a bond of indemnity. There is always a possibility that the draft has not been lost and is susceptible of negotiation by the payee to an innocent purchaser, or may have been indorsed in blank when lost, and in any case where an innocent purchaser should acquire the draft under proper indorsement, the issuing bank would be liable to pay the same to the drawer. (*Inquiry from Mich., Nov., 1920.*)

2178. Where a bank issues its draft upon its correspondent in favor of a third party who claims to have lost same and requests a duplicate, the issuing bank as a prerequisite to issuing such duplicate is entitled to a bond of indemnity to save it harmless should the original be negotiated under indorsement of the payee, but where a draft is made payable directly to the correspondent upon which drawn and is lost, duplicate may safely be issued without indemnity. (*Inquiry from N. D., Feb., 1918, Ill.*)

Issuing bank liable to innocent purchaser of lost bank draft notwithstanding payment of duplicate

2179. A bank issued a New York draft to a customer, who later represented that the draft had been lost and a duplicate was procured, the bank having taken the necessary steps to stop payment of the original draft. The duplicate draft was paid in regular order, and later the original draft came into the hands of a innocent purchaser. The question is asked whether the bank that sold the original draft on which stop payment was issued is liable. *Opinion:* The bank which issued the New York draft to a customer is responsible to an innocent purchaser upon proper indorsement from the payee. The fact that a duplicate had been issued to the payee and paid and that payment had been stopped on the original on claim of loss, while a defense by the drawer from a claim of the payee who purchased the original is no defense against an innocent holder thereof for value. The bank to protect itself in such cases should, before issuing a duplicate, require a satisfactory bond of indemnity against liability should the original turn up in the hands of an innocent purchaser. (*Inquiry from Ohio, June, 1920.*)

Non-necessity for indemnity where bank is payee

2180. A bank which is the payee of a bank draft which has been lost requests that payment be stopped and a duplicate draft be issued. Should the drawer require a bond before issuing the duplicate? *Opinion:* There seems to be no necessity for requiring a bond of indemnity before issuing a duplicate draft, unless there is reason to distrust the financial standing or solvency of the payee bank. The object of requiring a bond of indemnity is to protect the bank should the original lost draft turn out to have been negotiated by the payee who claims to have lost the same. If the bank is financially responsible, it would not claim the loss of a draft and then negotiate the same, and even if it did, it would be responsible for the amount twice received. (*Inquiry from Mont., Jan., 1921.*)

Holder in due course of bank draft indorsed under threat and stolen

2181. A draft drawn by the cashier of a bank in Montana, payable to his order on an Illinois bank, was forcibly taken from him at the point of a revolver and he was compelled to indorse it under threat of death. The draft bore four indorsements. Immediately thereafter the banks were directed to stop payment of the draft. The third indorser now holds the draft and threatens suit to recover the amount thereof. The first indorser asks as to his rights in the matter. *Opinion:* An innocent purchaser of this draft would be protected and entitled to recourse against the drawer and prior parties thereon. The Negotiable Instruments Act provides that "the title of a person who negotiates an instrument is defective within the meaning of this Act when he obtained the instrument or any signature thereto by fraud, duress, or force and fear or other unlawful means * * *" but provides that "a holder in due course holds the instrument free from any defect of title of prior parties and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon." Assuming that the third indorser is a holder in due course, he would have an enforceable right against the drawer and the first indorser would be the loser. (*Inquiry from Ill., April, 1916.*)

Indorsement of payee procured by force

2182. A banker's draft was stolen from

a payee, who was forced to indorse the draft. Payment was stopped on the draft and the same was protested. The payee wants a duplicate draft. *Opinion:* Assuming that the original draft was not surrendered, it would not be safe for the issuing bank to issue a duplicate without receiving indemnity as protection against liability on the original which might have been acquired by an innocent purchaser for value before presentment and protest. The fact that the indorsement was under duress would be no defense against a holder in due course. (*Inquiry from S. D., Feb., 1915, Jl.*)

Bank draft in hands of insane joint payee who has disappeared

2183. A bank asks what should be done in the following case: A man and wife deposited money in the bank in both of their names, and thereafter the bank gave them a New York draft for the amount of their balance, making it payable to them jointly at their request. The bank has been notified that the wife became insane and has disappeared, taking the draft with her. The husband has been unable to locate either his wife or the draft. *Opinion:* When a draft is made payable to two persons jointly, it requires the indorsement of both to negotiate or receive payment. In the present case, the bank stopped payment, and the joint payee desires the bank to issue a duplicate to him only. The bank should not comply with the request unless the husband gives the bank a satisfactory bond of indemnity to secure it against liability on the original. It is possible that, after receiving a duplicate, the original might be negotiated under indorsement of both payees and the bank be compelled to pay to an innocent purchaser. Furthermore, even though one of two joint payees is adjudicated incompetent in legal proceedings brought for that purpose, the property rights of such person are not thereby forfeited, but vest in the committee of the lunatic who would have equal right to payment of the draft as the other payee. (*Inquiry from W. Va., June, 1917.*)

Lost draft negotiated eight and one-half months after issue

2184. A draft by a bank on its correspondent, issued to A, its customer, and indorsed by A to B, was claimed to have been lost. A duplicate was issued and later paid by the bank in addition to stopping payment upon the original. Eight and one-half

months after date of the draft the original, having been found, was cashed by B at a bank, which presented it to payor bank where it was protested for non-payment. *Opinion:* The Negotiable Instruments Act provides that if an instrument payable on demand is negotiated an unreasonable length of time after its issue, the purchaser is not a holder in due course. Under this, the negotiation of a check of a customer on a bank eight months after its issue would probably be held not within a reasonable time, but a distinction has been taken in some cases between an ordinary check and a banker's draft as to time limit for negotiation, and the question of the period of time for free circulation of such instruments before they are discredited has not yet been definitely settled. As to banker's drafts, the question will remain somewhat problematical until a more definite rule is established by the courts indicating what is an unreasonable length of time of negotiation under Section 53 of the Negotiable Instruments Act to deprive a purchaser of the status of a holder in due course. London, etc., County Bk. v. Groome, L. R. 8 Q. B., Div. 228. Bk. v. Needham, 29 Iowa 249. Cowing v. Altman, 71 N. Y. 435. Caldwell v. Dismukes, 111 Mo. App. 570. Neg. Inst. L. (Comsr's. dft.), Sec. 53. Citizens St. Bk. v. Cowles, 39 Misc. (N. Y.) 571, aff'd 180 N. Y. 346. Asbury v. Taube, (Ky.) 151 S. W. 372. McAdam v. Grand Forks Merc. Co., (N. Dak.) 140 N. W. 725. German American Bk. v. Wright, (Wash.) 148 Pac. 769. Marbourg v. Brinkman, 23 Mo. App. 511. Story on Bills, Sec. 472. Bull v. First Nat. Bk., 123 U. S. 105. (*Inquiry from Minn., March, 1919, Jl.*)

Effect of "duplicate unpaid" on draft

2185. A Washington bank issued to its customer a draft on New York, which was stolen from the payee after he had indorsed it. A duplicate draft was issued and paid. Afterwards the stolen draft was cashed for value, and forwarded by the holder for payment and was protested. *Opinion:* The Washington bank is liable to the holder and would have remedy over against its customer. If in this case the original draft had upon it the words "duplicate unpaid," the drawer would not be liable to the holder. Wirt v. Stubblefield, 17 App. D. C. 283. Schlesinger v. Kelly, 114 N. Y. App. Div. 546. Klar v. Kostiuk, 119 N. Y. S. 682. (*Inquiry from Wash., July, 1911, Jl.*)

Paper signed or indorsed in blank*Rights of holder in due course of stolen check indorsed in blank*

2186. The Baltimore and Ohio Railroad Company issued its check for \$60 to John Doe, who indorsed it in blank and cashed it with a pool room proprietor. Shortly after, the proprietor lost the check and immediately notified the company not to honor the check if presented without his indorsement. The check was stolen and negotiated to an innocent purchaser for value. *Opinion:* Where a check, bearing indorsement in blank of the payee, is stolen from the owner and negotiated to an innocent purchaser for value, the latter is a holder in due course and acquires title to the check with right of enforcement. See citations in opinion No. 2186a. (*Inquiry from W. Va., Nov., 1917, Jl.*)

2186a. A's check to B, indorsed in blank by the latter, is stolen and negotiated to E, an innocent purchaser, for value. Payment was stopped by A. *Opinion:* E as holder in due course has a right to enforce payment from the drawer and indorser. The check was made payable to bearer by the indorsement in blank and E was an innocent holder in due course, notwithstanding it had been stolen. Mass. Nat. Bk. v. Snow, 187 Mass. 160. Jefferson Bk. v. Chapman, 122 Tenn. 415. Schaffer v. Marsh, 90 Misc. (N. Y.) 307. N. Y. Inst. A. (Comsr's. dft.), Sec. 57. (*Inquiry from Wyo., Nov., 1917, Jl.*)

Rights of purchaser of stolen instrument indorsed in blank

2187. In case a negotiable note indorsed in blank, and belonging to a bank, is stolen and then negotiated before maturity, can the bank have payment stopped by the maker, or can the then holder enforce collection? Would it be the same in the case of coupon bonds? *Opinion:* The purchaser of a negotiable note, or other negotiable security, which has been stolen from the true owner when indorsed in blank, has a right to enforce payment thereof, provided he acquired the same for value in good faith before maturity and without notice. But the burden of proof is upon such purchaser to show that he is a holder in due course. The rule would apply to coupon bonds which are negotiable instruments. Mass. Bank v. Snow, 187 Mass. 160. Hinckley v. Merchants Nat. Bank, 131 Mass. 147. City of Adrian v. Whitney Central Bank, 180 Mich.

171. Northampton Nat. Bank v. Kidder, 106 N. Y. 221. Jefferson Bank v. Chapman, 122 Tenn. 415. Sec. 57 Neg. Inst. Law. (*Inquiry from Kan., Jan., 1920, Jl.*)

2188. A bank cashed a check which was indorsed in blank by the payee and stolen from him. The bank had no notice of the loss. Payment of the check was stopped. *Opinion:* The bank acquired perfect title to the bearer check and can enforce payment from the drawer and the payee. Unaka Nat. Bk. v. Butler, 113 Tenn. 574. (*Inquiry from Ore., April, 1915, Jl.*)

2189. A check was indorsed in blank by the payee, stolen from him without delivery and negotiated to a merchant for value. The drawee under a stop payment order refused to pay the check. *Opinion:* The bank is not liable but the merchant as a bona fide purchaser can recover from the drawer and the payee, although the check was never delivered by the payee. Angus v. Downs, (Wash.) 147 Pac. 630. Mass. Nat. Bk. v. Snow, 187 Mass. 159. Greaser v. Sugarman, 76 N. Y. S. 922. Poess v. Twelfth Ward Bk., 86 N. Y. S. 857. Buzzell v. Tobin, (Mass.) 86 N. E. 923. (*Inquiry from Ill., June, 1915, Jl.*)

2190. A check indorsed in blank by the payee was stolen and cashed at a bank. The drawer stopped payment before the check reached the drawee. *Opinion:* The cashing bank was a bona fide purchaser from the thief, and, being a holder in due course, can enforce against the drawer and the indorser. Neg. Inst. L. (Comsr's. dft.), Secs. 16, 52. Mass. Nat. Bk. v. Snow, 187 Mass. 159. Greaser v. Sugarman, 37 Misc. (N. Y.) 799. Poess v. Twelfth Ward Bk., 43 Misc. (N. Y.) 45. (*Inquiry from W. Va., Sept., 1914, Jl.*)

Payment of check signed in blank, stolen and filled in—Drawee can charge depositor

2191. A depositor has been in the habit of signing blank checks before leaving town, to be filled in by his clerk to pay bills. One of these checks was lost or stolen, filled in, cashed and charged to his account. The bank inquires whether it is liable for paying said check. *Opinion:* Where a man signs a check in blank and leaves it lying around and it is taken by an unauthorized person, filled in and cashed at the bank, it has been held that the bank is protected and can charge the amount to the customer's account. (*Inquiry from N. Y., Oct., 1917.*)

2192. A signs blank check on the bank and leaves it with B to be filled out when needed to close a deal. C steals the check from B and fills it out to himself, and is identified to the bank which pays the check. Can A recover from the bank? *Opinion:* It was held in *Trust Company of America v. Conklin*, 119 N. Y. Supp. 367, that a depositor, who signed checks in blank to be used by his bookkeeper in the business, is chargeable by the bank for money paid on a check which was stolen and filled out by an unauthorized employee. This seems to cover the present case. (*Inquiry from Pa., Jan., 1919.*)

2193. A drawee bank paid three checks which were signed in blank by the drawer, and never delivered, but were stolen, filled out and negotiated. *Opinion:* The drawee which paid the checks can charge the amount to the drawer's account because of breach of an implied contract duty to exercise care. The drawer, however, has a right of recovery from the banks which purchased and collected such checks, because under the rule of the law merchant and the Negotiable Instruments Act an incompleting instrument not delivered is not a valid contract in the hands of any holder, notwithstanding its subsequent unauthorized completion and negotiation. *Mo. Rev. St., 1909, Sec. 9986. Tr. Co. v. Conklin*, 119 N. Y. S. 367. *Linick v. Nutting & Co.*, 125 N. Y. S. 93. (*Inquiry from Mo., Oct., 1914, Jl.*)

Drawer not liable to innocent purchaser of check signed in blank and stolen

2194. A thief stole from a check book a check bearing only the name of the drawer, and negotiated it for value to an innocent purchaser. Can payment of the check be stopped? *Opinion:* Payment can be stopped and the drawer is not liable to the innocent purchaser. The check was incomplete without delivery. *Baxendale v. Bennett*, L. R. 3 Q. B. Div. 525. *Burson v. Huntington*, 21 Mich. 416. *Salley v. Terrill*, 95 Me. 553. *Linich v. Nutting*, 125 N. Y. S. 931. *Neg. Inst. A., Sec. 15 (Com-
sr's. dft.).* (*Inquiry from Cal., Aug., 1913, Jl.*)

Note indorsed in blank by payee and lost or stolen

2195. A promissory note, indorsed in blank by the payee, is stolen from the payee and negotiated before maturity to an innocent purchaser for value. Can the innocent purchaser collect the amount of

the note, and if so, who should stand the loss, the thief being irresponsible? *Opinion:* In the case stated the payee is the loser. An innocent purchaser for value before maturity of a note indorsed in blank by the payee, stolen from him and negotiated by the thief, takes title as against the payee. (*Inquiry from Mo., June, 1914.*)

Negotiation of lost check indorsed in blank

2196. A party lost a check payable to his order, and indorsed by him. The check was cashed at another bank, but bears no other indorsement. Can the payee recover from the cashing bank? *Opinion:* Under the circumstances related, the cashing bank, in the absence of knowledge or bad faith, is a holder in due course, the indorsement in blank making the instrument payable to bearer and negotiable by delivery—and can enforce payment from the drawer, free from claim of title of the payee, who has no recourse against such cashing bank. *Mass. Nat. Bank v. Snow*, 187 Mass. 160. *Jefferson Bank v. Chapman*, 122 Tenn. 415; *Secs. 52, 56 Neg. Inst. Law.* (*Inquiry from Kan., June, 1920, Jl.*)

Newspaper notice of loss insufficient unless purchaser reads article

2197. A gave his note payable at a bank to B, who lost the instrument. C found it and negotiated it to an innocent purchaser for value, who received payment at the bank before B could serve notice. *Opinion:* Where a note indorsed in blank by the payee is lost and negotiated by the finder to a holder in due course, the latter acquires a good title as against the payee. Assuming payment has been stopped and notice of the loss published in the newspaper, this would not be sufficient to protect the maker and payee from liability, unless it could be proved that the purchaser for value read the article. *Mass. Nat. Bk. v. Snow*, 187 Mass. 160. *Jefferson Bk. v. Chapman*, 122 Tenn. 415. *Setzer v. Deal*, (N. C.) 47 S. E. 466. (*Inquiry from R. I., Nov., 1918, Jl.*)

Lost and stolen bonds

Holder in due course of stolen government bearer bonds

2198. The Federal Reserve Bank of St. Louis sent government coupon bonds by registered mail to a purchaser. The mail pouch containing these bonds was thrown off the train at the proper place but it was caught in the train, and the bonds in

question were carried some fifty miles and dropped near the track. The finder, after watching for notices of lost bonds, negotiated some of them to a bank. Some of the mutilated bonds were sent to the Federal Reserve Bank for exchange for new ones. At the Federal Reserve Bank it was discovered that these bonds were a part of the shipment by registered mail, and it claims all the bonds in the shipment as the property of the government, being undelivered registered mail. Is this claim valid? *Opinion:* It would seem that if the bank is the innocent purchaser of government coupon bonds, it has a valid claim thereto even though they were stolen from the government without delivery. (*Inquiry from Ill., Jan., 1921.*)

Banks as innocent purchasers of stolen Liberty coupon bonds

2199. What is the liability of a bank which purchases Liberty coupon bonds which afterwards turn out to have been stolen? *Opinion:* A coupon bond is a negotiable instrument payable to bearer and negotiable by delivery, and a purchaser to be secure with respect to a bond, which afterwards turns out to be stolen, must have acquired the same under the conditions prescribed by the Negotiable Instruments Act to constitute it a holder in due course. These conditions are found in section 52 of the Negotiable Instruments Act which provides: "A holder in due course is a holder who has taken the instrument under the following conditions: 1. That it is complete and regular on its face. 2. That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact. 3. That he took it in good faith and for value. 4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it." Sec. 56 provides: "To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith." Sec. 57 provides: "A holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount

thereof against all parties liable thereon." Under this section a holder in due course of a note or check payable to bearer acquires title thereto from one who has stolen it. *Mass. Nat. Bank v. Snow*, 187 Mass. 160. *Jefferson Bank v. Chapman*, 122 Tenn. 415. *Schaeffer v. Marsh*, 90 Misc. (N. Y.) 307. It has been held that the same rule applies to negotiable bonds payable to bearer. *City of Adrian v. Whitney Cent. Bank*, 146 N. W. (Mich.) 654. Taking in "good faith" is an essential of a holder in due course. The great majority of cases hold that the mere purchase of bearer paper from a stranger, without inquiry or investigation, does not, of itself, constitute bad faith. *Pennington County Bank v. First State Bank*, 125 N. W. (Minn.) 119 (citing *Commercial Bank v. First Nat. Bank*, 30 Md. 11, 96 Am. Dec. 554. *Murray v. Lardner*, 2 Wall. 110). *Unaka Nat. Bank v. Butler*, 83 S. W. (Tenn.) 655. But some courts hold that a person should not purchase paper payable to bearer from a stranger without inquiry. *Wickersham Banking Co. v. Nicholas*, 82 Pac. (Cal.) 1124. Where there are suspicious surrounding circumstances, the fact of purchase from a stranger will be taken into consideration with all the other circumstances in determining the good faith of the purchaser. In other words, a question of fact will be raised for the determination of a jury whether the purchaser was in fact honest or guilty of bad faith. See, for example, *Merchants, etc., Nat. Bank v. Ohio Valley Furniture Co.*, 50 S. E. (W. Va.) 880. *Pelletier v. State Nat. Bank*, 38 So. (La.) 132. There are a few specific cases growing out of the theft of Liberty and Victory coupon bonds and involving the title of purchasers. In *Morris v. Muir*, 181 N. Y. Supp. 913, there was more than the mere taking of bonds from a stranger; the court took the ground that the immature age and physical appearance of the seller was such as to negative the belief that he was the owner of the securities, and that he conducted a newspaper stand on his own account, as he represented, and it was therefore held that the purchaser acted in bad faith, and did not acquire title. *Wagner & Co. v. Whitney & Co.*, decided in the federal court in New York city Feb. 11, 1921, without opinion, did not involve purchase from a stranger, but did decide that a purchaser in good faith of stolen Victory coupon bonds takes good title to them. (*Inquiry from Tex., Feb., 1921.*)

Banks as purchasers of stolen Liberty coupon bonds—Notice

2200. Is a purchaser of stolen Liberty bonds chargeable with notice of the defect in the title of the seller where, by newspaper, special letters or printed circulars, the theft is announced and the bonds described? *Opinion:* Newspaper publication does not charge a purchaser of negotiable paper with notice in the absence of actual knowledge thereof. *Wildsmith v. Tracy*, 80 Ala. 258. *Gehlbach v. Carlinville Nat. Bank*, 83 Ill. A. 129. Of course, actual knowledge of the publication would charge the purchaser with notice. Newspaper articles have been held admissible as tending to show knowledge of contents by the purchaser where he subscribed to the paper. *Merrill v. Hole*, 85 Iowa 66. Apparently the receipt by a banker or broker of a printed circular or letter describing stolen negotiable paper does not charge the recipient with any legal duty to preserve the notice and retain the contents in memory, and if, notwithstanding the receipt of such notice, stolen paper is purchased before maturity for full value in forgetfulness or ignorance of the notice, the purchaser is protected. *Vermilye v. Adams Exp. Co.*, 21 Wall. 138; *Raphael v. Bank of England*, 17 Com. Bench Rep. (Eng.) 161. Actual knowledge would, of course, deprive the purchaser of the status of holder in due course, and the circumstances in any particular case might be such as to charge the purchaser with bad faith. (*Inquiry from N. Y., April, 1921, Jl.*)

Liability of bank for loss of Liberty coupon bonds in unregistered mail

2201. A draft, with coupon Liberty bonds attached, was sent through the mail, unregistered, by a bank, and was lost in transit. Who is liable for the loss? *Opinion:* Where a bank forwards coupon bonds by ordinary unregistered mail, and the letter is lost in transit, the bank is liable for the loss. *Clay City Nat. Bank v. Conlee*, 106 Ky. 788. (*Inquiry from S. C., June, 1920, Jl.*)

Duplicates not issued for lost government coupon bonds

2202. Where coupon bonds of the government are lost or stolen and are acquired by a bona fide purchaser from a finder or thief, the latter's title is superior to that of the former owner and there is no provision of the Federal statutes to protect the original owner in such case. But where such bonds are wholly or partly destroyed

or defaced and can be identified, the Federal statutes provide for the issue of duplicates upon giving of indemnity and also provide for the issue of duplicates for lost or destroyed registered bonds. (*Inquiry from W. Va., July, 1918, Jl.*)

Liability of government on stolen registered bonds

2203. A bank held registered Liberty bonds for a customer for safe keeping. They were stolen from the bank, assignment made before an officer of a bank in Louisiana, who acknowledged the assignment under his official signature and bank seal. The assignment has been accepted by the Treasury Department, who now hold the cancelled bonds. Can bank recover from the government, and if so, what procedure should be taken? *Opinion:* Where registered Liberty bonds have been stolen, the payee's assignment forged and acknowledged, and the bonds accepted and cancelled by the Treasury Department and new bonds issued, the government is liable to the true owner of the stolen bonds, who should petition the Treasury Department, or bring suit in the Court of Claims or Federal District Court for reimbursement. (*German Bank of Memphis v. U. S.*, 148 U. S. 573; U. S. Judicial Code, Sec. 991, subd. 20. And see *Stanley v. Schwalby*, 162 N. S. 255.) There is also a liability on the part of the official who certified the acknowledgment of the forged assignment. (*Second Nat. Bank v. Curtiss*, 153 N. Y. 681. *Nat. Exch. Bank v. U. S.*, 151 Fed. 402.) (*Inquiry from Okla., Feb., 1920, Jl.*)

Procedure to obtain duplicates of destroyed Liberty coupon bonds

2204. A bank lost some Liberty coupon bonds or same were destroyed. It asks how it will be possible to secure duplicates or reimbursement therefor. *Opinion:* If the bank can prove that the Liberty bonds have been destroyed, the procedure is, under sections 3702 and 3703 of the Revised Statutes, to obtain duplicates upon filing the bond of indemnity therein described. It is to be presumed that there can be obtained from the Treasury Department a copy of the regulations showing the precise procedure as to making application for duplicates. If, however, it is impossible to prove that the bonds have been destroyed, but the facts would indicate that they have been lost, there is no provision under which the Government will issue a duplicate,

because such bonds can pass from hand to hand the same as money and an innocent purchaser of the Liberty bonds would acquire the title. (*Inquiry from Ariz., Dec., 1919.*)

Rights of holder of stolen coupon bonds

2205. What are the legal rights and liabilities of a holder of stolen coupon bonds? *Opinion:* Coupon bonds payable to bearer are negotiable by delivery and an innocent purchaser can acquire a good title from the thief or finder. Mass. Nat. Bank v. Snow, 187 Mass. 160. City of Adrian v. Whitney Central Bank, 180 Mich. 171. However, section 59 of the Negotiable Instruments Act provides that when it is shown that the title of a prior party is defective, the burden is on the holder to prove that he, or some person under whom he claims, acquired the title as holder in due course.

Where negotiable securities have been stolen and negotiated, the burden is upon the holder to show that he is himself a holder in due course, or that he claims under such a holder; and there is no presumption that the thief negotiated the securities before they became due. Northampton Nat. Bank v. Kidder, 108 N. Y. 221. Hinckley v. Merchants Nat. Bank, 131 Mass. 147. (*Inquiry from Kan., Jan., 1921.*)

Stolen coupon bonds—Method of procedure to protect owner

2206. What method may be adopted to protect the owner of coupon bonds which have been stolen, with respect to the bonds themselves and the interest coupons? *Opinion:* See Opinion No. 2205 for law with respect to coupon bonds. As applied to the case submitted, if the issuing company should refuse payment on these bonds at the request of the owner on the claim that they were stolen, and the holder should sue the company thereon, the burden would be on the holder to prove that he was a holder in due course, and if he made such proof, and the bonds were payable to bearer, he would have a right of recovery. The correct procedure for the owner is to ask that payment of the stolen bonds and the coupons be withheld and to tender a sufficient bond of indemnity to protect the issuing company in the event it is sued and held liable by a holder in due course. Upon such request and tender it would seem reasonable that the issuing company should comply with the request and refuse payment until

the holder could prove that he was a holder in due course. (*Inquiry from Ore., April, 1920.*)

Holder in due course of stolen municipal bonds

2207. A bank from which municipal bonds were stolen notified the city of the theft, and the city notified the bank at which they were payable to stop payment thereon; the latter bank, however, neglected to do so and paid the bonds. What are the rights of bank holding the bonds? *Opinion:* Assuming that the stolen bonds were payable to bearer, they are negotiable by delivery and an innocent purchaser for value is entitled to enforce payment thereof, notwithstanding the theft. Mass. National Bank v. Snow, 187 Mass. 160. Jefferson Bank v. Chapman 122 Tenn. 415. City of Adrian v. Whitney Central Bank, 180 Mich., 171. The only advantage of stopping payment is to compel the holder to prove that he is an innocent holder for value. A bank at which a note or bond is made payable is compelled to obey the stop payment order of the maker and is liable for any damages caused to the maker by failure to carry out his instructions. Hence, the bank paying the bonds against the instructions of the city would be liable to it and the city would be liable to the bank from which the bonds were stolen, unless the paying bank could prove that the payment was made to a holder in due course, which would relieve it from liability. (*Inquiry from Ohio, Nov., 1920.*)

Method of procedure to protect holder of stolen municipal coupon bonds

2208. The holder of stolen municipal bonds with coupons payable to bearer has been asked by the bank at which they are payable to serve it with a legal notice so that if coupons are presented for payment it may have some basis for its refusal to pay. What should be the form of the notice? *Opinion:* It would be well to make a sworn statement or affidavit that the bonds in question were stolen from the bank and attach this to a notice to the city issuing the bonds, requesting it not to pay until the holder has established good title as an innocent purchaser for value and to instruct the bank, at which the bonds are made payable, to refuse payment. The notice should be accompanied with an offer to indemnify the city for any liability incurred in the event of suit and a request that it give notice to the owner of the bonds,

so that it may have an opportunity to come in and defend. The city should also be requested to make reply so that it will be known that it accedes to the request. A copy of the affidavit and notice should be sent directly to the paying bank, accompanied by a similar request not to pay. If the city and the bank agree not to pay until the holder has shown himself a holder in due course, this is sufficient; otherwise, it may be necessary to apply for an injunction against the city and the bank, restraining them from making payment until the rights of the holder are judicially established, and in such a proceeding the court would probably require the execution of a bond of indemnity as a condition precedent to the issuing of the restraining order. (*Inquiry from Ohio, Dec., 1920.*)

Lost or stolen pass-books

Savings pass-book not negotiable

2209. The fund in a savings bank had been withdrawn by a depositor upon claim of loss of his pass-book. Later he fraudulently negotiated to an innocent purchaser his draft and pass-book on the account. Can payment of the instrument be enforced against the bank? *Opinion:* A bank which pays a savings deposit to its depositor without production of the book, upon claim of loss, is not liable to an innocent purchaser to whom a draft upon the bank, accompanied by the pass-book, has been negotiated, the pass-book not being a negotiable instrument. *Witte v. Vincenott*, 43 Cal. 325. *McCaskell v. Conn. Sav. Bk.*, 60 Conn. 300. *Kummel v. Germania Sav. Bk.*, 127 N. Y. 488. (*Inquiry from Cal., April, 1917, Jl.*)

Indemnity not necessary unless bank in doubt as to identity of depositor

2210. A savings bank depositor claimed that his bank book was either lost or stolen. The bank required an indemnity bond in double the amount of the deposit, before issuing a duplicate book or before paying over the balance. *Opinion:* It is customary for savings banks to print in pass-books a rule that indemnity will be required before making payment in case of loss. These pass-book rules are generally held contracts, but the courts are divided as to enforcing the contract of indemnity. A majority hold that, the pass-book being non-negotiable, the bank is protected if it pays or issues a duplicate without indemnity. But where the bank is not satisfied as to the identity

of the depositor who claims payment, the right of indemnity may be upheld. *Cal. Bk. Act, Sec. 64. Bayer v. Com. Tr. Co.*, (Mo.) 129 S. W. 268. (*Inquiry from Cal., April, 1912, Jl.*)

2211. The depositor of a savings bank lost his pass-book and applied for a duplicate. The bank asks as to the necessity of a bond of indemnity before issuing the duplicate. *Opinion:* There is no necessity for a bond of indemnity before paying money or issuing a duplicate, except where the bank is uncertain as to the identity of its depositor. Ordinarily there is no necessity for such requirement, the pass-book being non-negotiable. Where there is a by-law providing for such indemnity, the courts will refuse bank's right to require a bond unless some necessity is shown. *Bayer v. Com. Tr. Co.*, (Mo.) 129 S. W. 268. *Mitchell v. Home Sav. Bk.*, 38 Hun (N. Y.) 255. *Warhus v. Bowery Sav. Bk.*, 21 N. Y. 543. *Mierke v. Jefferson Co. Sav. Bk.*, 134 N. Y. S. 44. *Mills v. Albany Exch. Sav. Bk.*, 28 Misc. (N. Y.) 251. *Wagner v. Howard Sav. Inst.*, 52 N. J. L. 225. *Palmer v. Provident Inst.*, 14 R. I. 68. *Heath v. Portsmouth Sav. Bk.*, 46 N. H. 78. *Vincent v. Port Huron Sav. Bk.*, 147 Mich. 437. (*Inquiry from Pa., April, 1913, Jl.*)

2212. A woman of foreign birth has considerable deposit with a savings bank, and advises the bank that her pass-book has been stolen. It would do no good to have her sign bond of indemnity, and, in the opinion of the bank, she could get no one to go on such bond. Should the bank issue a duplicate book? And is a savings bank book negotiable? *Opinion:* A savings bank pass-book is not a negotiable instrument, and where depositor claims his book has been lost, and bank is satisfied as to his identity, bank may safely pay him the money or issue duplicate, upon proper receipt, without requiring indemnity, which is only necessary where bank is in doubt as to identity of depositor. *Bayer v. Com. Trust Co.*, (Mo.) 126 S. W. 268. *Mills v. Albany Exch. Sav. Bank*, 28 Misc. (N. Y.) 251. (*Inquiry from Pa., July, 1919, Jl.*)

Waiver by bank of requirement of advertisement and indemnity

2213. Where the transferring of accounts in a mutual savings bank is prohibited, may the bank with safety waive its rules under which it may require the depositor to advertise the loss of a pass-book, and to

give a bond of indemnity, as a condition to the issuing of a duplicate? *Opinion:* A pass-book is not a negotiable instrument, hence a savings bank may safely pay a deposit to the depositor without its production and without indemnity. An assignee of the account, presenting the pass-book and an order on the bank, although receiving the assignment for value and without notice, takes no greater rights than the depositor. The stipulation by the bank, inserted in the pass book, that it will not make payments without the production of the pass-book does not raise an estoppel. There is one contingency when it might be necessary to require indemnity, which is where the bank is not sure of the identity of the depositor. (*Inquiry from Minn., May, 1914.*)

Issue of duplicate

2214. May a bank, which has received no notice of assignment of a savings deposit, issue a duplicate pass-book three months after notice of loss of the original pass-book and after advertising in one issue of a local paper? *Opinion:* The duplicate may be issued safely. A savings pass-book is not a negotiable instrument and a transferee acquires no greater rights than the assignor. Furthermore, a bond of indemnity is not necessary as a prerequisite to issuing a duplicate. (*Inquiry from N. Y., June, 1917.*)

Issue of duplicate without indemnity

2215. What is the proper course for a bank to pursue to insure it complete protection in the issuance of a duplicate savings pass-book? *Opinion:* A savings pass-book is not a negotiable instrument and an assignee of a book claimed to be lost takes no greater rights than the original depositor. It seems, therefore, that a savings bank may safely issue a duplicate book without requiring a bond of indemnity. The only contingency in which a bond of indemnity would seem to be necessary is where the bank is not sure of the identity of its depositor; that is to say, where a person claims to be John Smith, states that he has lost his book, and requests a duplicate, and the bank is not sure that he is John Smith. Were he an impersonator, the issuance of a duplicate book would not affect the liability of the bank to the original depositor. (*Inquiry from Wis., Jan., 1918.*)

Right of bank to require indemnity in absence of contract

2216. Where a savings bank pass-book

is claimed to be lost may the bank require a bond of indemnity before issuing a duplicate or paying the depositor? *Opinion:* Although the decisions are conflicting in New York, the weight of authority therein is that the bank cannot require indemnity in the absence of a contract therefor between the bank and the depositor. *Mierke v. Jefferson County Sav. Bank*, 134 N. Y. Supp. 44 and *Mills v. Albany Exch. Sav. Bank*, 28 Misc. Rep. 251, holding that the provisions for exacting indemnity against lost instruments in suit (Code Civ. Proc., Sec. 1917), refer to such as are negotiable, and the statute has no application to the savings bank pass-book, since it is not negotiable (citing as to non-negotiability of pass-book: *Kummel v. Germania Savings Bank*, 127 N. Y. 488. *Smith v. Brooklyn Savings Bank*, 101 N. Y. 58. *Allen v. Williamsburgh Savings Bank*, 69 N. Y. 314. *Beaver v. Beaver*, 53 Hun 258). Where a by-law as to indemnity exists, forming part of the contract between the bank and the depositor, it will generally be enforced in New York. *Mitchell v. Home Sav. Bank*, 38 Hun (N. Y.) 255. *Mills v. Albany Exchange Bank*, 28 Misc. Rep. 251. See also, on the general question, *Worhus v. Bowery Sav. Bank*, 21 N. Y. 543, holding that a regulation of a savings bank, requiring the production of the depositor's pass-book before he is entitled to receive any payment, is reasonable in a general sense; but that proof of the loss of the pass-book, or inability to find it after proper search, will excuse the non-production and entitle the depositor to his money. In this case the question as to security was not raised or decided. (*Inquiry from N. Y., March, 1918.*)

Lost stock certificate

Right of innocent purchaser of lost stock certificate indorsed in blank

2217. Where a stock certificate indorsed in blank is lost by the owner and sold by the finder to an innocent purchaser for value, latter acquires title as against owner under Stock Transfer Act which gives full negotiability to certificates of stock. *Knox v. Eden Musee*, 148 N. Y. 441. *Scollans v. Rollins*, 173 Mass. 275. N. Y. Personal Prop. Law, Secs. 162, 166, 168. (*Inquiry from N. Y., Aug., 1916, Jl.*)

Issue of duplicate for undelivered and lost certificate of stock

2218. A owned stock in a bank that merged with another bank, new stock being issued in lieu of old. He received dividends

on his allotment of the new stock for some years, but claims he never received certificate of stock which bank mailed to him. Could the bank issue a duplicate safely without requiring indemnity? *Opinion:* In the case stated the certificate of stock does not appear to have been delivered to the stockholder, and, if such fact were proved, he would be entitled, and the court would hold he had a right, to a duplicate without giving bond of indemnity, because the certificate could never be transferred by indorsement to a bona fide holder. Assuming the original has never been received by the stockholder, and there is no reason to question the honesty of his statement in this particular, the bank can safely issue a duplicate without requiring indemnity. (*Inquiry from Colo., Aug., 1916.*)

Bond of indemnity for duplicate for lost stock certificates

2219. A stockholder in a bank claimed to have lost his certificates of stock undorsed. The bank wishes protection against dishonesty. *Opinion:* The bank should issue duplicate certificates and require a sufficient bond of indemnity of the stockholder. The object of the bond is to protect the bank against the claim of a bona fide purchaser for value of the lost certificates who derived title through the stockholder, who may have been dishonest. (*Inquiry from N. J., May, 1911.*)

2220. A stockholder of a national bank claims to have lost his certificate and requests a duplicate. *Opinion:* As a certificate of stock is freely transferable by the owner, the bank is entitled to a bond of indemnity to protect it against liability upon the original certificate. *Johnson v. Laflin*, 103 U. S. 800. (*Inquiry from Ohio, Jan., 1919, Jl.*)

Issuing corporation cannot require surety company bond

2221. A corporation refused to issue a new certificate of stock to replace one stolen from the owner, unless the owner furnished a surety company bond. The owner tendered an individual indemnity bond, which was refused by the corporation, pursuant to a provision in its by-laws. *Opinion:* The corporation cannot enforce the by-law, which requires a surety company, as distinguished from an individual bond, before issuing duplicate for stolen certificate. The character and sufficiency of the bond is for the court to determine if the parties can-

not agree. Pa. Const., Art. 3, Sec. 7. *Jones on Collateral Securities*, Sec. 162. *Meeker v. Jackson*, 3 Yeates (Pa.) 442. *Beaver Valley Lodge v. Bk.*, 7 Pa. Super. Ct. 552. *Snyder v. Wolfley*, 8 Serg. & R. (Pa.) 328. *Milne v. Marshall*, 5 Phila. (Pa.) 131. *Fitchett v. North Pa. R. Co.*, 5 Phila. (Pa.) 132. (*Inquiry from W. Va., April, 1914, Jl.*)

Power of bank to become surety on indemnity bond for lost stock collateral

2222. Certain certificates of stock were held by a national bank as collateral security and were lost through robbery. To enable the owners of the lost stock certificates to procure duplicates, the bank became surety on indemnity bonds. *Opinion:* It was not an *ultra vires* act for the bank to become surety, for although the loss of stock certificates imposes no real loss upon the owner in the absence of statute conferring full negotiability, but only the burden of obtaining duplicates, the bank has a special title in such certificates and an interest in obtaining duplicates to be lodged with it as security, so long as the loan is unpaid, which would make the giving of indemnity an act in its own interest and within its power. *Knox v. Eden Musee Co.*, 148 N. Y. 441. *Nat. Bk. v. Graham*, 100 U. S. 699. *Prather v. Kean*, 29 Fed. 498. *Pattison v. Bk.*, 80 N. Y. 82. (*Inquiry from W. Va., Jan., 1912, Jl.*)

(Right of national bank to bond of indemnity before issuing duplicate for lost certificate)

2223. A bank asks for instructions how to proceed in the case of a lost certificate of its (national) bank stock. *Opinion:* Upon a claim of loss or destruction of a certificate of stock in a national bank in New Jersey, the bank is entitled, as a prerequisite to issuing a new certificate, to a bond of indemnity, in the discretion of its board of directors, in such sum as the directors may direct. It is not essential that a corporation bond be taken, nor is it within the province of a national bank examiner to pass upon the sufficiency of the bond. The New Jersey statute authorizing requirement of a bond in case of a lost or destroyed certificate of stock is applicable to a national bank. In *re Hoyt*, 39 Misc 356, 79 N. Y. Suppl. 845, (citing New York Laws 1892, Ch. 688, Secs. 50, 51, and *Hiscock v. Lacy*, 30 N. Y. Suppl. 860), *Comp. St. N. J.*, Art. XIII (Pub. L. 1896, p. 314); *ibid.*, Secs. 112, 113. 22 Stat. 1882, Ch. 290, Sec. 4. U. S. Rev. St., Sec. 5240. (*Inquiry from N. J., Nov., 1919, Jl.*)

Bank's return of stock collateral by unregistered mail—Responsibility for loss

2224. A bank is requested to return a paid note together with collateral consisting of a stock certificate. The bank claims to have returned the same by special delivery. The certificate was lost in the mail. The bank asks who should pay for the bond of indemnity. *Opinion:* If the customer requested return by special delivery and not by registered mail, and the bank followed his request, it would not be responsible; but if he simply requested return of the stock and the bank failed to use the customary method of return of valuable securities by registered mail, it seems the bank would be responsible and should pay the bond of indemnity. (*Inquiry from Fla., Feb., 1919.*)

Lost letter of credit

Bank purchasing forged draft against lost letter of credit

2225. A Texas bank issued a general letter of credit to one J. E. C., authorizing the latter to draw drafts up to \$200. The letter contained the signature of J. E. C. for identification. The letter was stolen and attached to a forged draft for the full amount and cashed by a bank in California.

Opinion: The California bank is the loser and cannot hold the bank issuing the letter of credit responsible. (*Inquiry from Cal., July, 1914, Jl.*)

Issue of duplicate for lost letter of credit

2226. A bank issued a letter of credit addressed generally and authorizing a specified customer, and not the bearer, to draw for amount within thirty days from date. The letter became lost before any checks were drawn, and the customer desired a duplicate. *Opinion:* A duplicate can safely be issued by the bank without indemnity except as against the customer's dishonesty. The bank would be liable to bona fide purchasers of checks negotiated by the customer. (*Inquiry from N. M., April, 1916, Jl.*)

Unsigned national bank notes stolen and circulated

Unsigned bank currency stolen and circulated

2227. Where national bank notes are lost or stolen and put into circulation without the signature or upon forged signatures, the public is protected, and the bank and not the holder stands the loss. U. S. Stat. at Large, Act July 28, 1892. (*Inquiry from Pa., April, 1914, Jl.*)

MAIL

Loss of registered mail

Collecting bank not responsible for loss of securities in registered mail

2228. Where a bank receives for collection a draft with Liberty bonds payable to bearer attached and forwards same through the registered mail, it would appear that such method of forwarding (without insuring the package unless the amount is unusually large) is the exercise of reasonable care and the bank would not be responsible where the securities are lost through robbery of the post office. The fact that the draft was mailed direct to the payor, although held by some courts a negligent method, would not charge the bank with responsibility where neglect or failure of the payor was not the cause of loss. *Auten v. Manistee Nat. Bk.*, 67 Ark. 243. *Amer. Exch. Nat. Bk. v. Met. Nat. Bk.*, 71 Mo. App. 451. *Buell v. Chapin*, 99 Mass. 594. *Clay City Nat. Bk. v. Conlee*, 106 Ky. 788. *U. S. Comp. St.* 1918, Sec. 7406. (*Inquiry from Ark., April, 1919, Jl.*)

Railroad as government agent not responsible to owner for loss of registered mail

2229. A mail pouch containing a registered package addressed from one bank to another was stolen from one of the trucks at a railroad depot. The package contained \$1,500 currency and was being transported by the railroad company. *Opinion:* The nature of the railroad's employment in carrying registered or unregistered mail is as public agent and not as common carrier for the individual, and there is no liability to the individual owner for loss of registered mail caused by negligence or even theft of a railroad employee, unless in a particular case the negligence of the corporation itself, as distinguished from its subordinates, was the direct cause of the loss. *German St. Bk. v. Minn., etc., R. Co.*, 113 Fed. 414. *Bankers Mut. Cas. Co. v. Minn., etc., R. Co.*, 117 Fed. 434. *Boston Ins. Co. v. Chicago, etc., R. Co.*, 118 Iowa 423. (*Inquiry from Kan., May, 1911, Jl.*)

Claim against government for undelivered revenue stamps

2230. A bank ordered revenue stamps to be forwarded by registered mail. The order was received but the stamps were never delivered. It is likely that they were never forwarded but that the collector profited personally by the non-delivery. What can the bank do to recover? *Opinion:* The Court of Claims has jurisdiction of the claim for reimbursement. U. S. Comp. Stat. 1901, p 752. There is apparently no regulation of the treasury, interior, or post-office departments providing for refund in cases similar to the one submitted, and it would seem that the procedure in the Court of Claims is the only method of redress open. (*Inquiry from Iowa, Jan., 1921.*)

Non-liability of postmaster for failure to properly identify addressee of registered package

2231. A bank received a letter and check purporting to be signed by A, its customer, requesting the amount be sent by registered mail to A at a place named. The check and letter were forged by a person impersonating A. The bank sent the money by registered package addressed to A at the place named, and the postmaster delivered it to the impersonator. The bank reimbursed its customer and seeks to hold the postmaster liable because he failed to procure proper identification before delivering the registered package. *Opinion:* The postmaster would not be personally liable unless guilty of negligence in the performance of his official duty, and where he delivered the package to the precise person who had asked that the money be forwarded and whom the bank intended as the person to receive it in mistaken belief that such person was its customer, it is doubtful if the postmaster could be held liable. Raynsford v. Phelps, 43 Mich. 344. Teal v. Felton, 12 How. (U. S.) 284. Danforth v. Grant, 14 Vt. 283. U. S. v. Griswold, 8 Ark. 453, 9 Ark. 304. (*Inquiry from W. Va., June, 1912, Jl.*)

Acceptance of offer by mail

Mailing letter of acceptance completes contract

2232. A from Salt Lake City makes an offer to B New York City, which B accepts by mail. The question is asked whether the contract is made when B places his acceptance in the mail, and would B have power to revoke his acceptance by telegraph before A received it. *Opinion:* Where an offer is made by mail, acceptance by post, dis-

patched in due time as far as the acceptor is concerned, concludes the contract, notwithstanding delay or miscarriage of the letter of acceptance. It is always sufficient that the offer be accepted in the mode either expressly or impliedly required by the offerer. There is a contrary view in Massachusetts. Revocation of an acceptance is valid if communicated before the acceptance is communicated. Niebling Co. v. James Coal, etc., Co., 44 Utah 50, 137 Pac. 834. White v. Corlies, 46 N. Y. 467. Howard v. Daly, 61 N. Y. 362. N. J. Com. Ins. Co. v. Hallock, 27 N. J. L. 645. Tayloe v. Merchants F. Ins. Co., 9 How. (U. S.) 390. Patrick v. Bowman, 149 U. S. 411. Haarstick v. Fox, 9 Utah 110. U. S. Postal Reg., Secs. 531, 533. Contra, McCulloch v. Eagle Ins. Co., 1 Pick. (Mass.) 278. (*Inquiry from Utah, March, 1919, Jl.*)

Gift of bank draft through mail

Death of donee before delivery

2233. A sister, intending to make a gift to her brother, purchased a bank draft payable to his order and mailed it to him. The brother died before the mail was delivered. *Opinion:* The gift was not completed for want of delivery and the sister and not the brother's estate is entitled to the money represented by the draft. In this case the post office is not to be regarded as the agent of the brother, and delivery to the post office is not delivery to the addressee. Wheeler v. Glasgow, 97 Ala. 700. Field v. Shorb, 99 Cal. 661. Burke v. Bishop, 27 La. Ann. 465. Taylor's Est., 154 Pa. 183. Scott v. Lauman, 104 Pa. 593. Jones v. Deyer, 16 Ala. 221. Seavey v. Seavey, 30 Ill. App. 625. People v. Benson, 99 Ill. App. 325. Bickford v. Mattocks, 95 Me. 547. Brogden v. Met. R. Co., 2 App. Cas. 666. Dunmore v. Alexander, 9 Shaw D. & B. 190. U. S. Post-office Reg. 487, 489. Carr v. Taylor, 128 Iowa 636. 29 Cyc. 1116. Buehler v. Galt, 35 Ill. App. 225. (*Inquiry from Ill., Aug., 1913, Jl.*)

Deposits by mail

Dishonor of customer's check where sufficient deposit in P. O. mail box

2234. A bank has a number of customers living in the country, whose deposits are made through the mails. These mails arrive at various times during the forenoon, one at such an hour as to be placed in the bank mail box at from 1.00 to 1.30 P. M. The bank closes at 2.00 P. M. Suppose it should

fail to send to the post office to get the mail just before closing hour, and a note or check of a depositor should go to protest, through the bank's failure to get a remittance of such customer in this last mail, is the bank in any way liable for damages? *Opinion:* Where a bank shortly before its closing hour or 2.00 P. M. dishonors a customer's check for insufficient funds, there is no liability to such customer arising from the fact that

there has arrived at and been deposited in the bank's box at the post office at 1.30 P.M. a mail remittance from the customer sufficient to cover the check, because (1) the mail is the agent of the customer, and the bank is not indebted for the deposit until received at the bank; (2) in the absence of special agreement there is no duty to the customer to send for mail at any particular hour. (*Inquiry from Ala., March, 1920, Jl.*)

MINORS AND INCOMPETENTS

Deposits of minors

2235. Note: An act relative to the payment of deposits to minors or other persons under disability.

"Be it enacted, etc. Whenever any minor or other person under disability shall make or have credit for a deposit in any bank in his or her name, such bank may pay such money on the check or order of such depositor, and such payment shall be in all respects valid in law."

Statement. In a majority of states there are statutes which authorize the payment of deposits to minors and other persons under disability; but such statutes do not exist in all of the states and in many they only relate to the deposits of minors in savings institutions and do not extend to general deposits subject to check. In view of the fact that business accounts of minors and other persons under disability in banks and trust companies are not infrequent, it would seem desirable to extend such legislation to all banks in states which have legislation relating to deposits in savings banks only, as well as to procure enactment in states which have no legislation on the subject.

The foregoing draft of proposed law drafted and recommended by the American Bankers Association with appropriate modifications is presented chiefly by way of suggestion for passage in states whose legislation is incomplete on this subject or which have no legislation at all. (*April, 1921.*)

No legal capacity to withdraw deposit except by statute

2236. Has a minor legal capacity to withdraw funds from bank? *Opinion:* In the absence of a statute, a minor has no legal capacity to withdraw a deposit standing in his name. The only statute in Arkansas is one which authorizes a minor who makes a deposit in any savings bank to with-

draw the deposit. (*Inquiry from Ark., Aug., 1916.*)

Parent as natural guardian cannot control minor's deposit

2237. A boy, eighteen years old, opened an account in a national bank and deposited therein his weekly earnings. The boy's father notified the bank to desist paying his son's checks unless countersigned by him. The bank asks whether it can legally refuse payment of the son's check if not so countersigned. *Opinion:* A parent as natural guardian cannot control or withdraw a deposit to the credit of a minor in the absence of legal appointment as guardian of the estate, and in the case stated by the bank the father has no authority to forbid the bank to pay any more checks of the son. In the state of Florida there are statutes which permit a minor when not under guardianship to make or withdraw deposits in any savings bank, institution of savings or trust company. There is no special statute covering deposits of a minor in a national bank. As to the safety of the bank in honoring the minor's checks upon deposits made by him, there might be a question of liability if when the minor became of age he should disaffirm such checks. (*Inquiry from Fla., Oct., 1920.*)

Withdrawal of deposit by parent

2238. A bank which holds a deposit of a minor receives the following letter: "First National Bank of ———, Gentlemen: You and each of you are hereby notified not to cash any more checks drawn by ———, my son, he being a minor, until further notice from his father. Signed, his father." The bank asks if it should obey the instructions. *Opinion:* Where a minor makes a deposit to his personal credit and there is a statute, as in California, exempting such deposit from the control of all persons except

creditors and authorizing payment to the minor, it is beyond the power of the father of the minor to stop payment of the minor's check. A parent, as natural guardian, cannot control or withdraw a deposit to the credit of a minor in the absence of legal appointment as guardian of the estate. Cal. Bk. Act, Sec. 16. (*Inquiry from Cal., May, 1919, Jl.*)

2239. A father, who deposited money in a bank in California to the credit of his son, a minor, has no right to withdraw the same. By statute in California the bank holds the deposit free from the father's control and may pay the same to the minor, taking his receipt or acquittance therefor. Bk. Act Cal., Sec. 16. (*Inquiry from Cal., Oct., 1912, Jl.*)

2240. A parent cannot withdraw a deposit to the credit of a minor without letters of guardianship. When the New Jersey statute provides that such deposit shall be held for the "exclusive right and benefit" of the minor and "free from control of all other persons except creditors" and "shall be paid" to the minor, whose receipt shall be a discharge to the bank, it is doubtful whether even a legally appointed guardian would have the right to withdraw the deposit; and it is uncertain whether this statute applies to a national bank. *Lefever v. Lefever*, 6 Md. 472. *Land v. Pettus*, 11 Ala. 37. Bk. Law N. J., Sec. 17. *Young's Est.*, 17 Phila. (Pa.) 511. (*Inquiry from N. J., Feb., 1913, Jl.*)

2241. Under decisions in Pennsylvania a parent has no right to withdraw a deposit to the credit of a minor child, even though the parent made the deposit; the parent cannot control the child's property unless he has been duly appointed as guardian and the judicial policy of Pennsylvania is not to appoint the parent as curator of the child's estate. The statute in Pennsylvania on this subject allows the bank to pay the deposit to a minor free from the control of the legally appointed guardian. Pa. St. 1874, Sec. 1. (*Inquiry from Pa., July, 1913, Jl.*)

2242. A parent, as natural guardian, cannot withdraw a deposit to the credit of a minor in the absence of a legal appointment as guardian of the estate. *Nelson v. Goree*, 34 Ala. 565. *Vernon's Sayles' Tex. Civ. St.*, 1914, Arts. 4068-4070. *Vineyard v. Haard*, (Tex.) 167 S. W. 22. (*Inquiry from Tex., Nov., 1916, Jl.*)

Applicability to national bank of Kansas statute authorizing payment of deposit to minor

2243. What is the law of Kansas relative to deposits of minors? *Opinion:* Section 70 of the Banking Law of Kansas provides: "It shall be lawful for any bank now or hereafter doing business in the state of Kansas to receive deposits from minors, and pay same upon the order of such minors. Payments so made shall discharge the bank forever from further liability on account of the money so paid." Laws 1907, ch. 66, Sec. 1.

This provision would probably apply to a national bank as it is not limited to a bank incorporated under the law of Kansas but applies to any bank doing business in the state, whereas a number of other provisions of the Banking Law refer to "any state bank doing business in the state." And certain other provisions of the law, for example, Section 14, expressly except a national bank. If this statute applies to a minor's deposit in a national bank, then it may lawfully pay a deposit standing to the credit of a minor to him personally. Furthermore, the father of the minor, in the absence of a permissive statute, would have no right to withdraw the deposit to the credit of the minor, for a father's natural guardianship does not extend to control of the property of his minor child without express letters of guardianship from the court. (*Inquiry from Kan., April, 1913.*)

Applicability to national bank of New York statute authorizing payment to minor

2244. Where an account in the savings deposit department of a national bank stands in the name of a minor, is it subject to his order? *Opinion:* The New York statute authorizes a bank to pay out the deposit of a minor on his order. The question is whether this statute includes a national bank. This is doubtful. The New York statute defines a bank as a domestic moneyed corporation. If a national bank comes within this definition the statute applies to it, but the General Corporation Law provides that "a 'domestic corporation' is a corporation incorporated by or under the laws of the state or colony of New York. Every corporation which is not a domestic corporation is a foreign corporation, except as provided by the Code of Civil Procedure for the purpose of construing such code." The Code of Civil Procedure provides that "a 'domestic corporation' is a corporation created by or under the laws

of the state, or located in the state and created by or under the laws of the United States. . . ." In matters of court procedure, therefore, a national bank comes within the definition of a domestic corporation, but it is doubtful whether such bank comes under the permissive provision to banks with respect to payment of deposits to minors. It might be so held; the question is uncertain and undecided. (*Inquiry from N. Y., Sept., 1917.*)

2245. The question is doubtful and undecided whether the New York statute allowing banks to pay deposits to minors would be held applicable to national banks. The statute contemplates a deposit by or in the name of any minor, and requires that the bank shall hold the deposit for the benefit of the minor with the authority to pay the same to him. There is no provision fixing a minimum age limit. N. Y. Bk. Law, Art. III, Sec. 148. N. Y. Bk. Law, Art. V, Sec. 198. N. Y. Bk. Law, Art. VI, Sec. 249. (*Inquiry from N. Y., Dec., 1916, Jl.*)

Note: The following recent decisions as to the applicability or non-applicability to national banks of state statutes not expressly including such institutions in the term "bank," but relating generally to "banks" or "corporations" will illustrate, by analogy, the doubtful nature of the question whether a state statute authorizing a "bank" to pay a deposit to a minor will be construed as applicable to national banks. In *Commonwealth v. Clark Co. Nat. Bank*, 219 S. W. (Ky.) 175, decided 1920, a state statute prohibiting corporations from holding real estate not necessary for their own legitimate business, longer than five years, was held applicable to national banks and not in conflict with any act of Congress. The court cited *McClelland v. Chipman*, 164 U. S. 347, which holds in substance that national banks are subject to the laws of the state in their business transactions, except when the state law incapacitates the banks from discharging their duties to the government. But in *England v. Hughes*, 217 S. W. (Ark.) 13, decided 1920, the state statute providing for disposition of unclaimed deposits by the Commissioner was held to refer exclusively to state banks and not to apply to national banks; and in *Columbia Nat. Bank v. Powell*, 108 Atl. (Pa.) 445, the Escheat Act of 1915, requiring banks to make annual reports to the auditor, was held not applicable to national banks doing business in Pennsylvania, but only to institutions governed by its laws.

Application to national bank of Maryland statute authorizing payment to minor

2246. A national bank asks as to the law of Maryland with respect to deposits of minors. *Opinion:* The Banking Law of Maryland (Code Art. XI, Sec. 70) provides: "Whenever any deposit shall be made in any bank, savings institution, or trust company, by and in the name of any minor, or female being or thereafter becoming a married woman, the same shall be held for the exclusive right and benefit of such minor or female, and free from the control or lien of all persons whatsoever, except creditors, and shall be paid, with any interest due thereon, to the person in whose name the deposit shall have been made, and the receipt of such minor or female shall be a sufficient release or discharge for such deposit to the bank." If this is applicable to a national bank, it may receive deposits from a minor and pay such deposits to the minor without his parent's consent. It is somewhat doubtful, however, whether this statute applies to a national bank, and there is no provision in the National Bank Act governing the deposits of minors. Until the point is positively decided a deposit standing to the credit of a minor in a national bank cannot with entire safety be paid to him nor to his father or mother, but only to a regularly appointed guardian. While the father is the natural guardian of his child, he is not the guardian of the property of such child, and has no right to control the child's deposit in the absence of letters of administration. (*Inquiry from Md., June, 1913.*)

Time certificate payable to minor

2247. The mother of A, a minor, had bank B issue a certificate of deposit to him payable to his own order seven years after date with interest at 4 per cent per annum if left seven years. The certificate was left with C for safe keeping, who, on the demand of an attorney who presented a written order for it signed both by mother and son, mailed it to the mother's address where it was received by another person about the day of her death. The administrator of her estate threatened to sue bank B for refusal to pay the certificate upon the demand of the attorney. The bank inquires as to its rights in the matter. *Opinion:* A suit could not successfully be maintained against bank B for refusal to pay the certificate to the attorney, even if he had a right to receive payment, as it is payable seven years after date, and the bank cannot be compelled to

pay before maturity. Even if this certificate was payable on demand, it certifies to the deposit by a minor of the money payable to the order of himself and neither the mother of the boy, nor the boy himself, nor both would have a right to demand payment, for a parent, as natural guardian, has no right to money standing in the name of a minor child even though the parent made the deposit, but letters of guardianship must be obtained. The attorney authorized by mother and son had no standing to maintain a legal demand of payment, and there was no default in refusing his demand. Ordinarily a legal guardian would be entitled to demand the deposit of a minor payable on demand but this certificate is not payable on demand and, unless the interest clause providing for payment of interest "if left seven years" is to be held by the court to give the holder the right to payment at any time before the date of maturity, and it is not likely that it would be so construed, no action can be maintained on it by anyone. (*Inquiry from La., Sept., 1913.*)

Deposit by A, trustee for minor

2248. Where an account in a national bank stands in the name of A, trustee for B, a minor, may the bank pay the deposit to B when he reaches his majority? *Opinion:* The trustee is the depositor and the account remains payable to him unless by the terms of the trust it is to terminate when the infant becomes twenty-one. See *Hemerich v. Union Dimes Savings Instn.*, 129 N. Y. Supp. 267. The result desired can be effected by coupling with the account a provision terminating the trust when the minor reaches his majority. (*Inquiry from N. Y., Sept., 1917.*)

Indorsement of certificate of deposit by minor

2249. A minor deposited \$25 in a state bank, obtaining the bank's certificate of deposit. The minor indorsed the certificate to a firm in payment for a suit of clothes. Before the certificate reached the bank for payment, the minor's father stopped payment. *Opinion:* The bank under the New York statute has the right to pay the amount of the certificate to a bona fide indorsee of the minor, although the father ordered the bank not to pay. The indorsement by the minor would pass the property in the certificate to the indorsee, although the minor might not be liable on the indorsement. *Dickinson v. Leominster Sav. Bk.*, 152 Mass. 51. *Genet v. Talmadge*, 1 Johns Ch. (N. Y.) 4. *Neg.*

Inst. Law (Comsr's. dft.), Sec. 41. (Inquiry from N. Y., Oct., 1912, Jl.)

Payment by Idaho bank of check of minor

2250. What is the liability of a bank in Idaho which pays a check of a minor, which the payee has obtained from him under false pretenses? *Opinion:* Under the law of Idaho a bank is protected in paying a deposit on the check of a minor. The fact that the check was obtained by false pretenses does not affect the duty of the bank to obey the order of the depositor and pay the money. (*Inquiry from Idaho, May, 1915.*)

Minors as agents and mortgagors

Payment of check to infant agent

2251. A customer sends his son, a minor, to the bank to cash checks amounting to \$1,000. In the event the boy is robbed on his return to his father, would the bank in any way be liable? *Opinion:* An infant or minor may act as the agent of another person and a bank which pays a check to an infant, who has been authorized by his principal to collect same, is protected, although the money is lost by or stolen from the infant and never reaches the principal. *Talbot v. Bower*, 1 A. K. Marsh (Ky.) 436. *U. S. Invest. Corp. v. Ulrickson*, (Minn.) 86 N. W. 613. (*Inquiry from Wis., April, 1918, Jl.*)

Power of infant to buy and mortgage real estate

2252. The question is asked whether an infant has legal right to purchase real estate in his own name and give a valid deed of trust respecting same. *Opinion:* At common law an infant may be a grantee in a conveyance of land, and the estate conveyed vests in him, subject only to be divested in case he elects to avoid same when he reaches full age, which he has power to do. *Davenport v. Prewitt*, 9 B. Mon. (Ky.) 94. *Masterson v. Cheek*, 23 Ill. 72. *Monumental Bldg. Assn. v. Herman*, 33 Md. 128. *Scanlan v. Wright*, 13 Pick. (Mass.), 523. In Missouri conveyances to infants are not void, but merely voidable. *Griffith v. Schwenderman*, 27 Mo., 412. *Irvine v. Irvine*, 9 Wall. (U. S.) 617. *Baker v. Kenneth*, 50 Mo. 82, where the court said: "The old distinction between the void and voidable contracts of infants is becoming exploded by the courts, and the tendency of modern decisions is in favor of the reasonableness and policy of a very liberal extension of the rule, that the acts and contracts

of infants should be deemed voidable only, and subject to their election when they become of age either to affirm or disaffirm them. *Townsend Admr. v. Cox*, 45 Mo. 401. 2 Kent's Com. 268, and cases cited. If an infant would disaffirm his contract, and recover back his property, either real or personal, he must refund what he has received. There can be no right of recovery so long as any part of the consideration is withheld. *Kerr v. Bell*, 44 Mo. 120. *Highley v. Barron*, 49 Mo. 103. In case of land, the general doctrine seems now to be that the infant cannot conclusively avoid the conveyance till he arrives at age. *Schneider v. Staihr*, 20 Mo. 269. *Stafford v. Roof*, 9 Cow. 626. *Bool v. Mix*, 17 Wend. 120. In Missouri a deed or any instrument purporting to convey real property, or any interest therein, operates to transmit the title, and is voidable only, and not void. *Shipley v. Bunn*, 125 Mo. 445. *Ferguson v. Bell*, 17 Mo. 347, and cases above cited. (*Inquiry from Mo., April, 1920.*)

Deposits of Incompetents

Authority of wife to withdraw savings account of husband in sanitarium

2253. A savings bank depositor is compelled to go to a sanitarium, and while there is mentally under disability and incapable of giving legal authority to the bank to pay out the deposit. His wife is permitted by the bank to withdraw the account, signing his name, followed by the word "by," and her own name. A portion of this money is expended for the expenses of the husband. About two years after the withdrawal and after the husband's recovery he and his wife separate and he starts suit against the bank. May he recover? *Opinion:* As a general rule a wife has no authority to sign her husband's name to a check or withdraw his funds, and unless the bank can prove authority or ratification, it is responsible to the husband for the money so withdrawn. In the case submitted, with the husband in such a condition that he could not sign a power of attorney, the proper procedure would have been to have obtained a court order appointing a committee of his estate with authority to expend the money on his behalf. It would have been far better and safer to have had the checks made payable to the sanitarium for the precise amounts needed for the husband's care instead of permitting the whole amount to be withdrawn at once. Unless the bank can prove

ratification, it is liable for the amount of the deposit, as paid without authority, less the amount expended for the benefit of the husband. Acquiescence may constitute ratification, and a two years' acquiescence, with knowledge of the withdrawal, might be held under the circumstances to constitute a complete ratification. (*Inquiry from Kan., March, 1920.*)

Payment to incompetent depositor unsafe

2254. A "trusty" in a hospital for treatment of the insane had earned and deposited in a bank a considerable sum of money. The bank questions its right to allow the depositor to withdraw any of his deposit. *Opinion:* The bank should make payment only to the legally appointed guardian. It would be unsafe to pay the "trusty" who has been judicially declared insane and has not been discharged as cured. *American Tr. & Bk. Co. v. Boone*, 102 Ga. 202. *Reed v. Matapan, etc., Co.*, 198 Mass. 306. *Riley v. Bk.*, 36 Hun (N. Y.) 519. *Wallis v. Manhattan Co.*, 2 Hall (N. Y.) 495. *Drew v. Nunn*, L. R. 4 B. Div. 661. (*Inquiry from Cal., Dec., 1912, Jl.*)

Checks of depositor taking "gold cure"

2255. Checks are signed by a depositor, who is in a sanitarium taking the "gold cure" for alcoholism and whose father notified the bank that the depositor is incompetent. *Opinion:* The safest course is for the bank to refuse to honor the checks until it is reasonably sure that, in issuing them, the drawer was in possession of his reason sufficiently to know the nature of his acts. The liability a bank would incur for injuring the depositor's credit in a case of possible competency would be negligible. *Prentice v. Achorn*, 2 Paige (N. Y.) 30. *Pickett v. Sutter*, 5 Cal. 412. *Bates v. Ball*, 72 Ill. 108. *Mansfield v. Watson*, 2 Iowa 111. *Drefahl v. Security Sav. Bk.*, (Iowa) 107 N. W. 179. (*Inquiry from N. Y., Dec., 1909, Jl.*)

Payment by Georgia bank of check of minor and of insane depositor

2256. A bank asks information relative to the handling of a minor's account; also as to responsibility of bank for paying a lunatic's check without knowledge of his mental incapacity. *Opinion:* 1. The Statute of Georgia (Park's Annotated Code. Sec. 4233) provides that the contracts of an infant are void, except for necessities; but (Sec. 4235) if an infant, by permission

of his parent or guardian, or by permission of law, practices any profession or trade, or engages in any business as an adult, he shall be bound for all contracts connected with such profession, trade or business. 2. Concerning payment of a lunatic's check where the bank is ignorant of the lunacy. Insanity of a depositor revokes the authority of the bank to pay his check. But payment of the genuine check of an insane person without notice of the insanity would generally be held a valid payment. *Riley v. Bank*, 36 Hun. 519. But the Supreme Court of Georgia has held in *Am. Trust & B. Co. v. Boone*, 102 Ga. 202, that a check drawn by a depositor while insane, is absolutely void and payment by the bank in ignorance of the insanity is no protection. This rule seems to be peculiar to Georgia and is contrary to the general rule which protects a bank which pays a check of an insane depositor in good faith without notice that he has become, or has been adjudicated, insane. (*Inquiry from Ga., March, 1918.*)

Payment of deposit to foreign committee of lunatic

2257. Can a New Mexico bank with safety turn over money on deposit to the conservator of the estate of its insane depositor appointed by a court of probate of Connecticut? *Opinion:* It would appear from the provisions of the New Mexico statute that the foreign conservator is not entitled to the fund on deposit in New Mexico, and it would not be safe to turn it over to him. The statute indicates that the proper procedure is to present duly authenticated proof of such foreign appointment to the proper district court in New Mexico, and have such conservator, or some other proper person, appointed a committee of the estate in New Mexico. (*Inquiry from N. M., April, 1921, Jl.*)

Minors as stockholders

Liability of minor as national bank stockholder

2258. A minor was presented with a share of stock in a national bank, the transfer being registered on the books. Fifteen months later the bank failed and the receiver is trying to enforce the full 100 per cent. assessment against the parent of the child. *Opinion:* The minor cannot be held liable for the assessment, as he has no capacity to assent to become a stockholder, but the person making the transfer is not relieved from liability. The parent of the minor

cannot be held liable for the assessment unless he himself owned the stock and transferred it to his child. *Foster v. Chase*, 75 Fed. 797. *Aldrich v. Bingham*, 131 Fed. 363. *Fowler v. Gowing*, 152 Fed. 801. 29 Cyc. 1654. (*Inquiry from Fla., April, 1919, Jl.*)

Infant as joint owner of national bank stock

2259. A bank states that one of its shareholders has fourteen shares of the bank stock and has requested that the same be transferred to John Doe or John Doe, Jr., or the survivor. Inasmuch as John Doe, Jr., is a minor, the bank doubts that it would be legal to register the stock. *Opinion:* Infants are not necessarily precluded from becoming stockholders, and, in the absence of statutes which expressly or impliedly exclude them, they may become such, but with the right to repudiate the relation either during infancy or within a reasonable time after becoming of age. But it has been held in the case of national banks that one who buys stock in the name of an infant, or transfers stock to an infant, will be liable for an assessment since the infant is not capable of binding himself as a stockholder. *Foster v. Chase*, 75 Fed. 797. *Aldrich v. Bingham*, 131 Fed. 163. Further, that ratification by the infant of such purchase after he becomes of age will not affect such liability. *Foster v. Wilson*, 75 Fed. 797. In the case stated by the bank it appears that it would be proper to transfer the stock to John Doe or John Doe, Jr., or survivor, for, in such case John Doe would remain liable as a stockholder. (*Inquiry from N. J., March, 1920.*)

Contracts of persons under disability

Note of aged maker under guardianship in exchange for prior valid notes

2260. An old man was put under guardianship on May 26, 1910. Not knowing this, a bank on October 31, 1910, consolidated three notes, which he owed it, into one and surrendered the old ones. Two of the notes were dated prior to the guardianship. *Opinion:* The Minnesota statute makes contracts of a person put under guardianship void—but notes given before the guardian was appointed are collectible, if acquired in good faith and without notice of the incompetency. The bank would have a right in a proper proceeding to recover the amount of the two notes, which were surrendered under mistake of fact. *Schaps v. Lehmer*, 54 Minn. 208. *Morris v. Great*

Northern R. Co., 67 Minn. 74. Griswold v. Butler, 3 Conn. 227. American Tr. Co. v. Boone, 102 Ga. 202. Willmerth v. Leon-

ard, 156 Mass. 277. Carter v. Beckwith, 128 N. Y. 312. Knox v. Haug, 48 Minn. 58. (*Inquiry from Minn., Aug., 1912, Jl.*)

MORTGAGES AND LIENS

Chattel mortgages

Joinder of wife in chattel mortgage for purchase price unnecessary

2261. A chattel mortgage was given to secure the purchase price of personal property bought by a man at a farm sale. The bank to which the mortgage was executed asks whether it is necessary to have his wife join in the mortgage. The question is raised in view of the Iowa Code (Sec. 2906, Code 1897) which provides as follows: "That no incumbrance of personal property which may be held exempt from execution by the head of a family, if a resident of the state, shall be of any validity as to such exempt property, unless the husband and wife, if both are living, concur in and sign the same joint instrument." *Opinion:* Iowa statute which invalidates chattel mortgage of exempt property unless both husband and wife join in mortgage does not require joinder of wife where mortgage executed to secure *purchase price* of property. Iowa Code, 1897, Sec. 2906. Grover v. Younie, 110 Iowa 446. Nicholson v. Aney, 127 Iowa 278. Pease v. L. Fish, etc., Co., 70 Ill. App. 138, 176 Ill. 138. Mantony v. Emerich Outfit Co., 172 Ill. 92. (*Inquiry from Iowa, May, 1919, Jl.*)

Date of chattel mortgage

2262. A note was dated and delivered in January and a chattel mortgage to secure its payment was given by the maker of the note the following February. *Opinion:* The chattel mortgage was valid. The mortgage should bear the date of its actual execution, reference being made in the body thereof to the note. Heitman v. Griffith, 43 Kan. 553. Hees v. Carr, 115 Mich. 654. Burditt v. Hunt, 25 Me. 419. Jacobs v. Dennison, 141 Mass. 117. Partridge v. Swazey, 46 Me. 414. Johnson v. Stellwagon, 67 Mich. 10. Stonebraker v. Kerr, 40 Ind. 186. Shaughnessey v. Lewis, 130 Mass. 355. Sheldon v. Brown, 72 Minn. 496. Merrill v. Dawson, Hempst. (U. S.) 563. (*Inquiry from Kan., Sept., 1913, Jl.*)

Affidavit of consideration under New Jersey statute

2263. A bank, through its executive

committee, sanctioned a loan of \$1,500, crediting this amount to a mortgagor and taking as evidence three four-months' notes of \$500 each, secured by a chattel mortgage. The mortgagor orally agreed with the bank's cashier that, in case the committee a week hence should object to the amount of the loan, the mortgagor would then consent to charging back \$500 before maturity. The bank, under the New Jersey chattel mortgage act, filed an affidavit of consideration, which did not include the oral agreement. The statute provides that a mortgage is absolutely void as against creditors of the mortgagor unless it has annexed thereto an affidavit stating the consideration of the mortgage. The mortgagor became bankrupt and the bank relies on the validity of the mortgage to recover the loan. *Opinion:* It would seem that the affidavit stating that the consideration of the chattel mortgage was for \$1,500, was the substantial truth and should not be held defective, and the mortgage should not be held void because it did not include a statement of the oral agreement. Ehler v. Turner, 35 N. J. Eq. 68. Black v. Pidgeon, 70 N. J. L. 802. Howell v. Stone, (N. J.) 71 Atl. 914. Breit v. Solferino, (N. J.) 72 Atl. 79. Simpson v. Anderson, (N. J.) 73 Atl. 493. (*Inquiry from N. J., Jan., 1913, Jl.*)

Sufficiency of consideration for chattel mortgage

2264. A bank holds note of B. I. S. for \$500 for a loan; also holds note of C. O. S. for a loan which B. I. S. signs with the maker. The bank proposes to renew both notes and to take as additional security a chattel mortgage from B. I. S. to secure both notes. B. I. S., instead of signing new note with C. O. S., is to give his written guaranty. The bank asks—(1) can there be any defense on the ground the mortgage is without consideration; (2) could the bank sue C. O. S. on the old note without making B. I. S. a defendant; (3) if not, could the bank sue C. O. S. on the new note without making B. I. S. a defendant where he did not sign the note but has given a written guaranty respecting same? *Opinion:* If the bank renews the notes in the

way stated, (1) there could not be any defense on the ground that the chattel mortgage was without consideration; (2) it is doubtful if the bank could sue C. O. S. on the old note either with or without making B. I. S. a defendant because, according to the weight of authority, where a note is given in renewal of another note and the original is retained, the right of action on the original is suspended, but (3) the bank could sue C. O. S. on the new note without making B. I. S. a defendant. (*Inquiry from Kan., June, 1914.*)

Validity of chattel mortgage securing pre-existing indebtedness

2265. A bank asks whether it is legal to include in a chattel mortgage an old note that has been in force for some time, as well as the new note. *Opinion:* A mortgage may be given for a pre-existing debt which is valid between the parties and their privies; but a pre-existing debt, according to the weight of authority, is not such a consideration as to put the mortgagee in the position of a bona fide purchaser for value so as to entitle him to prevail over a defrauded seller seeking to rescind the sale for fraud. *Browning v. De Ford*, 178 U. S. 196. But if, besides procuring a pre-existing debt, the mortgage is based on some new and additional consideration, such as an extension of time of payment, the mortgage will be protected. *Com. Nat. Bk. v. Pierre*, 82 Fed. 799. (*Inquiry from N. D., March, 1919.*)

Form of mortgage in Wyoming to secure additional advances

2266. A form of chattel mortgage is prepared and submitted with the intention of complying with Chapter 71 of the Session Laws of Wyoming for 1913. The question presented is whether the clause in said form relative to additional advances meets the requirements of said statute. *Opinion:* The statute makes it lawful to execute a mortgage of chattels to secure further advances and points out how this may be done, namely, that the mortgage shall state a specific sum as the ultimate amount to be secured, a date prior to which such advances shall be completed, and the date on which the last installment or portion of indebtedness shall mature. The form of mortgage submitted provides "the ultimate amount so secured not to exceed ——— dollars." This is stating a specific sum as the ultimate amount to be secured. The statute further

requires a statement of a date prior to which such advances shall be completed and the date on which the last installment shall mature. This requirement seems to be complied with by the language employed in the mortgage. (*Inquiry from Wyo., July, 1914.*)

Statement of amount secured

2267. In the absence of a statute requiring the specific amount secured to be stated in the chattel mortgage, the weight of authority is to the effect that a provision in the mortgage that it is given to secure a specified amount and "any other indebtedness" to the mortgagee on future advances is valid and enforceable. Where the statute (as in Kansas) requires the filing of an affidavit upon renewal specifically stating the amount yet due and unpaid under the chattel mortgage, it is questionable whether additional advances thereafter made would be protected as against a subsequent incumbrance under the terms of the chattel mortgage which secures "any other indebtedness," and it would be unsafe to make an additional loan during the pendency of the renewal. *Field v. Silo*, 44 N. J. L. 355. *Milburn Mfg. Co. v. Johnson*, 9 Mont. 537. *Pub. L. N. J.*, 1878, p. 139. *Ehler v. Turner*, 35 N. J. Eq. 68. *Ohio Rev. St.* 1890. Sec. 4154. *Hanes v. Tiffany*, 25 Ohio St. 549. *Blandy v. Benedict*, 42 Ohio St. 295. 20 *Am. & Eng. Encyc. L.* (2nd Ed.), p. 927, and cases cited. *Greeson v. German Nat. Bk.*, 78 Ark. 141. *Fort v. Black*, 50 Ark. 259. *Rice v. Davis*, 96 Mo. App. 636. *Thompson v. Bairbanks*, 196 U. S. 516 (aff'ing 75 Vt. 361). *Frank H. Buck Co. v. Buck*, (Cal. 1912) 122 Pac. 466. *Tapia v. Demartini*, 77 Cal. 383. *Ackerman v. Hansicker*, 85 N. Y. 43. *Chandler v. Cromwell*, (Miss. 1912) 57 So. 554. *Gen. St. Kan.* 1909, Ch. 82, Sec. 5226. (*Inquiry from Kan., March, 1914, Jl.*)

After acquired property

2268. A chattel mortgage covers the following property: "All of our personal property of all kinds and descriptions whatsoever whether described specifically herein or not and all that may be added thereto or come into our possession until this note is fully paid," specifying thereafter some individual articles. As between mortgagor and mortgagee does this mortgage cover all personal property owned by the mortgagor at the time of the foreclosure? *Opinion:* The rule is well recognized that if a chattel

mortgage is designed to cover after-acquired property, whether in esse or not, it is necessary that such an intent be clearly expressed, and that the property be described so that it may be identified. *Ashley v. Keenan*, 157 Iowa 1; *Iowa State Nat. Bank v. Taylor*, 98 Iowa 631. *Lormer v. Allyn*, 64 Iowa 726. *McArthur v. Garman*, 71 Iowa 34; *Jones Chat. Mort. Sec.* 160. This rule does not obtain where the effect would be to defeat the manifest intention of the parties as gathered from the language and the surrounding circumstances. *Iowa State Nat. Bank v. Taylor*, 98 Iowa 631.

Following the spirit of these decisions it would seem that as between the mortgagor and the mortgagee the quoted instrument would cover all personal property of the mortgagor. Of course, in order to make such mortgage effective as against subsequent lien creditors of the mortgagor, it would have to be recorded as provided by statute, unless there be a visible and notorious change of possession. *Anno. Code, Iowa 1897, Sec. 2906. Horsley v. Hairsine*, 77 Iowa 141. *Hickok v. Buell*, 51 Iowa 655. (*Inquiry from Iowa, Jan., 1919.*)

Future crops

2269. A bank, as a condition for renewing a note, accepted security from the maker, consisting of a chattel mortgage covering future crops to be grown on lands which he owned and leased. In advance of the season for planting, the maker sold the lands without provision for the chattel mortgage. The bank inquires whether an action for conversion will lie against the purchaser after crops thereon have been harvested. *Opinion:* A chattel mortgage on crops to be thereafter grown does not give the mortgagee a lien on the lands, but attaches only to the interest which the mortgagor has in the crop when it comes into being. *McMaster v. Emerson*, 109 Iowa 284, 80 N. W. 389. It is held in that case that, before a chattel mortgage on crops to be grown in the future attaches, such crops must come into existence and be acquired by the mortgagor. Where the mortgagor, in a chattel mortgage on crops to be grown in the future, leased the land, receiving full payment, the crops raised by such lessee cannot be subjected to the payment of the mortgage as said mortgage, not being a lien on the land, did not prevent the leasing of it by the mortgagor who thereafter retained no interest in the crops grown by the lessee. It appears, therefore, in the case submitted by the

bank, that "A," the chattel mortgagor, would have no interest in the crop subsequently grown by his vendee on the lands to which the lien of the mortgage could attach. Had he, in his contract of sale, reserved to himself an interest in the future crops to be grown upon the land, the lien of the chattel mortgage would attach as soon as such crops came into being; but no such reservation being made, the bank, as holder of the chattel mortgage, would have no recourse against the vendee of the land. (*Inquiry from Okla., June, 1920.*)

Widow's statutory rights in mortgaged personal property in Missouri

2270. After a chattel mortgage on farm animals and implements fell due the mortgagor foreclosed it and sold the property for less than the amount due. May the widow thereafter claim the statutory allowance of \$400 from the mortgagor? *Opinion:* The Missouri statute allows the widow certain enumerated household furniture and articles, and necessary provisions, not to exceed the value of \$500, and "in addition . . . the widow may take such personal property as she may choose, not to exceed the appraised value of four hundred dollars," under which the claim is made in this case. The statute further provides that "the widow shall apply for such property [that last mentioned] . . . before the same shall be distributed or sold." This last quoted provision bars any recovery in this case, for there was no application by the widow before the sale of the property. See also *Drawry v. Baur*, 68 Mo., 155. (*Inquiry from Mo., May, 1921, Jl.*)

Requirement of filing in Idaho

2271. A bank expresses doubt as to whether the original or copy of a chattel mortgage should be filed with the County Recorder of the county. *Opinion:* Either the original or a copy of the mortgage may be filed, accompanied by affidavit of the mortgagor as prescribed by statute. See *Compiled Stat. 1919, Chap. 238, Sec. 6375.* (*Inquiry from Idaho, June, 1920.*)

Priority of record determines priority of lien

2272. On January 1st, 1914, A gave a chattel mortgage to B, and on February 4th, another to C on the same horse. At the time C received his mortgage B's mortgage had not been recorded, nor was C aware that B held a mortgage on the horse. However, B had his mortgage

recorded on February 26th, and C recorded his on April 10th. The question is asked whether the fact that B did not have his mortgage recorded before C's gave the latter a prior claim. *Opinion:* It seems, in the case stated, B has a better claim to the horse than C because his mortgage was first in point of time and first recorded, although before he recorded it A gave another mortgage on the same horse to C. The present Code of Alabama (1907, Sec. 3386) in regard to recording chattel mortgages has no provision as to the time in which chattel mortgages should be recorded, except in instances not applicable to the present case. The general rule, however, seems to be that, as between recorded mortgages, priority of record generally determines priority of lien, and priority as between unrecorded mortgages is generally determined by priority of execution. (*Inquiry from Ala., Oct., 1914.*)

Chattel mortgage by A to C of property A has agreed to sell B

2273. A, the owner of personal property, delivers possession thereof to B under an agreement that if B secures a loan upon his real estate, the price agreed upon is to be paid by B as soon as the money on loan is secured. Before the loan is made A mortgages the personal property to bank C which has notice of the agreement between A and B, this agreement not being in writing and consequently not filed or recorded. The mortgage to C was recorded. Who is entitled to the personal property in question? *Opinion:* The general rule is that a valid mortgage may be made covering chattels which the mortgagor is under an executory contract to sell to another when title has not yet passed. *Buckingham v. Dake*, 112 Fed. 258. *Everitt v. Hall*, 67 Me. 497. *Snohomish Iron Works v. Guhr Lumber Co.*, 57 Wash. 381. In the case submitted, the agreement between A and B would seem at best to be simply an executory contract of sale, and would, therefore, be subject to the recorded mortgage of the C bank. (*Inquiry from Mo., July, 1919.*)

Right of recorded mortgagee as against subsequent agister's lien

2274. Assuming that a chattel mortgage of cattle is properly recorded, is it subject to a subsequent agister's lien? To an earlier agister's lien? *Opinion:* A chattel mortgage is superior to a later agister's lien, but subject to an earlier lien of the

latter kind. (*Inquiry from Tex., Jan., 1921.*)

Double registry or filing of mortgage embracing both real and personal property

2275. Is it necessary to file a trust deed as a chattel mortgage in addition to filing it as a real estate mortgage, where personal property as well as real estate is covered? *Opinion:* It has been held in a number of states that double recording or filing is necessary as to a mortgage embracing both real and personal property—in order to comply with the recording laws and protect both classes of property. *Stewart v. Beale*, 7 Hun (N. Y.) 405, 68 N. Y. 629. *Bayne v. Brewer Pottery Co.*, 90 Fed. 754. *Ramsdell v. Citizens' Elec. L. & P. Co.*, 103 Mich. 89, 61 N. W. 275. *Manhattan Trust Co. v. Seattle C. & I. Co.*, 16 Wash. 499, 48 Pac. 333, 737. There has been no decision in Wisconsin. The only statutory provision relative to the question is section 2314 of the laws of 1915, which provides that every mortgage of personal property, or a copy thereof, shall (or may) be filed in the office of the clerk of the town, city or village where the mortgagor resides; and where such mortgage consists of a stock of goods, wares and merchandise, or of the fixtures pertaining to the same, the mortgage, or a copy of it, shall, in addition, be filed in the office of the registry of deeds of the county in which the town, city or village may be situated. See also *Pierce v. Milwaukee & St. P. R. Co.*, 24 Wis. 551; *Smith v. Waggoner*, 50 Wis. 155, in which latter case it was held that a prior lien by mortgage or otherwise upon a mill containing machinery, which had become fixtures, would not be affected as to such fixtures by a subsequent mortgage of them as chattels, executed by the owner of the estate. (*Inquiry from Wis., Aug., 1917.*)

Chattel mortgage law of Ohio

2276. A bank refers to the fact that farmers of Ohio for a few years past have been feeding cattle for the market, and the bank is desirous of loaning them money and to secure same by taking a lien on the cattle; and further states that in such cases the only means of securing such loans is by chattel mortgage which is expensive as to recording, etc. The bank refers to an Ohio statute which, it states, simplifies such transactions and requests the particulars thereof and advantages thereunder, with the view of having a similar statute passed

in Maryland. *Opinion*: The Ohio statute in regard to instruments intended to create a lien on personal property, where there is no change of possession, is as follows: "A mortgage, or conveyance intended to operate as a mortgage of goods and chattels, which is not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against creditors of the mortgagor, subsequent purchasers, and mortgagees in good faith, and unless the mortgage, or a true copy thereof, be forthwith deposited as directed in the next succeeding section." (Page & Adams Anno. Ohio Gen. Code, Chap. 1, Sec. 5680.) A transfer of the title of personal property as a security for a debt is, under this statute, in legal effect a chattel mortgage. (Tufts v. Haynie, 4 Ohio Cir. Ct. 494.) (*Inquiry from Md., Jan., 1916.*)

Rights of purchaser and mortgagee of stolen cattle

2277. A bank's customer, H. F. T., bought three car loads of cattle of B. Bros. & Co., commission merchants, at K. C. Stock Yards, and the bank took a chattel mortgage for a sum necessary to purchase same. A few days after the purchase a man replevined them, claiming they had been stolen from his pasture. A bond was furnished by T., the purchaser, and it seems probable that the claimant will prove ownership of the cattle at the trial, as he has several witnesses to identify the cattle. The bank requests opinion as to whether B. Bros. are responsible to T. for such loss as he may suffer because of the fact they were stolen cattle. B. Bros. claim to have acted merely as purchasing agents. *Opinion*: If the claimant proves ownership of the cattle, then two questions arise, (1) liability of B. Bros. to the bank's customer, (2) liability of the customer to the bank. If B. Bros. are to be regarded as principals, then the well established rule must apply that on a sale of goods there is an implied warranty of title (Williamson v. Sammons, 34 Ala. 691. Gould v. Bourgeois, 51 N. J. L. 361. Edick v. Crim, 10 Barb. [N. Y.] 445. Whitaker v. Eastwick, 75 Pa. St. 229), especially if the sale is for a fair price and the goods are in the possession of the seller at the time of the sale (Paulsen v. Hall, 39 Kan. 365), [holding that where an implication of warranty arises, and the title of the seller is defective so that nothing

passes, the purchaser can recover his money, although there is no fraud or express warranty on the part of the vendor]. Benington v. Corwin, 24 N. J. L. 257. McKinney v. Fort, 10 Tex. 220. Lane v. Romer, 2 Pinn. [Wis.] 404). If, on the other hand, they are factors or commission merchants, it has been held that a factor who sells stolen goods is liable to the owner for their value, though he merely sells them for another, without knowledge of the theft, and pays over the proceeds to his employer. Miller Bros. v. Laws, 6 Ohio Dec. Rep. 607. See also Johnson v. Martin, 92 N. W. (Minn.) 221, holding that in an action for conversion brought against a factor by the owner of personal property which had come into the possession of the factor by a criminal act of a third person, where the factor has sold the property and paid over the net proceeds to the criminal, it is no defense that he acted throughout in entire good faith, without negligence in the belief that the criminal was the owner of the property. If, therefore, B. Bros. are factors they would be liable in this transaction to the original owners of the cattle, and the bank's customer, as innocent purchaser, would, it seems, be subrogated to the rights of the original owners and be entitled to recover from B. Bros. the amount of the purchase price of the stolen property. As to the rights of the bank in the matter, if its customer took no title to the cattle, the mortgage given to the bank would be null and void. There is an implied warranty of title in the sale of personal property, and the same rule applies to a mortgage of such property. Schell v. Stephens, 50 Mo. 375. Watkins v. Crenshaw, 59 Mo. App. 183. Hickman v. Dill, 39 Mo. App. 246. Moore v. Byrum, 10 S. C. 453. Sherman v. Transp'n Co., 31 Vt. 162; Jones on Chat. Mtges. (5th Ed.) Sec. 101. The remedy of the bank, therefore, would be to hold its customer, the mortgagor of the cattle, on his implied warranty of title. The bank would have no remedy against B. Bros. (*Inquiry from Kan., Dec., 1915.*)

Purchaser of goods covered by recorded mortgage

2278. A gave a chattel mortgage to the inquiring bank, and after doing so sold the chattels covered thereby to his father, who knew of the then existing instrument. What are the rights of the father or of his creditors? *Opinion*: If the chattel mortgage which the bank took as security has

been recorded, the record furnishes constructive notice of its contents to creditors of the mortgagor and to subsequent purchasers of the property. *Berson v. Numan*, 63 Cal. 550. The fact, therefore, that the mortgagor has sold the chattels to his father, who knew of the existence of the mortgage, would not affect the security in the bank's hands and the mortgage would hold as against creditors of the father. (*Inquiry from Cal., Dec., 1915.*)

Rights of mortgagee superior to garnishing creditor of mortgagor—Liability of clerk of sale

2279. An owner of property holds a public sale of personal property on which there is a chattel mortgage of \$3,500. The property brings \$4,000. Before the sale the chattel mortgagee delivers his note and mortgage to the clerk of the sale for collection. After the sale, and while the clerk still has the proceeds, a third person serves the clerk with garnishee summons based on an open account and brings suit against the chattel mortgagor for \$600. The clerk, at the instance of the mortgagor, pays the \$600 out of the proceeds of the sale. Is the clerk liable to the mortgagee for the difference between \$3,500, the amount of the mortgage, and \$3,400, the balance of the proceeds? *Opinion:* The clerk is personally liable for \$100. It was his first duty to apply the proceeds of the sale on the note and mortgage. The claim of the garnishee creditor was clearly subsequent to that of the mortgagee B. The clerk was the mortgagor's agent, and is liable as such. *Greer v. Newland*, 70 Kan. 310, has a partial analogy to the case submitted.

The mortgagor may also recover from the garnishee creditor for the amount of B's money which he has converted. (*Inquiry from Kan., April, 1917.*)

Colorado statute allowing thirty days after maturity to take possession

2280. A note was payable on demand, and the chattel mortgage given to secure the same provided that if the mortgagor shall pay the note of even date "due on demand after date, or if no demand is made, then note is due two years from date," the mortgage shall be void. *Opinion:* A reasonable construction is that the debt matures in two years unless sooner demanded and the holder is protected for thirty days thereafter under the Colorado statute allowing thirty days after maturity of the debt to take

possession of the chattels. *Mills Anno. St. Colo.*, 1912, Sec. 627. *Brooks v. Mitchell*, 9 Mus. & W. 15. *Brophy Grocery Co. v. Wilson*, (Mont.) 124 Pac. 510. *Mobile Sav. Bk. v. McConnell*, 83 Ala. 595. *O'Neil v. Wagner*, 81 Cal. 631. *Lee v. Balcom*, 9 Colo. 216. *Walker v. Woolen*, 54 Ind. 164. (*Inquiry from Colo., July, 1915, Jl.*)

Release of chattel mortgage in Nebraska

2281. An order of release of a chattel mortgage in Nebraska must be attested and unless a chattel mortgage which has been paid is discharged in one of the two modes prescribed by the statute within ten days after request, the mortgagee would be liable to the statutory penalty. *Cobbey's Anno. St. Neb.*, Sec. 6034. *Boyes v. Summers*, 46 Neb. 308. (*Inquiry from Neb., July, 1912, Jl.*)

Real estate mortgages and deeds of trust—Parties and contents

Mortgage in name of cashier

2282. A mortgage runs to "John Doe, Cashier, First National Bank," and an assignment of such mortgage is executed by "John Scott, Cashier, First National Bank," successor of Doe. *Opinion:* The courts would be likely to hold that the mortgage so drawn and assignment so executed were instruments running to and executed by the bank and not the person named as cashier individually, but the authorities are not all uniform. Although a national bank has no power to take a real estate mortgage for a present loan, only the Government can complain and the mortgage as between the parties is not invalidated. *Nat. Bk. v. Whitney*, 103 U. S. 99. *Reynolds v. Crawfordville Nat. Bk.*, 112 U. S., 405. *Greenfield v. Stout*, 122 Ga. 303. *N. W. Fire, etc., Co. v. Lough*, (N. Dak.) 102 N. W. 160. *Mich. St. Bk. v. Trowbridge* 92 Mich. 217. *Shewalter v. Pinder*, 55 Mo. 218. *Caspy v. Dodwell*, 115 Cal. 677. *Steinkey v. Yetzer*, 108 Iowa 512. *Board v. Mfrs. Bk.*, 59 Minn. 421. (*Inquiry from Wis., Aug., 1912, Jl.*)

Note: By Sec. 24 of the Federal Reserve Act, national banks not situated in central reserve cities may make loans secured by farm land or real estate, improved and unencumbered, within their federal reserve district or within 100 miles' radius of the bank, limited to five years for farm land and one year for other real estate, up to 50% of the value of the property.

Signature of wife to purchase-money mortgage without signature to note

2283. Where a wife signs a purchase-money mortgage given by her husband but does not sign the notes to secure which the mortgage was given, is she bound to the extent of her interest in the land? *Opinion:* The failure to sign the notes does not relieve the wife from liability to the extent of her interest in the land. *Main v. Ray*, 57 S. W. (Ky.) 7. *Hadley v. Clark*, 8 Ida. 497. (*Inquiry from Okla., March, 1920.*)

Wrong description in mortgage

2284. A national bank as mortgagee of certain real estate recorded the mortgage and learned that the mortgage papers described a different parcel of land from that intended. *Opinion:* If the owner of the real estate which through error was not described disposes of his rights therein by sale or by mortgage to an innocent purchaser for value, the latter's rights are superior to those of the bank, regardless of the recorded mortgage, but the bank has an equitable title, good against the owner or attaching creditor. The course to pursue is to have the owner correct the mistake by giving a new correct mortgage and have that mortgage recorded; if the owner refuses, to file a bill in equity to compel reformation of the mortgage. *Bush v. Bush*, 33 Kan. 556. (*Inquiry from Okla., Jan., 1912, Jl.*)

Mortgage covering other indebtedness

2285. A form of mortgage is submitted containing the following clause: "It is further expressly agreed that this mortgage shall stand as security for any other indebtedness the mortgagee may hold or acquire against the said mortgagor." Information is sought as to whether this clause is valid and enforceable. *Opinion:* In the absence of agreement a mortgage cannot, of course, be held as security for any debt other than that for which it was given. But where the mortgage contains a clause that it is given as security for other indebtedness, the courts generally recognize the validity of the mortgage as securing such other indebtedness, unless there is some statute to the contrary. For example, under the Georgia statute requiring the mortgage to specify the debt secured, a mortgage reciting that it is given for a note and "such future advances" as may be made during a given year is valid only as security for the note. *Benton v. Shingler Co. v. Mills*, 79 N. E. 755. But, unless there

is some such statute in Iowa—and upon examination of the Revised Statutes there appears to be no such provision—it seems the mortgage would be valid to secure other indebtedness. (*Inquiry from Iowa, Oct., 1915.*)

Difference between deed of trust and mortgage

2286. What is the difference between a deed of trust and a mortgage? *Opinion:* Briefly stated, a trust deed in the nature of a mortgage is a conveyance of real estate in fee simple to one or more trustees who are to hold the same for the benefit of the lawful holder of the note, bond or other obligation secured, permitting the grantor to retain the possession and enjoy the rents and profits of the estate until default shall be made in the payment of the obligation secured, and with a power in the trustee or trustees, upon such default, to make a sale of the premises and satisfy the holder of the debt out of the net proceeds, retaining the surplus, if any, to the grantor. 27 Cyc. 966. The California case of *Levy v. Burkle*, 14 Pac. 564, appears to hold that a deed of trust of real estate executed for the purpose of securing a debt, conditioned to be void upon payment of the debt and containing a power of sale upon default, is essentially a mortgage and does not differ in its legal operation and effect from an ordinary mortgage with power of sale. See also *Grant v. Burr*, 54 Cal. 298, as to the distinction between an absolute deed of trust and a deed of trust in the nature of a mortgage. (*Inquiry from Cal., Oct., 1915.*)

Validity of mortgage*Clause requiring mortgagor to pay taxes upon mortgage debt in addition to maximum interest*

2287. A real estate mortgage given to secure a loan drawing ten per cent. interest, the highest legal rate in Nebraska, contains a clause providing that the mortgagor shall pay taxes levied upon the mortgage or debt, or against the holder. *Opinion:* The clause would probably render the transaction usurious, because it calls for payment of taxes in addition to the highest legal rate. Such a clause was formerly held to render the mortgage note non-negotiable but a Nebraska statute now provides that its negotiability is unaffected. *Allen v. Dunn*, 71 Neb. 831. *Rev. St. Neb., (1911) Sec. 6351.* *Green v. Grant*, 134 Mich. 462. *Mortimer v. Pritchard*. *Bailey Eq. (S. C.) 505.*

Meem v. Dulaney, 88 Va. 674. Union Mort. Co. v. Hagood 97 Fed. 360. Cobbey's Anno. St. Neb., (1903) Vol. 2, Sec. 10257. (*Inquiry from Neb., Nov., 1915, Jl.*)

Relinquishment of homestead after mortgage thereof

2288. A borrower procured a loan from a bank and gave as security therefor a preliminary mortgage on his homestead, and some time later he relinquished his right to the land for \$200 and left the country without paying his note. *Opinion:* Where there is neither constitutional nor statutory prohibition, as incident to the right of ownership, the owner of the homestead may sell or encumber it; and such sale or encumbrance will be as valid as if the property had not been set apart as a homestead. *Gee v. Moore*, 14 Cal. 473. *Wea Gas, etc., Co. v. Franklin Land Co.*, 54 Kan. 533, 38 Pac. 790. *Allensworth v. Kimbrough*, 19 Ky. 332. *Lewis v. Wetherell*, 36 Minn. 386, holding that one making a "homestead entry" under the laws of the U. S. may, after receiving his final certificate, and before he receives a patent, make a valid mortgage upon the land. The Montana Statute recognizes the right of the owner to mortgage his homestead by providing that the homestead is subject to execution, or forced sale in satisfaction of judgments obtained or debts secured by mortgage on the premises, executed by the husband and wife, or by an unmarried claimant. *Rev. Code Mont.*, 1907, Sec. 4698. In the submitted case, if the mortgage on the homestead held by the bank was duly acknowledged by the husband and wife, or the claimant alone, if single, and duly recorded prior to the abandonment of the homestead, then the grantee under such abandonment would undoubtedly take the homestead subject to the lien of the mortgage. In *Amer. Sav. & Loan Assn. v. Burghardt*, 19 Mont. 323, it was held that a subsequent declaration of abandonment by husband and wife gives no validity to a void mortgage of the homestead, but it has nowhere been held that a subsequent abandonment will render invalid a prior valid mortgage. (*Inquiry from Mont., June, 1919.*)

Questions of priority

Agreement subordinating senior to junior mortgage

2289. Will the lien of a senior mortgage be subordinated to that of a junior encumbrance where an agreement to that effect

is made between the parties to the first mortgage or between the two mortgagees? *Opinion:* The authorities are to the effect that the lien of a senior mortgage will be subordinated to that of a junior encumbrance, where an agreement is made between the parties to the first mortgage or between the two mortgagees. See, for example, *Sanders v. Barlow*, 21 Fed. 836. *Loucks v. Union Bank*, 2 La. Ann. 617. *Walters v. Ward*, 153 Ind. 578. But it was held in an early case in New York (*Bank for Savings v. Frank*, 56 How. Prac. 403, affirmed 45 N. Y. Super. Ct. 404) that, while such a subordination agreement is valid and binding between the parties, it is not binding upon an assignee of the first mortgage for value and without notice. It was held in that case that the agreement was not such a one as was entitled to be recorded under the recording statute in effect at that time and hence a record thereof was not constructive notice to anybody. The Connecticut recording acts entitle such an agreement to be recorded so that the record would constitute notice. See *Genl. Stats. of Conn.*, Section 4036. As between the first and second mortgages the agreement is valid and gives priority to the second mortgage. (*Inquiry from Conn., Aug., 1915.*)

Recorded writing subordinating first to second corporate mortgage

2290. A corporation issued bonds secured by a first mortgage on its plant, these bonds being registered and held in its treasury. Later, and before any of these bonds were sold, the corporation issued a second mortgage. Still later, and before any bonds secured by the first mortgage had been sold, it executed and recorded a writing declaring the second mortgage a prior lien to the first mortgage. Subsequently bonds were sold and pledged to a bank as collateral for a loan by an innocent purchaser. Can the bank, as an innocent purchaser, enforce payment of these bonds against the first mortgage security against which they were originally issued? Also, if the bank is afterwards notified of the facts and continues to renew the loan from time to time, will its original position be changed? *Opinion:* The sale of the bonds which were secured by the "first mortgage" carried to the vendee of such bonds the full benefit of the security, but if such first mortgage was not recorded (as would seem to be the case) and a subsequently executed mortgage

was recorded, then the purchaser of the bonds secured by the "first mortgage" could only enforce its lien subject to the lien of the "second mortgage." See Compiled St. of N. J. (1910), p. 3414, Sec. 22. (*Inquiry from N. J., May, 1914.*)

Mortgage to secure future advances—Priority over second mortgage where advances made after second mortgage recorded

2291. A bank took and had recorded a mortgage for \$2,000 upon real estate, as collateral to loans to be made to maker for amounts not to exceed \$2,000. In the mortgage was written: "This mortgage and note secured thereby are to be held by ——— bank as a collateral to such loans and advances as may be made to John Doe by ——— bank, the principal of sum not to exceed \$2,000." The maker has only borrowed a part of the money when the bank learns that a second mortgage has been recorded. Is it safe in advancing the balance? *Opinion:* From the decisions cited below, it would appear that where the bank takes a mortgage to secure loans to \$2,000, and only advances a part of that amount before notice that a second mortgage to another person has been recorded, the bank would nevertheless be safe in advancing the balance of the \$2,000 to the mortgagor and the first mortgage would be a prior lien for the full amount as against the subsequent encumbrances. *Hamilton v. Rhodes*, 72 Ark. 625, 83 S. W. 351. *Huntington v. Kneeland*, 92 N. Y. Suppl. 944. *Freiberg v. Negale*, 70 Tex. 116, 7 S. W. 684. *Citizens Sav. Bk. v. Koch*, 117 Mich. 225. *Wagner v. Breed*, 29 Neb. 720, 46 N. W. 286. *Truscott v. King*, 6 N. Y. 147. *Kramer v. Farmers, etc. Bk.*, 15 Ohio 203; and there are numerous other decisions to like effect in various states. (*Inquiry from Ohio, March, 1919.*)

Assignment of negotiable note secured by mortgage

2292. A bank purchased a note from the payee on the face of which appeared the words, "This note is secured by real estate mortgage"; the assignment of which was recorded in the county wherein the land lies. The note was returned to the payee for indorsement, but he failed to return same to the bank. Inquiry is made whether, in case this note has been transferred to another party, a claim could be successfully made that such transferee is an innocent purchaser for value. *Opinion:* Where a

promissory note secured by a mortgage on real estate is indorsed and transferred to a purchaser without a formal assignment of the mortgage, the security follows the note as an incident thereto. The purchaser becomes the equitable owner of the mortgage, acquiring an interest which enables him to deal with it for all purposes, unless it is expressly stipulated to the contrary by the parties to the transfer. *Mankato First Nat. Bank v. Pope*, 85 Minn. 433. Also, *Cooper v. Newell*, 263 Mo. 190, 172 S. W. 326. *Ferry v. Meckert*, 32 N. J. Eq. 38; *Matter of Falls*, 66 N. Y. App. Div. 616; and other cases. The fact that a note contains on its face a reference to collateral security for the payment thereof, as where a note contains a provision that it is secured by a lien on real state, or that it is secured by mortgage, does not destroy its negotiability. *De Hass v. Dilbert*, 70 Fed. 227. *Dumas v. Peoples Bk.*, 146 Ala. 226. *Farmer v. Malvern First Nat. Bk.*, 89 Ark. 132. *Zollman v. Jackson, etc., T. Co.*, 238 Ill. 290. *Branning v. Markham*, 12 Allen (Mass.) 454. But notwithstanding the indorsee of a negotiable note secured by mortgage ordinarily acquires the mortgage as an incident, in a case like the present, where the assignment of the mortgage to the bank is on record, it is doubtful if it would be held that the indorsee of the note took superior rights to the mortgage security. (*Inquiry from Minn., April, 1919.*)

Priority of mortgage lien over subsequent judgment

2293. A executes a mortgage on realty to B to secure the payment of a promissory note. C held judgment notes on which judgment was entered after the mortgage was recorded. Is the mortgage lien prior to the judgment? *Opinion:* The mortgage lien has priority. The general rule is that the lien of a mortgage, once attached to land, continues in force until the mortgagee has received payment or satisfaction of the debt secured thereby. *Morse v. Clayton*, 13 Sm. & M. (Miss.) 373. *Rice v. Dewey*, 54 Barb. (N. Y.) 455. *Priest v. Wheelock*, 58 Ill. 114, holding that, in the absence of any statutory provision to the contrary, the lien of a mortgage continues, notwithstanding the debt has been reduced to a judgment, which, by lapse of time, has ceased to be a lien, unless he previously releases it. *McMillan v. McMillan*, 184 Ill. 230. *Hazle v. Bondy*, 173 Ill. 302; or a merger takes place by his acquisition of the

legal title to the property mortgaged or until the debt has become barred by the statute of limitations. Where a mortgage is renewed or extended, at or before its maturity, or the evidence of the debt secured is changed, by the substitution of new notes or otherwise, the lien of the mortgage is not affected, in respect either to its continuity or its priority, unless it clearly appears to have been the intention to make an absolute payment and cancellation of the mortgage, and to create an entirely new security. *Bond v. Liverpool, etc., Ins. Co.*, 106 Ill. 654. (*Inquiry from Ill., Aug., 1913.*)

Priority between judgment and mortgage

2294. On January 2, 1918, A executed a note secured by mortgage covering real estate which was given as collateral security to bank B. On August 1, 1918, the note given by A to bank B was paid. Without assigning this mortgage, A by a separate and distinct transaction gave a mortgage to bank C to secure a loan, which mortgage was not put on record until August 1, 1918. A creditor obtained a judgment against A on June 1, 1918. An opinion is asked relative to the rights of the parties. *Opinion:* As above shown, the judgment against A was obtained on June 1, 1918, and, assuming it was docketed, the lien thereof immediately attached to all the realty of A in the county so that while it was subordinate to the mortgage held by bank B it had priority over the mortgage given to bank C on August 1, 1918. (*Inquiry from Mich., April, 1919.*)

Priority of judgment over mortgage discharged by payment and subsequently pledged

2295. Jones gave his note to a bank secured by deed of trust on his property. He paid the note and received back the deed of trust. Thereafter a creditor obtained a judgment against Jones which was docketed. Afterwards Jones obtained a further loan secured by the same deed of trust. *Opinion:* The payment of the note, or debt, satisfied the deed of trust. When the creditor obtained the judgment against Jones which was docketed and became a lien on Jones' land, the priority of this judgment lien was not affected by the fact that still later Jones obtained a loan from bank and hypothecated the same deed of trust which had become *functus officio* upon payment of the debt which it secured. It has been held in many cases that payment of a debt secured by mortgage, when made

by the mortgagor to the holder of the debt, for the purpose of extinguishing it, discharges the mortgage and lifts its lien from the property affected. *Kilpatrick v. Haley*, 66 Fed. 133. *Loewenthal v. McCormick*, 101 Ill. 143. *Stevenson v. Polk*, 71 Iowa, 278. (*Inquiry from Mo., June, 1919.*)

Second mortgage cannot claim priority because first mortgage extended

2296. A first mortgagee extended the time of payment of his mortgage. Inquiry is made whether a second mortgagee can claim priority over the first mortgage merely on the ground of such extension. *Opinion:* The rule is well recognized that where the first mortgagee grants to the mortgagor an extension of time for payment of the mortgage debt, but without any intended or actual discharge of the mortgage or accepting a new one in its place, and without any fraudulent intent as to the second mortgagee, the latter cannot claim to be preferred to the first mortgage merely on the ground of such extension. *Fry v. Shehee*, 55 Ga. 208. *Kraft v. Holzman*, 206 Ill. 548. *French v. Poole*, 111 Pac. 488. *Whittacre v. Fuller*, 5 Minn. 508. *Farmers Bk. v. Mut. Assur. Soc.*, 4 Leigh (Va.) 69. *Sheridan First Nat. Bk. v. Cit. St. Bk.*, 11 Wyo. 32. *Willis v. Sanger*, 15 Tex. Civ. App. 655. See also *Lord v. Morris*, 18 Cal. 482. (*Inquiry from Cal., Nov., 1916.*)

Extended first mortgage retains priority over second unless outlawed

2297. A savings bank holds a note secured by first mortgage on property falling due February 1, 1917, and a second mortgage has been given thereon which falls due on the same date. The bank desires to extend its note and first mortgage for a period of three years from its due date. The bank asks (1) whether, if it executes and records a written instrument reciting that the mortgage has been extended in accordance therewith, it will lose its position as first lien holder and the second mortgage become a first lien; (2) whether in case the bank's mortgage became outlawed it could have an extension agreement executed and still hold its first mortgage lien even though there were other liens secondary thereto which had not become outlawed. *Opinion:* 1. The rule is well recognized that, where a first mortgagee grants to the mortgagor an extension of time for payment of the mortgage debt, but without any intended or actual discharge

of the mortgage or taking a new one, and without any fraudulent intent as regards the second mortgagee, the latter cannot claim to be preferred to the first mortgage merely on the ground of such extension. *Fry v. Shehee*, 55 Ga. 208. *Kraft v. Holzmann*, 206 Ill. 548. *French v. Poole*, 111 Pac. 488. It has been further held that where, as in the instant case, a note is also given in connection with the mortgage, the mortgage so given would continue to be a first lien until the note became barred by the statute of limitations. *Wittacre v. Fuller*, 5 Minn. 508. *Farmers' Bk. v. Mut. Assur. Soc.*, 4 Leigh (Va.) 69. *Sheridan First Nat. Bk. v. Citizens St. Bk.* 11 Wyo. 32; in which latter case it was held that the taking of a new note in place of the one originally given does not generally operate as an extinguishment of the lien of the mortgage securing the debt, unless it is the actual and express intention of the parties; that the mere extension of the time of payment of the debt by a mortgagee in no way impairs the security even as against subsequent incumbrances, although the extension may have been made by a renewal of the mortgage. 2. In the early case of *Lord v. Morris*, 18 Cal. 482, it was held that where a note is secured by mortgage upon real property, and subsequently, after the remedy on the note is barred by the statute, the mortgagor executes a second mortgage to a third party, such third party can interpose a plea of the statute of limitations in a suit to foreclose the first mortgage, and thus acquire priority for his subsequent mortgage; and this, even though the mortgagor had, after the execution of the second mortgage and after the note was barred, indorsed the first note and renewed, revived and agreed to pay the same. See, also, *Wood v. Goodfellow*, 43 Cal. 185. *Branderstein v. Johnson*, 140 Cal. 29. *Redondo Imprv. Co. v. O'Shaughnessy*, 168 Cal. 325. (*Inquiry from Cal.*, Nov., 1916.)

Extension of time of payment

Methods of extending unpaid mortgage security

2298. Advice is asked as to which of the following methods of taking care of a matured real estate mortgage affords the greatest protection: 1. "To execute and record an extension of mortgage. (Will the filing of such an extension allow previously filed liens, mortgages, etc., which are of record subsequent to the first mortgage to

take precedence thereto?)" 2. "To allow the original first mortgage and note to remain past due. (How long can a matured mortgage retain its security and precedence?)" 3. "To have executed a new mortgage and note. (What is the proper method of negotiating the renewal to insure the mortgagee, absolutely, against the filing of some lien or other mortgage between the filing of release and new indenture?)" *Opinion*: 1. An agreement by a mortgagee to extend the time for payment of the debt secured by a mortgage, whether indorsed on the instrument or otherwise evidenced, will continue the lien of the mortgage and all his rights and remedies thereunder for the new period. *Lent v. Morrill*, 25 Cal. 492. *Bennesson v. Savage*, 130 Ill. 352. *Cook v. Gilchrist*, 82 Iowa 277. *Griffin v. Walter*, 74 Mich. 1. *Eby v. Ryan*, 22 Neb. 470. *Veerhof v. Miller*, 51 N. Y. Supp. 1048. *Hinton v. Ferebee*, 107 N. C. 154. *Union Cent. L. Ins. Co. v. Bonnell*, 35 Ohio St. 365. *Cleveland v. Martin*, 2 Head (Tenn.) 128. *Montague County v. Meadows*, 28 Tex. Civ. App. 256. *Warner v. Conn. Mut. Life Ins. Co.*, 109 U. S. 357. 2. Duration of Lien. The lien of a mortgage, once attached to land, continues in force until the mortgagee has received payment or satisfaction of the debt secured (*Schroeder v. Wolf*, 127 Ill. App. 506. *Morse v. Clayton*, 13 Sm. & M. Miss. 373. *Rice v. Dewey*, 54 Barb. [N. Y.] 455) unless he previously releases it, or a merger takes place by his acquisition of the legal title to the property mortgaged (*McMillan v. McMillan*, 184 Ill. 230. *Hazle v. Bondy*, 173 Ill. 302. *Mut. Mills Ins. Co. v. Gordon*, 20 Ill. App. 559), or until the debt has become barred by the statute of limitations. In Wisconsin this period would be twenty years. (Wis. St. 1917, Sec. 4220. See also *Wells v. Scanlan* 124 Wis. 229.) 3. Effect of taking new mortgage. The execution of a new mortgage on the same property to secure the same debt covered by the old mortgage will release and discharge it if intended by the parties to operate as a payment or satisfaction, or to cancel one security to substitute the other. (*Williamson v. Strong*, [Cal.] 68 Pac. 484. *Walters v. Walters*, 73 Ind. 425. *Friend v. Yahr*, 126 Wis. 291. *Brown v. Bass*, 4 Wall. [U. S.] 262.) Certainly it is not discharged if the purpose of the parties was merely to give and receive an additional or cumulative security (*Dillon v. Byrne*, 5 Cal. 455. *Whitney v. Trainer*, 74 Wis. 289) or to renew

the loan or extend the time for its payment, in which case the lien of the original mortgage is simply continued, without interruption, by and under the new mortgage. It was held, *Gerb v. Reynolds*, 35 Minn. 331, that, if the holder of a mortgage takes a new mortgage as a substitute for a former one, and releases the latter in ignorance of the existence of an intervening lien upon the mortgaged premises, equity will, in the absence of some disqualifying circumstance, restore the lien of the first mortgage. (*Inquiry from Wis., Dec., 1919.*)

2299. A bank requests an outline of the different methods of banks in renewing mortgage loans. *Opinion:* The same are as follows: (1) Crediting payments on the back of the mortgage note, (2) Taking new note and retaining original as collateral, (3) Taking new note and surrendering the old, but marking the new note "renewal," the mortgage expressly providing that it is security for renewals. All these methods, from a legal standpoint, are sufficient to preserve the security and the question resolves itself into one of practicability—By what method is the transaction more easily or readily handled? There is some danger, where an original mortgage note is surrendered and a new note taken, that it might be held a payment and extinguishment of the debt and a relinquishment of the mortgage security. This, the courts hold, is a matter of intention, and where the intention of the parties is that the debt and security were to be continued, the courts give effect to such intention. (*Inquiry from S. C., Jan., 1920.*)

Extension of mortgage debt at greater rate

2300. A bank holds a mortgage bearing interest at 6% that matured on May 1, 1920. The mortgagor wishes a renewal for five years at the rate of 6½%. The bank does not desire to accept a new mortgage and note, but is willing that the existing mortgage be extended by agreement for the requested period at said increased rate of interest. Inquiry is made as to the legality of the proposed transaction. *Opinion:* Where a mortgagee grants to the mortgagor an extension of the time of payment of the mortgage debt, but without any actual or intended discharge of the mortgage or taking a new one, and without any fraudulent intent as regards junior incumbrances, the latter cannot claim to be preferred to the first mortgage merely on the ground of such extension. *Fry v. Shehee*, 55 Ga. 208.

Kraft v. Holzmahn, 206 Ill. 548. *Whittacre v. Fuller*, 5 Minn. 508. *Farmers Bk. v. Mt. Assur. Soc.*, 4 Leigh (Va.) 69. *Sheridan First Nat. Bk. v. Cit. State Bk.*, 11 Wyo. 32, 70 Pac. 726. In the case submitted, an extension agreement, with a provision that the mortgage shall bear interest at the rate of 6½% for the extension period, would be perfectly legal, but such agreement should be recorded in order to protect the mortgage against junior incumbrances. Minnesota has a statute which provides that contracts shall bear the same rate of interest after maturity as before, and that any provision in any contract, note or instrument providing for an increase of the rate of interest after maturity, shall work a forfeiture of the entire interest. *Genl. Stat. Minn. 1913, Sec. 5805.* *Green v. Northw. T. Co.*, 128 Minn. 30. This statute goes upon the theory that such increased rate of interest after maturity is in the nature of a penalty, and against public policy, and is, therefore, declared unenforceable. It manifestly has no application to an agreement such as in the instant case, where a new agreement is entered into upon the maturity of the mortgage, based upon a valid consideration—namely, the five years' extension of the mortgage. (*Inquiry from Minn., May, 1920.*)

Partial payment by and extension to sole heir of mortgagor

2301. A person mortgaged his real estate to a bank and died before the mortgage became due. It is asked if the bank would be safe in accepting partial payment from the widow who is sole heir and extending the mortgage? *Opinion:* Under the rule that payment of a debt secured by a mortgage may be made by any person having a right or interest in the property which he is obliged to protect by paying the mortgage, thereby subrogating him to the rights of the mortgagee, a widow may pay off, or make partial payments on, a mortgage on realty of her deceased husband and thereby be subrogated to the rights of the mortgagee therein and a partial payment by her of the principal of the mortgage, particularly where she is the sole heir or devisee, will be a valid consideration and ample protection to the mortgagee in extending the mortgage. *Stinson v. Anderson*, 96 Ill. 373. (*Inquiry from Ill., April, 1917.*)

Insurance

Mortgage clause in insurance policies

2302. The building occupied by a bank

on which it holds a mortgage for \$10,000, is owned by a holding company. The bank holds policies of insurance thereon issued to the holding company aggregating \$20,000. Up to the present the bank has had mortgage clause attached on only enough of the insurance, \$10,000, to cover amount of its loan. The bank is advised by an attorney that the clause should be attached to all the policies covering the building in view of the existence of the mortgage thereon. An opinion is asked by the bank as to the effect of such situation. *Opinion:* Insurance taken by the holding company in its own interest would not inure to the benefit of the bank, although if procured by the mortgagor under an obligation to insure for the mortgagee's benefit, the proceeds recovered by the mortgagor would be held in trust for the mortgagee. In the case submitted by the bank the reason, perhaps, the attorney advised that the mortgage clause should be attached to all the policies covering the building is that where other insurance is taken out in which the bank is not the beneficiary to the extent to which its interest may appear, the bank's interest may be directly damaged by scaling down its insurance by reason of the pro rata clauses contained in the various policies. See *Wilson v. Guyer*, 53 Ill. App. 348, and *Ames v. Richardson*, 29 Minn. 330, on this point. (*Inquiry from Wis., Feb., 1920.*)

Statute of limitations

Fifteen year period in Minnesota

2303. Information is sought as to the law governing limitation of actions on real estate mortgages. *Opinion:* No action or proceeding can be maintained to foreclose a real estate mortgage unless commenced within fifteen years from the maturity of the whole debt secured thereby, and this limitation shall not be extended by reason of non-residence of any party interested in the land, nor by reason of any payment made after maturity, nor by reason of any extension of the time of payment of the mortgage or the debt or obligation thereby secured or any portion thereof, unless such extension be in writing and recorded in the same office in which the original mortgage is recorded within the said limitation period. See Genl. Stat. Minn. (1913) Secs. 7698, 7699. (*Inquiry from Minn., Feb., 1915.*)

Twenty year period in New York

2304. An opinion is asked relative to enforceability of a mortgage thirty-six years

old, upon which there has been no payment either of principal or interest. *Opinion:* The Code of Civil Procedure fixes a limitation of twenty years within which actions may be brought upon sealed instruments. It is said, in *Herbert v. Clark*, 128 N. Y. 295, that: "The mortgage, being under seal, can be foreclosed by action at any time within twenty years. It is only an action upon the notes that is barred after six years." The instant mortgage is outlawed, unless there has been some particular acknowledgment or extension to keep it alive. (*Inquiry from N. Y., Aug., 1920.*)

Payment and satisfaction

Notice of intention to pay principal at maturity of interest installment

2305. A first mortgage real estate note gave the maker the option to pay \$100 or any multiple thereof on the principal at the maturity of any coupon by giving the holder of the note thirty days' notice in writing of his intention. The maker gave notice that he would pay the whole note at maturity of a certain interest coupon. At such maturity the maker paid the interest but concluded not to pay the principal until it was due. *Opinion:* The mere giving of notice of intention does not mature the note, where the intention has not been carried out by payment of the principal. (*Inquiry from Mo., April, 1911, Jl.*)

Release by alternative payee of mortgage note

2306. A mortgage note payable to a bank was indorsed by the bank to John Doe or Anna Doe without recourse. John Doe died and the mortgagor is ready to pay the note at maturity, but hesitates to receive the release signed by Anna Doe. *Opinion:* Anna Doe could execute a good release to the mortgagor upon payment and surrender of the note. The note indorsed by the bank payable to alternative payees is negotiable under the Negotiable Instruments Law and the indorsement by either one of the payees passes title. Colo. Neg. Inst. Act, Secs. 5058, 5091. *Union Bk. v. Spies*, 151 Iowa 178. (*Inquiry from Colo., Jan., 1916, Jl.*)

Satisfaction of mortgage acquired by bank merger

2307. Where a bank purchases the assets and assumes the liabilities of two other banks, effecting a complete merger thereof, can such bank, as the successor of the two merged banks, satisfy or assign mortgages running to either of these institutions?

Opinion: A valid and effectual release of a mortgage can only be given by the person who is the rightful owner of the debt which secures it; hence, after an assignment of the debt and mortgage, authority to give a release resides in the assignee, not in the assignor. (Center v. Elgin City Bank Co., 185 Ill. 534, 57 N. E. 439. George v. Somerville, 153 N. W. 7, 54 S. W. 491. Frerking v. Thomas, 64 Neb. 193, 89 N. W. 1005. Tradesmen's Build., etc., Assoc. v. Thompson, 31 N. J. Eq. 536.) In the instant case all the assets of, including debts due to, the merged corporations, automatically became the property of the new institution immediately upon consolidation, unless specifically excepted therefrom, and the latter bank was thereafter the only party who could execute a valid satisfaction piece as the owner of the mortgages. (See Owensboro v. Tel., etc., Co., 230 U. S. 58. Otis v. Mines Co., 15 Ariz. 264. Trust Co. v. Zinser, 264 Ill. 31, 105 N. E. 718. In re Bergdorf, 206 N. Y. 309, 99 N. E. 714. Dalmas v. R. R. Co., 254 Pa. St. 9.) (*Inquiry from Minn., June, 1919.*)

Place of payment of mortgage note

2308. A mortgage note does not state where it is payable. B, the mortgagee, moves to another state and mortgage becomes due. A, the mortgagor, wishes to pay it off. Is it his duty to locate B, and remit to him, or should B have the mortgage presented to A, and if so, who should pay the expense attached to the presentation? *Opinion:* The rule both in England and the United States is that where a mortgage note becomes due and does not state where it is payable, the maker must seek out the holder, if within the state, and make tender to him. But if the holder has removed to another state, the debtor is not obliged to follow him, and readiness to pay within the state will save a forfeiture. Weyand v. Park Terrace Co., (N. Y.) 95 N. E. 723. Hale v. Patton, 60 N. Y. 233. Shepp. Touch. Sec. 136. (*Inquiry from Neb., July, 1919, Jl.*)

Surrender by mortgagee of uncanceled note and mortgage to stranger

2309. A bank holds a note secured by mortgage and receives the money thereon from one other than the maker without cancelling the note but delivers the payor the note and mortgage. It is asked what liability the bank incurs by so doing. *Opinion:* It does not seem that the bank

incurs any liability. The transaction is more in the nature of a sale of the note and mortgage and purchase thereof than payment, and the bank certainly has a right to sell and assign the note and mortgage. Assuming the transaction to be payment by a stranger and not a sale, such payment would discharge the debt and the payor would have no recourse upon the maker of the note; but it seems such a transaction would be construed as a purchase and not a payment of the debt. (*Inquiry from Mo., March, 1920.*)

Payment of coupons on called bonds

2310. The usual provision in trust mortgages for optional acceleration of bonds prescribes newspaper publication, but this is not adapted to the giving of actual notice to all the bond holders. Kirkbride, Sterrett and Willis' "Modern Trust Company" (Fifth Edition), p. 271, offers the following suggestion: "It is well to refuse payment of the coupon due on the date when interest ceased unless the called bond is presented at the same time." A bank criticizes this procedure. *Opinion:* The method suggested seems rather drastic and unwarranted. At the same time, may it not be better and more to the interest of the bond holder to dishonor, without technical right, the particular coupon than to await presentment of the next coupon which will certainly be dishonored and the holder of the coupon lose six months interest in the interim? May dishonor of the coupon not also be justified upon the theory that as the bond, by reason of the published notice, is due as well as the coupon, the corporation is entitled to make payment of the whole debt and not merely that part of the debt represented by the coupon? The book quoted gives as an alternative "or if the coupons are paid, pains should be taken to notify the payee of the call." If this is practicable, it would be the better method. (*Inquiry from Wis., Jan., 1921.*)

Foreclosure of mortgage

Remedy in Iowa

2311. In the case of the foreclosure of a mortgage on realty in Iowa, a personal judgment is rendered against the mortgagor (save in some excepted cases), and a special execution issues against the mortgaged property; and where the debt is not satisfied a general execution for the deficiency issues against any other realty than held by the mortgagor. In the case of the foreclosure

of a chattel mortgage in Iowa, where the proceeds of a sale of the mortgaged chattels are insufficient to pay the mortgage, the mortgagor is personally liable for the deficiency. *Grand Island Sav., etc., Assoc. v. Moore*, 40 Neb. 686. *Williams Bros. v. Hanmer*, 132 Mich. 635. *Elmore v. Higgins*, 20 Iowa 250. *Kennion v. Kelsey*, 10 Iowa 443. *Weil v. Church*, 52 Iowa 253. *Chittenden & Co. v. Gossage*, 18 Iowa 157. *Demond v. Crary*, 9 Fed. 750. *Pike v. Gleason*, 60 Iowa 150. Iowa Code, 1897, Ch. 7, Secs. 4289, 4290. Iowa Code, 1897, Ch. 9, Secs. 3801, 3802. *Aetna L. Ins. Co. v. Hesser*, 77 Iowa 381. *Handy v. Tracy*, 150 Mass. 524. *Comer v. Lehman*, 87 Ala. 362. *Com. Bk. v. Davidson*, 18 Ore. 57. *Lynch v. Naylor*, 63 Ill. App. 107. *Mannen v. Bailey*, 51 Kan. 442. *Dinning v. Gavin*, 4 N. Y. App. Div. 298. Iowa Code, 1897, Ch. 7, Sec. 4286. (*Inquiry from Iowa, June, 1915, Jl.*)

Foreclosure of second mortgage

2312. A bank asks: (1) Whether a second mortgage on real estate in Wyoming may be foreclosed without reference to a prior mortgage, and (2) If there is anything in the Federal Farm Loan Act that would prevent the foreclosure of a second mortgage prior to the maturity of a first mortgage. *Opinion:* (1) It is held by the courts in numerous cases that, where the sale is made on foreclosure of a junior mortgage or trust deed, the purchaser does not acquire an absolute title but only the mortgagor's equity of redemption; that is, he takes subject to the older lien. *Grahan v. King*, 15 Ala. 563. *Scheppelmann v. Fuerth*, 87 Mo. 351. The Federal Farm Loan Act provides that no Federal Land Bank shall make loans except upon the security of first mortgages. There seems to be nothing in the Act which would prevent a second mortgagee from foreclosing his mortgage prior to the maturity of the first mortgage held by the farm land bank. But, of course, the purchaser would take the property subject to the first mortgage. (*Inquiry from Wyo., May, 1918.*)

Foreclosure of mortgage securing corporate bonds—Liability of guarantors

2313. A bank interested in some bonds presents this situation: A trust company, as trustee for bondholders, commenced an action to foreclose a mortgage because of default in payment of principal and interest due on the bonds. There were three

guarantors of payment thereof, all of whom were made defendants in the foreclosure action. The bank asks whether the resources of the maker of the bonds or notes must be exhausted before recourse can be had to the guarantors. *Opinion:* It has been held that where a third person guarantees the payment of a bond or note secured by mortgage, he is not liable until after resort is made to the mortgage security. *Johnson v. Cook*, 24 Wash. 474. But see, contra, *Hartman v. Lancaster, etc., Bank*, 103 Pa. St. 581. *Mizner v. Spier*, 96 Pa. St. 533. *Stearns Sur. Sec. 61*. And a guaranty of payment has been generally held to be an absolute undertaking imposing liability upon the guarantor immediately upon the default of the principal debtor and regardless of whether any steps were taken to enforce the liability of the principal debtor, or whether notice of the default was given to the guarantor. *Kalman v. Scarborough*, 11 Ga. App. 547. *Cownie v. Dodd*, 167 Iowa, 627. *Bank, etc., Co. v. Concienne*, 140 La. 929. *Sanford v. Allen*, 1 Cush. (Mass.) 473. *Bank v. Schirmer*, (Minn.) 159 N. W. 800, and many other cases might be cited. (*Inquiry from Wis., March, 1919.*)

Liens

Priority between mortgage and mechanic's lien

2314. A mortgagor caused some improvements to be made upon his property after he had mortgaged it to a bank. The party making the improvements was not paid and duly filed a mechanic's lien. Thereupon the property was sold, but the proceeds were only sufficient to cover the mortgage. *Opinion:* In the absence of a statute giving the mechanic's lien priority, a prior recorded mortgage takes precedence over a subsequent mechanic's lien. (*Inquiry from N. C., Oct., 1908, Jl.*)

Landlord's lien on crops

2315. The owner of a farm filed a lease containing an agreement by the lessee to execute a chattel mortgage on the crops as soon as planted and growing as security for the rent notes. *Opinion:* The lessor would probably not be protected against a subsequent mortgagee of the crops after they were grown, in the event the promised mortgage was not given. It is doubtful if the filed lease would affect the rights of a subsequent mortgagee of the crops and, in any event, it has been held in Nebraska that the lien of a chattel mortgage on a crop not planted will not attach to the

future crop. *Forrester v. Kearney Nat. Bk.*, 49 Neb. 655. *Meyer v. Miller*, 51 Kan. 620. *Cole v. Kerr*, 19 Neb. 553. *New Lincoln Hotel Co. v. Shears*, 57 Neb. 478. *Brown v. Neilson*, 61 Neb. 765. (*Inquiry from Neb.*, Nov., 1914, *Jl.*)

Note: In some states a landlord is given a statutory lien on crops for rent reserved. There is no such statute in Nebraska, but by section 8656 Revised Statutes if a tenant or lessee, without consent of the landlord, disposes of the landlord's share of the crop, he is punishable as for stealing property.

Landlord's statutory lien on crops for rent in Kansas

2316. In the case of a farm lease, where the land is rented for cash, and the crop becomes a lien for the rent, and the lease is not recorded, and the crop is afterwards mortgaged by the tenant, or levied on by creditors, can the landlord's lien be enforced, and is it a prior lien to the recorded mortgage or creditor's levy? *Opinion:* By statute in a number of jurisdictions, and among them Kansas, a landlord is given a lien upon the personal property or crops of his tenant for the payment of the rent reserved. (Kan. Gen. St., 1889, Sec. 3633.) No writing is required to give force to a landlord's lien, nor is the filing or recording of the contract of lease a prerequisite to the creation of such lien. And where a landlord's lien upon a crop has not been waived, relinquished, lost, or otherwise divested, it is paramount to the claim of one who has purchased the same (or acquires a mortgage thereon) while yet in the possession of the tenant upon the leased premises. (*Scully v. Porter*, 57 Kan. 322, 46 Pac. 313. (*Inquiry from Kan.*, Nov., 1920.)

Laborer's lien vs. chattel mortgage on crop

2317. A bank filed a chattel mortgage covering a growing crop. Subsequently to such filing a laborer, who planted the crop and cultivated it throughout the season, filed a lien for his wages. Inquiry is made as to which lien has priority. *Opinion:* The Nebraska statute nowhere specifically provides for or mentions a lien given to

farm laborers, *eo nomine*, though it does provide for mechanics', artisans', and laborers' liens in general, and provides thus respecting the priority of such liens: "Such lien shall be in force from and after the date it is filed as aforesaid, and shall be prior and paramount to all other liens upon such property except those previously filed in said office (office of County Clerk) and shall be treated in all respects as a chattel mortgage * * * Laws of Nebraska 1913, p. 311. It would seem, therefore, that in the case submitted by the bank the chattel mortgage would have priority over the lien of the farm laborer by reason of the fact that the chattel mortgage was first recorded, particularly in the absence of express statutory provision to the contrary. (*Inquiry from Neb.*, April, 1916.)

Vendor's lien note v. chattel mortgage

2318. A sells B a horse for \$150, and takes B's note for \$100 which recites that a lien is retained on said horse to secure the note. B then gives the bank a mortgage on the horse which is duly recorded. Quære: Does an ownership note take precedence over a recorded mortgage? The bank states that it has been advised both ways. *Opinion:* In the case submitted it is stated that B, the vendee, gave A, the vendor, his note for \$100, the remainder of the purchase price of the horse, which note recited that "a lien is retained on said horse to secure the note." The transaction, then, might well be regarded as a chattel mortgage rather than a conditional sale. Under the Arkansas Mortgage Act (Kirby's Digest, Sec. 5396) the filing or recording of a chattel mortgage is essential and is not a valid lien against other mortgages, purchasers or creditors acquiring liens thereon until it is filed in the recorder's office. (*Thornton v. Findley*, 97 Ark. 432. *Smead v. Chandler*, 71 Ark. 505. *Turman v. Bell*, 54 Ark. 273.) As between conflicting mortgages, the one first filed for record will have priority. (*Mitchell v. Badgett*, 33 Ark. 387.) Assuming the bank's mortgage was first recorded, its claim would have preference. (*Inquiry from Ark.*, March, 1919.)

NOTARIES

Competency of bank and corporation notaries

Legislation

2319. The law advocated by the American Bankers Association relating to competency of bank and corporation notaries has been passed either in full or with modifications in the following states: Delaware, (1919, c. 65, p. 144), Idaho, (passed in 1921), Kansas, (Genl. St. 1915, sections 6733-6735), Louisiana, (passed in 1921), Maine, (R. S. 1916, c. 40, sec. 27), Michigan, (Comp. L. 1915, sec. 2503, p. 1025), Minnesota, (1913 Genl. St., sec. 5747, amended 1915, c. 20, p. 21), Mississippi, (1918, c. 227, p. 287), Montana, (1909, c. 77, p. 107, Rev. Code Suppl. 1915, sec. 332a), Nevada, (1917, c. 38, p. 42), New Jersey, (Comp. St. 1910, sec. 40, p. 3776) 7 New Mexico, (passed in 1921), New York, (Consol. L. 1918 [Executive Law sections 101-105a] pp. 2729, 2737), North Carolina, (passed in 1921), (examine revised code of North Dakota, sec. 5593) South Dakota, (Rev. Code 1919, sec. 5250, 1911 c. 197), Vermont, (1917 Genl. Laws, sec. 4943, Laws 1917, No. 95, p. 88. [limited to acknowledgments]), Washington, (Pierce's Code 1919, sec. 4273, R. & B. 1913 Suppl., sections 8298-1), West Virginia, (1919, c. 60, sec. 79a [12] p. 248), Wyoming, (Comp. St. 1920, sec. 4516). The law, stated in full, is as follows: "It shall be lawful for any notary public who is a stockholder, director, officer or employe of a bank or other corporation to take the acknowledgment of any party to any written instrument executed to or by such corporation or to administer an oath to any other stockholder, director, officer, employe or agent of such corporation, or to protest for non-acceptance or non-payment bills of exchange, drafts, checks, notes and other negotiable instruments which may be owned or held for collection by such corporation: Provided, it shall be unlawful for any notary public to take the acknowledgment of an instrument by or to a bank or other corporation of which he is a stockholder, director, officer, or employe, where such notary is a party to such instrument, either individually or as a representative of such corporation, or to protest any negotiable instrument owned or held for collection by such corporation, where such notary is individually a party to such instrument." (*April, 1921.*)

Cashier not a stockholder—Alabama

2320. A bank asks if its cashier, who is a notary public, can legally protest checks for the bank, the cashier not owning stock of the bank. *Opinion:* It has been held in Alabama in *Morris v. Bank of Attalia*, 142 Ala. 638, 38 So. 804 (1905), that the acknowledgment of a mortgage to a bank was not invalid because taken before a notary who was an agent or employee of the mortgagee. Where, however, the notary is also a stockholder, the acknowledgment is invalid. *Jenkins v. Schwab Co.*, 138 Ala. 664 (1903). Answering the bank's specific question, therefore, the cashier of a bank, who is a notary public, can legally protest checks for the bank and also take acknowledgments of instruments running to the bank where he does not own stock in the institution. See also 4 A. B. A., Jl., 615 (*Inquiry from Ala., March, 1919.*)

Acknowledgment before officer and stockholder of mortgagee bank—Arkansas

2321. A bank inquires as to the legality of one of its officers and stockholders taking an acknowledgment to a trust deed or mortgage in favor of the bank. *Opinion:* It was held by the Supreme Court of Arkansas in *Davis v. Hale*, 114 Ark. 426, 170 S. W. 99, that, where a deed of trust was executed to secure an indebtedness to a corporation without fraud, coercion or undue advantage, its validity was not affected by the fact that the notary who took the acknowledgment was a stockholder in the corporation. Under this decision, it seems, it would be competent for one of the bank's officers and stockholders who is a notary to take such acknowledgment. (*Inquiry from Ark., Feb., 1919.*)

Protest of paper payable at the bank — District of Columbia

2322. A bank asks whether its cashier can act as notary, and whether he can protest paper payable at the bank. *Opinion:* There appears to be no legal disqualification which would prevent the cashier from acting as notary, and if he were not a stockholder, it seems he would be qualified to protest paper owned by the bank and payable at the bank. In case the paper payable at the bank is not owned by the bank, it appears he would be qualified in any event because

the reason for disqualification, namely, pecuniary interest, would not exist where the bank was mere agent. (*Inquiry from D. C., Sept., 1917.*)

Officer-stockholder not disqualified in California

2323. A bank wishes to be advised whether a notary who is assistant cashier of the bank can take acknowledgments of instruments executed to or by the bank. *Opinion:* A notary who is assistant cashier of a national bank can take acknowledgments of instruments executed to or by the bank. He could do so even if he were stockholder. See *Riverside v. Merrill*, Cal. Decisions, Vol. 47, page 377, No. 2501. *First National Bank v. Merrill* (1914) 139 Pac. (Cal.) 1066. (*Inquiry from Cal., Feb., 1919, Jl.*)

Note: Prior to 1914 a notary in California who was a stockholder was held incompetent to take acknowledgments running to the bank, although competent to acknowledge instruments executed by the bank. It was also held that he could acknowledge paper running to the bank where he was an officer and not a stockholder. *Bank v. Oberhaus*. 125 Cal. 320. *Lee v. Murphy* 119 Cal. 365. *Merced Bank v. Rosenthal*, 99 Cal. 39. *Murray v. Tulare Irrig. Co.* 120 Cal. 311.

Acknowledgment before cashier-stockholder of mortgagee—Colorado

2324. Is a notary in Colorado competent to take acknowledgments running to the bank although he is a stockholder? *Opinion:* A decision of the Supreme Court of Colorado makes it clear that a notary is competent to take acknowledgments of instruments running to the bank although he is a stockholder thereof. In *Babbitt v. Bent County Bank of Las Animas*, 108 Pac. (Col.) 1003, the court held that the fact that an acknowledgment of a chattel mortgage executed to a bank was taken before a notary who was a cashier of and stockholder in the bank would not invalidate the mortgage in the absence of fraud in taking the acknowledgment. The court said:

"Upon the claim that the acknowledgment of the mortgage to the bank was taken before a notary who was the cashier of, and a stockholder in, that corporation, and the mortgage therefore invalid, it is to be observed that on its face the mortgage was fair and entitled to record. The taking of

this acknowledgment, unlike that of a married woman, where separate examination is required, was purely ministerial. The alleged infirmity is a matter outside the record that may not be taken advantage of except for fraud. If there was fraud in fact, of which there is no intimation, it should have been averred and proven. In the absence of such averment and proof the record of the mortgage must be held to have been constructive notice to Babbitt. To say otherwise would be to overturn the purpose of the law providing for this notice. Such policy would destroy the reliability of records, and lead to mischievous dissensions rather than to the stability and security of property rights. The rule here announced is well settled. *Brereton v. Bennett*, supra; *Bank v. Hove*, 45 Minn. 40, 47 N. W. 449; *Heilbrun v. Hammond*, 13 Hun (N. Y.) 475. *Bank v. Conway* (U. S. Cir. Ct., 4th Dist.) 1 Hughes 37, Fed. Cas. No. 10,037." (*Inquiry from Colo., July, 1915, Jl.*)

Weight of authority unless changed by statute disqualifies notary-stockholder—Uncided in Florida

2325. Is an assistant cashier, who owns no stock in the bank, competent to take acknowledgment running to the bank? *Opinion:* While the majority of the courts hold that an officer of the bank, who is a stockholder, is, by reason of his pecuniary interest, disqualified to take acknowledgments running to his bank, the decisions are quite unanimous that where there is no stock interest, the mere fact of being an officer does not disqualify the notary. There is no decision upon the special point in Florida, but it is reasonably certain that an assistant cashier who owns no stock in the bank would be held competent, as notary, to take acknowledgments of instruments running to the bank. The Negotiable Instruments Act does not affect this question. (*Inquiry from Fla., Oct., 1916.*)

Notary-stockholder in Illinois competent to take acknowledgment real estate mortgage to his bank—Uncertain as to chattel mortgages

2326. What is the law in Illinois as to the competency of an officer of a bank, who is also a stockholder, to take acknowledgments of real estate and chattel mortgages running to the bank? *Opinion:* By statute in Illinois a notary who is a stockholder or officer of a bank is competent to take acknowledgments of instruments relating to

real estate to which the bank is a party. See *Maxwell v. Lincoln Building & Loan Assn.*, 216 Ill. 85 holding statute valid and constitutional. Statute, however, covers only deeds and mortgages of real estate. It changes law as held in *Ogden Building & Loan Assn. v. Meusch*, 196 Ill. 554, which held that acknowledgment of a mortgage taken before a notary who is stockholder of the mortgages is invalid because of the notary's pecuniary interest. The statute does not cover chattel mortgages and the rule as to the competency of notary-stockholder to take acknowledgment of chattel mortgage to bank remains uncertain. (*Inquiry from Ill., May, 1912, Jl.*)

Officer of Illinois bank, not a stockholder competent to take acknowledgments and protest paper owned by bank

2327. The cashier of an Illinois bank, who is not a stockholder, desires to act as notary in taking acknowledgments of instruments running to the bank and protesting paper owned by the bank. Is he competent? *Opinion:* Notary of bank in Illinois who is an officer of the bank, but has no stock interest therein, is competent to take such acknowledgments and protest paper owned by the bank. (*Inquiry from Ill., Sept., 1914, Jl.*)

Competency of notary-stockholder of Illinois bank to protest paper held by bank as collection agent

2328. In the absence of judicial decision in Illinois a notary-stockholder of a bank is competent to protest paper held by the bank as collection agent, and, when held by the bank as owner, it is probable that such notary is likewise competent to protest. (*Inquiry from Ill., Aug., 1911, Jl.*)

Competency of bank notary in Indiana

2329. By statute in Indiana a notary public who is an officer or employee of a bank or trust company cannot protest paper running to the bank or otherwise act as notary in the business of the bank. *Burns Rev. St. Ind.*, (1908) Secs. 9539, 2932. *Ind. Acts*, 1911, Ch. 248. *Kothe v. Krag Co.* 20 Ind. App. 293. *Spegal v. Krag Co.* 21 Ind. App. 205. *McNulty v. State*, 37 Ind. App. 612. (*Inquiry from Ind., Aug., 1914, Jl.*)

Competency of bank notary—Iowa

2330. A bank asks whether a notary who is an officer, director or stockholder in a state bank is authorized to take acknowl-

edgments of mortgages, deeds and other instruments running to the bank. *Opinion:* Under decisions rendered by the Supreme Court of Iowa a notary who is a stockholder of a bank is incompetent to take acknowledgments running to the bank. See, for example, *Bardsley v. German Am. Bk.*, 113 Iowa 216, in which the Supreme Court held that (1) a notary having an interest, direct or contingent, in a mortgage or its subject matter, cannot take and certify an acknowledgment thereof, and the record of an instrument so acknowledged does not impart notice to third persons of the mortgagee's interest thereunder; (2) but the mere fact that a notary who takes the acknowledgment of a mortgage to a banking partnership is cashier of the mortgagee—he not being a partner—does not disqualify him from acting as notary in the transaction; (3) nor is the notary disqualified because he himself is a creditor of the mortgagor (having sold him the mortgaged land), and the mortgage to the bank is to obtain money with which to pay his claim. See also *City Bank v. Radtke* 87 Iowa 363. *Smith v. Clark*, 100 Iowa 605. *Farmers, etc., Bank v. Stockdale* 121 Iowa 748. *Bank v. Bank* 107 Iowa 543, 78 N. W. 195. It would appear, therefore, that an officer who is not a stockholder would be competent, but where the notary is a stockholder, his pecuniary interest would disqualify him. See *Greve v. Echo Oil Co.* 8 Cal. App. 275 and 7 A. B. A. Jl., 779. (*Inquiry from Iowa, Oct., 1917.*)

Interpretation of Kansas statute

2331. In Kansas the statute of 1905 authorizes a notary-stockholder to take acknowledgment of instruments executed to his bank except "when acting himself in behalf of the corporation." Where a notary draws up a mortgage for bank, and his name is not mentioned in the papers, it seems unreasonable to hold that he is acting himself in behalf of the bank. The Kansas statute does not require an affidavit of ownership upon the original filing of a chattel mortgage, but such affidavit is necessary for a renewal. *Kan. Laws*, 1905, Ch. 311. *Gen. St. Kan.*, 1909, Secs. 5224-5227 *Gen. Stat.* 1915 Sections 6733, 6735. *Farmers, etc., Bk. v. Bk. of Glen Elder*, 46 Kan. 376. *Howard v. Nat. Bk.*, 44 Kan. 549. *Fair v. Citizens St. Bk.*, 70 Kan. 612. (*Inquiry from Kan., April, 1912, Jl.*)

Competency of notary in Massachusetts

2332. Is a cashier who is not a stock-

holder competent to act as notary in protesting checks drawn on his bank or notes payable at his bank in Massachusetts? *Opinion:* It seems the question of competency of a notary who is an officer or a stockholder, or both, of a bank, to take acknowledgments of instruments running to the bank or protests of the bank's paper has never been passed on by the courts of Massachusetts. But in view of the decisions elsewhere, it would be reasonably safe for the cashier in the case stated to protest checks drawn on the bank or notes payable at the bank—in which cases the bank is acting as agent for the holder. (*Inquiry from Mass., Aug., 1914.*)

Competency of notary in Missouri

2333. It is asked whether a notary who is also an officer or director in a bank may legally take acknowledgments of instruments running to the bank. *Opinion:* It has not been specifically decided in Missouri that where a deed of trust is made to a bank, an acknowledgment taken by a notary who is an officer or stockholder of the bank is invalid. But, according to the weight of authority elsewhere, it seems that the acknowledgment would be valid where taken by an officer who is not a stockholder, but if the notary were also a stockholder his pecuniary interest would disqualify him. See *Dail v. Moore* 51 Mo. 589. 3 A. B. A. Jl. 202. 4 A. B. A. Jl. 552. Under the existing conditions of the law in Missouri, a bank would be safe in using its notary for protests and acknowledgments, where such notary is a non-stockholding officer, but not when he is a stockholder, except in case of protest of paper held by the bank as collecting agent. (*Inquiry from Mo., Feb., 1916.*)

2334. Is it proper for a stockholder in a bank who is also a notary to protest items sent to it for collection. *Opinion:* Where items are sent to a Missouri bank merely for collection, the bank having no property interests in them, the notary would probably be competent to make protest even though he was a stockholder. (*Inquiry from Mo., May, 1919.*)

Competency of bank notary in Nebraska

2335. A notary who is stockholder not competent to take acknowledgments of instruments running to the bank. But an officer who is not stockholder is competent. *Chadron Loan, etc., Assn. v. O'Linn*, (Neb.) 95 N. W. 368. *Wilson v. Griess*, 64 Neb.

792. *Horbach v. Tyrrell*, 48 Neb. 514. *Castetter v. Stewart*, 70 Neb. 815. *Girard Tr. Co. v. Null*, (Neb.) 134 N. W. 372. (*Inquiry from Neb., July, 1912, Jl.*)

Rule unsettled in New Hampshire

2336. In the absence of any established rule in New Hampshire, a notary who is a director of a bank is competent to protest paper held by the bank for collection, but when the paper is owned by the bank the question is unsettled. (*Inquiry from N. H., Dec., 1911.*)

Disqualification of Ohio notary

2337. A statute in Ohio prohibiting a director, officer or clerk of a bank from acting as a notary in any matter in which the bank "is in any way interested" does not disqualify a stockholder holding no official relation from taking acknowledgments or making protests, but a director who is a notary cannot protest paper owned by the bank. Whether a director-notary can protest paper held for collection is doubtful. *Bates' Anno. Ohio St., Ch. 1, Sec. 111. Read v. Toledo Loan Co.*, (Ohio) 67 N. E. 729. (*Inquiry from Ohio, Jan., 1916, Jl.*)

Competency of bank notary in Oklahoma

2338. In Oklahoma a notary is probably competent to acknowledge instruments to and from a bank or to protest the bank's paper, although a stockholder of such bank or holding other official relation. *Ardmore Nat. Bk. v. Briggs Mach., etc., Co.*, 20 Okla. 427. *Read v. Toledo Loan Co.*, 68 Ohio St. 280. (*Inquiry from Okla., May, 1912, Jl.*)

Competency of bank clerk notary in Pennsylvania

2339. Are bank clerks in Pennsylvania competent as notaries to take acknowledgments of instruments executed by and running to the bank. *Opinion:* Under the Act of 1909 a bank clerk would be competent, as notary, to take acknowledgments of instruments executed by or running to the bank. The competency of a stockholder to take acknowledgments, as notary, of instruments running to the bank would depend on whether he is disqualified by his stock interest, which has not been decided in Pennsylvania. A stockholder other than a director would be competent to make protests. (*Inquiry from Pa., June, 1912, Jl.*)

Competency of bank notary in South Carolina

2340. A bank asks if one of its officers who is also a notary can protest paper in which the bank is interested. *Opinion:* It would probably be competent in South Carolina for a notary who is an officer of a bank to protest paper owned by the bank as well as that held by it as collecting agent, and also to take acknowledgments of mortgages and other instruments running to the bank. If, however, a notary is pecuniarily interested in the bank as a stockholder, as well as being an officer, there would be a question as to his competency which has not yet been tested in South Carolina. (*Inquiry from S. C., Jan., 1913.*)

Competency of bank notary in Tennessee

2341. The courts of Tennessee disapprove acknowledgments of instruments running to bank by a notary who is a stockholder of bank, but hold that such acknowledgments are not void but merely voidable upon proof of fraud, oppression or other ground for invalidation. *Cooper v. Hamilton Loan, etc., Assn.*, 97 Tenn. 285. (*Inquiry from Tenn., Sept., 1909, Jl.*)

Notary-stockholder of mortgagee bank in Texas incompetent to take acknowledgment

2342. A chattel mortgage was given to a Texas bank, and the mortgagor's acknowledgment was taken by a notary who was also an officer and shareholder in the bank. Would this make the mortgage invalid? *Opinion:* It was held in the case of *Brown v. Moore*, 38 Tex. 645, that an officer interested in a deed cannot take the acknowledgment of the grantors in such deed. Later decisions, *Bexar Building & Loan Assn. v. Heady*, 21 Tex. Civ. App. 154, and *W. C. Belcher Land Mortgage Co. v. Taylor*, (Tex. 1914) 173 S. W. 278, are to the same effect. The conclusion can be drawn from these authorities that the acknowledgment of a chattel mortgage in Texas taken before a notary who was an officer and stockholder in the mortgagee would be invalid because of the interest of the notary, even though there was nothing in the instrument to show that the notary was an officer or stockholder. (*Inquiry from Tex., March, 1919.*)

Competency of bank notary in Wisconsin

2343. A cashier of Wisconsin bank who is notary but not a stockholder is competent to take acknowledgments of instruments running to the bank. If cashier is also a stockholder, this fact would probably dis-

qualify him. *Bk. v. Oberhaus*, 125 Cal. 320. *Fla. Sav. Bk. v. Rivers*, 36 Fla. 577. *Bardsley v. German-Amer. Bk.*, 113 Iowa 216. *Bank House v. Stewart*, 70 Neb. 815. *Horbach v. Tyrell*, 48 Neb. 514. *Sawyer v. Cox*, 63 Ill. 130. *Laws Wis.*, 1911, Ch. 579, Sec. 1. (*Inquiry from Wis., May, 1915, Jl.*)

2344. A bank raises the question whether an officer of a bank who is a notary can protest checks, drafts or bills of exchange for non-payment or non-acceptance, where there is no notary in the vicinity. *Opinion:* In the absence of express statutory provisions, it has been held in a number of cases that an officer who is a stockholder of a bank is disqualified by reason of his interest to take acknowledgments, as a notary, of instruments running to the bank; but where the officer is not a stockholder he is not disqualified. This point has not been expressly decided in Wisconsin. (*Inquiry from Wis., May, 1920.*)

Jurisdiction of notary*Protest in government camp*

2345. Inquiry is made as to whether a notary public can protest an instrument in a Government camp ceded to the United States but situate within the bounds of the county in which he has jurisdiction. *Opinion:* Usually, under the express provisions of the statute authorizing his appointment, the jurisdiction of a notary public is confined to the limits designated in the commission of the governor. It would follow that he would not be qualified to make protest at the camp which is not within the jurisdiction of the state, and the Negotiable Instruments Act which provides that protest may be made by "any respectable resident of the place where the bill is dishonored in the presence of two or more credible witnesses" is not operative. However, as the act in this respect is simply a codification of the law merchant, this procedure may be followed. *Harris v. Burton*, 4 Harr. (Del.) 66. *Allgood v. State*, 87 Ga. 668. *Barhydt v. Alexander*, 59 Mo. App. 188. *Lamb v. Lamb*, 139 Mich. 166. *Mut. Life Ins. Co. v. Corey*, 7 N. Y. Suppl. 939. *Maxwell v. Hartman*, 50 Wis. 660. *Schiff v. Leipsinger*, 65 N. Y. App. Div. 33. (*Inquiry from Kan., Jan., 1919.*)

Prerequisite of appointment*Notary not living in state one year*

2346. An acknowledgment to a mortgage deed is taken by a notary who has not

resided in the state a year previous to taking out his commission. Would this affect the legality of the deed? *Opinion*: The only residential prerequisite for appointment as notary public in Montana is citizenship in state and residence in county. Citizenship is acquired as soon as a citizen of the United States leaves his former residence with no intention of returning and enters the state with the intention of residing there. Sec. 71 Political Code. See also *Donovan v. State Capital Commission* 21 Mont. 344, 53 Pac. 1133. If the acknowledgment is regular and conforms to the statute in other respects, it is valid. (*Inquiry from Mont., Oct., 1914.*)

Eligibility of woman as notary

Qualified elector in Mississippi

2347. A bank has appointed a female employee as notary public, and desires an opinion as to the legality of a woman acting as notary. *Opinion*: At common law a woman could not be a notary (*Opinion of Justices*, 165 Mass. 599. *Opinion of Justices*, 73 N. H. 621. *State v. Davidson*, 92 Tenn. 531, 534), but could be made eligible by statute, in the absence of constitutional prohibition. (*Van Dorn v. Mengedoh*, [Neb.] 59 N. W. 800). In some states, as in Mississippi, the constitution restricts the holding of office to qualified electors, and such provisions have disqualified women from holding the office of notary. (In matter of House Bill No. 166, 9 Colo. 628; Miss. Constitution, Secs. 106, 250.) But, under the recent amendment of the Federal Constitution, women citizens become qualified electors, and as such are eligible to hold the office of notary under such constitutional provisions. (See Miss. Code 2780 et seq.) (*Inquiry from Miss., Dec., 1920, Jl.*)

Disqualification by relationship or where party to instrument

Brother of mortgagee taking acknowledgment

2348. B and his wife executed a mortgage to A. A's brother, having no pecuniary interest in the transaction, took the acknowledgments as notary public. *Opinion*: The relationship of the notary to the mortgagee did not disqualify the notary and the acknowledgment is valid. *Welsh v. Lewis*, 71 Ga. 387. *Benson Bk. v. Hove*, 45 Minn. 40. *Helena First Nat. Bk. v. Roberts*, 9 Mont. 323. *Lynch v. Livingston*, 6 N. Y. 422. *McAllister v. Cornell*, 124 N. C. 262.

Holmes v. Carr, 163 N. C. 122. *Horbach v. Tyrrell*, 48 Neb. 514. *Bank. House v. Stewart*, 70 Neb. 815. (*Inquiry from Neb., Nov., 1915, Jl.*)

Disqualification of notary-trustee

2349. A Mayor of a city, authorized to take acknowledgments, is disqualified to take the acknowledgment of the grantor to a deed of trust in which he is named as trustee. *Bowden v. Parrish*, 86 Va. 67. *Dail v. Moore*, 51 Mo. 589. *Muense v. Harper*, 70 Ark. 309. *Holden v. Brimage*, 72 Miss. 228. *Wasson v. Connor*, 54 Miss. 351. *Stevens v. Hampton*, 46 Mo. 404. *Brown v. Moore*, 34 Tex. 645. *Tavener v. Barrett*, 21 W. Va. 656. *Am. & Eng. Ency. L.*, Vol. 1, p. 145. *Contra*: *Bennett v. Shipley*, 82 Mo. 448. *Darst v. Gale*, 83 Ill. 136. (*Inquiry from Miss., April, 1917, Jl.*)

Form of acknowledgment

Certificate valid where in substantial compliance with statute

2350. A notary public in making out an acknowledgment to a deed used the words "and has duly acknowledged to me," etc., instead of "and he duly acknowledged to me," etc. *Opinion*: Where the statute, as in case in California requires that a certificate of acknowledgment must be substantially in a form therein provided, the certificate will be valid though not in the precise language of the statute if it substantially complies therewith. *Civ. Code Cal.*, (1909) Art. III, Sec. 1189. *People v. Harrison*, 8 Barb. (N. Y.) 560. *Davar v. Cardwell*, 27 Ind. 478. *Musgrove v. Bouser*, 5 Ore. 313. *Tew v. Henderson*, 116 Ala. 545. *Bowles v. Lowery* (Ala., 1913) 62 So. 107. *Canandacqua Academy v. McKechnie*, 19 Hun (N. Y.) 62. *Smith v. Boyd*, 101 N. Y. 472. *Holland v. Hotchkiss*, (Cal., 1912) 123 Pac. 258. (*Inquiry from Cal., Aug., 1914, Jl.*)

Acknowledgment over telephone

2351. Is an acknowledgment taken over the telephone valid? *Opinion*: Acknowledgment of mortgage or other instrument taken by notary over telephone would be invalid, as law requires personal (physical) appearance of person making acknowledgment. *Russell v. Whiteside*, 5 Ill. 7. *Brunswick-Balke Collender Co. v. Brackett*, 37 Minn. 58. *Hoboken Land Co. v. Kerrigan*, 31 N. J. L. 13. *Pierce's Wash. Code* (1905) Sec. 4455. *Mays v. Hedges*, 79

Ind. 288. *St. Nat. Bk. v. Mee*, (Okla.) 136 Pac. 758. *Barnard v. Schuler*, 100 Minn. 289. (*Inquiry from Wash., March, 1915, Jl.*)

2352. An acknowledgment taken by a notary over the telephone where the statute requires a certificate that the person "personally appeared" before the notary has been held invalid in several states; but in California its validity has been upheld in the absence of fraud, duress or mistake. Question not decided in West Virginia. *Barnard v. Schuler*, 100 Minn. 289. *Wester v. Hurt*, 123 Tenn. 508. *Shannon's Code Tenn.*, Sec. 3753. *Sullivan v. First Nat. Bk.*, 37 Tex. Civ. App. 228. *Banning v. Banning*, 80 Cal. 271. *West Va. Code*, Secs. 3806, 3807, 3808. (*Inquiry from W. Va., Feb., 1917, Jl.*)

Fees

Notary's fee in Alabama

2353. A fee of \$5.11 charged by a notary in Alabama for protesting a check is excessive and is in violation of Section 5174 of the Alabama Code. (*Inquiry from Ala., June, 1918, Jl.*)

Right to charge for notice of dishonor given to collecting bank

2354. Has a notary acting for a collecting bank the right to make a charge for notice to the bank which holds the item for collection? *Opinion:* The Arkansas Statutes allow notaries public fees, "for notice to indorsers and other parties." It is customary to give notice of dishonor to the collecting agent as well as to other indorsers. Section 97 of the Negotiable Instruments Act provides that "Notice of dishonor may

be given, either to the party himself or to his agent in that behalf." That it is competent to give the notice to a collecting agent is indicated by the rule of law as to time of giving notice between successive indorsers, which rule applies to indorsers or agents for collection as well as to indorsers for value. It seems from this that the fee allowed by statute for notice to indorser would be chargeable. See *Oakley v. Carr*, 66 Neb. 751, 92 N. W. 1000, 60 L. R. A. 431. (*Inquiry from Ark., Oct., 1919.*)

Notary's fee in Iowa

2355. Can a notary collect a fee for protesting a check given in Iowa on an Iowa bank which bears no foreign indorsements? *Opinion:* While protest is absolutely necessary only in case of foreign bills of exchange, the Negotiable Instruments Act authorizes protest of any negotiable instrument. A check drawn and payable in Iowa is, therefore, protestable and notary entitled to fees, there being parties contingently liable on the check. (*Inquiry from Iowa, Aug., 1916.*)

Right of bank to share notary's fee

2356. A notary employed by a bank agreed to accept for his services to the bank in protesting its negotiable paper and that held by it for collection, in full payment, one half the usual and legal fees charged for such work. Can the bank charge the statutory fee and retain one half of same? *Opinion:* Such an agreement is void for want of consideration, and also upon the ground that it is against public policy. (*Inquiry from N. Y., June, 1920.*)

NOTES

Date

Post-dated note

2357. If a bank takes a post-dated note and the maker dies or becomes bankrupt before the day of its date, can the bank enforce collection? *Opinion:* A post-dated note is negotiable before its date and if before maturity the maker dies or becomes bankrupt, the bank would have the same recourse against his estate as in the case of any other note which it acquires before maturity. (*Inquiry from Minn., Nov., 1915.*)

Requirement as to writing

Two kinds of handwriting in body of note

2358. Is a note legal the body of which

is in part in the handwriting of one person and in part in the handwriting of another person? *Opinion:* A negotiable promissory note must be in writing, but a note is not illegal because the body over the signature of the maker is in the handwriting of two different persons. *Zimmerman v. Rote*, 75 Pa. St. 188. *Neg. Inst. Law*, Sec. 14. See also *Seibel v. Vaughn*, 69 Ill. 257 and *Harvey v. Smith*, 55 Ill. 224. (*Inquiry from Pa., Aug., 1919.*)

Blank spaces

Unfilled blank for personal pronoun referring to maker

2359. A note contains a provision for

confession of judgment, attorney's fees, waiver of exemption, etc. Is validity of the note affected by leaving unfilled therein at the time of the issuance thereof blanks for personal pronouns referring to the maker and for the amount of the attorney's fees? *Opinion:* The leaving of the spaces blank does not affect the validity of the note. (*Inquiry from Pa., May, 1915.*)

Name of payee missing

2360. A customer offers for sale a note in which the name of the payee is missing. Is the note payable to bearer? *Opinion:* A note wherein no payee is named or indicated with reasonable certainty is incomplete and not negotiable. But where the note contains a blank for the name of the payee which is unfilled, under the law merchant the instrument was payable to bearer and negotiable and carried impliedly authority to a bona fide purchaser to fill the blank and complete the instrument; however, under the Negotiable Instruments Act the blank must be filled strictly in accordance with the authority given, and if the holder negotiates such an instrument without authority, the purchaser is put on inquiry and it is subject to defenses in his hands. *McIntosh v. Lytle*, 26 Minn. 336. *Holborn v. Pa. Cement Co.*, 129 N. Y. S. 957. *Hartington Nat. Bk. v. Breslin*, (Neb.) 128 N. W. 658. *Guerrant v. Guerrant*, 7 Va. Law Reg. 639. (*Inquiry from Minn., Aug., 1918, Jl.*)

Blank space filled in "in accordance with authority"

2361. B and C signed a note in blank with A as principal maker, authorizing A to fill in the note for \$100. A, in violation of the agreement, borrowed \$2,500 from a bank upon the note, and the bank fills in that amount. Upon default of A, the bank seeks to recover from B and C, who claim their liability is only for \$100. *Opinion:* The bank was put on inquiry as to the extent of the authority of A and cannot recover from the accommodation makers the full face value of the note, but only the amount authorized. Section 14 of the Negotiable Instruments Act provides that the blank must be filled up "strictly in accordance with the authority given," and when the bank received the note in that condition, it was put on notice that it must proceed at its peril. *Frank v. Lillienfeld*, 33 Gratt (Va.) 377. *Neg. Inst. L. (Comsr's. dft.)*, Sec. 14. *Guerrant v. Guerrant*, 7 Va. L.

Reg. 639. *Boston Steel, etc., Co. v. Steurer*, 183 Mass. 140. *Vander Ploeg v. Van Zuuk*, 135 Iowa 350. (*Inquiry from W. Va., Feb., 1919, Jl.*)

Signature

Third maker signing under bottom line

2362. Is the signature of the third maker of a note which is placed under the bottom line, because there is no room above, binding on him? *Opinion:* The third maker is bound although his signature is outside the border of the note. (*Inquiry from Pa., March, 1916.*)

Signature to partnership note

2363. A bank incloses two notes with its inquiry as to signatures. The first one has the name of a partnership printed or written by some third person, and under it is the signature of a partner. The second is signed complete by a partner in the following form: "Hamblet and Filimon (and thereunder) Harold Hamblet." Is each form of signature binding on the partnership? *Opinion:* The signature is binding in both cases. The fact that the name of the firm in the first form is printed is immaterial. It would, however, be better to prefix the word "by" in both cases. (*Inquiry from N. Y., Feb., 1921.*)

2364. Is it correct for a firm to sign a note "Jones & Smith," or should the individual name of one of the members be added thereto, preceded by "per"? *Opinion:* The signature "Jones & Smith" is perfectly valid without the suffix "per John Smith" to indicate the particular member who signs the firm name. But in view of the likelihood of the signature being disputed, it might be preferable to have the suffix to make it easier to prove genuineness. (*Inquiry from N. Y., March, 1917.*)

Signature to corporate note

2365. Is the officer of a corporation who signs its note for it in the ordinary way liable personally thereon? *Opinion:* The courts quite generally hold a note signed "Indiana Coal & Clay Company, George W. Hana, President," to be a corporation note alone and not the joint note of the corporation and Hana. In a few states, however, such form of signature is held to bind not only the corporation but also the president individually. For example, see *McCandless v. The Belle Plaine Canning Co.*, 75 Iowa 161. In Indiana a note signed simply John Smith, President, without the name of the

corporation, has been held to be the individual obligation of Smith and parol evidence is inadmissible to show an intention to bind the corporation. *Hayes v. Brubaker*, 65 Ind. 27. But if the signature had been "Smith, President for A. B. Mfg. Co.," it would then import a corporate obligation. *Prescott v. Hixon*, 22 Ind. App. 139. Therefore, if an officer of a corporation wishes to escape personal liability, as a joint obligor with the corporation, he should take care, after signing the name of the corporation, to prefix the words "by" or "per" before his official signature as president. (*Inquiry from Ind., March, 1919.*)

Omission of prefix "by"

2366. An order, note or agreement was signed "John Smith Company, John Smith, Treasurer," without the prefix "by" before "John Smith." *Opinion:* Such form of signature is generally held to be the signature of the corporation alone (such is the case in Maine) although in one or two states it has been held to import an obligation both of the company and John Smith individually. *Castle v. Belford Foundry*, 72 Me. 167. *Draper v. Mass. Steamheating Co.*, 87 Mass. 338. (*Inquiry from Me., May, 1913, Jl.*)

Signature by "A Corporation, B, Treasurer"

2367. A corporation note was executed as follows:

\$1,000 Buffalo, N. Y., June 4, 1911.

On demand after date, we promise to pay to the order of ourselves at the First National Bank, Buffalo, N. Y., one Thousand Dollars. Value received with interest. Home Hardware Co. H. I. Jones, Treas. Indorsed Home Hardware Co., H. I. Jones, Treas. The question was raised as to the personal liability of H. I. Jones thereon. *Opinion:* A note reading "We promise to pay" signed "Home Hardware Co., H. I. Jones, Treas." is generally held to be the note of the corporation alone equally as if the word "by" were prefixed to the name of the treasurer and the latter is not personally liable. The point has not yet been decided in New York. *Casco Nat. Bk. v. Clark*, 139 N. Y. 307. *Bk. v. Wallace*, 150 N. Y. 455. *Dunbar Box & Lumber Co. v. Martin*, 103 N. Y. S. 91. *Megowan v. Peterson*, 173 N. Y. 1. (*Inquiry from N. Y., Nov., 1911, Jl.*)

Signature "John Jones, Treasurer"

2368. Where the name of the corporation is not designated as the sole promisor

in the body of the note and it is signed merely "John Jones, Treasurer," the weight of authority is that the word "Treasurer" is merely descriptive of the person and not of the character of the liability and that Jones will be personally liable. Had John Jones in the above case signed "As treasurer," without disclosing his principal he would not have been shielded from personal liability. (*Inquiry from N. Y., Feb. 1911, Jl.*)

Proper form of signature of corporation note

2369. Where a corporation note simply reads "I" or "We" promise to pay, without reciting in the body of the promise that "The Smith Manufacturing Co." promises to pay, the form of the signature which should be used by an officer authorized to sign, in order to free himself from personal liability, should be either "The Smith Manufacturing Co. by John Jones, Treasurer," or "For the Smith Manufacturing Co., John Jones, Treasurer." *Heffner v. Brownell*, 70 Iowa 591, 75 Iowa 341. *Shaver v. Ocean Mining Co.*, 21 Cal. 45. *Day v. Ramsfell*, 52 N. W. (Iowa) 208. *Casco Nat. Bk. v. Clark*, 139 N. Y. 307. (*Inquiry from N. Y., Feb., 1911, Jl.*)

Signature "Doe Company, John Doe, President"

2370. According to the weight of authority a note signed "Doe Manufacturing Company, John Doe, President, Jim Doe, Treasurer," is held to be the obligation of the corporation alone, although the word "by" or "per" is not prefixed to the signature of the officers, but in a few states where the form of the note reads "we promise to pay" the signature would be prima facie evidence binding both corporation and officers individually. *Bean v. Pioneer Mining Co.*, 66 Cal. 453. *Miers v. Coates*, 57 Ill. App. 216. *Castle v. Belfast Foundry Co.*, 72 Me. 167. *Draper v. Mass. Steamheating Co.*, 87 Mass. 338. *English, etc., Inv. Co. v. Globe Loan & Tr. Co.*, 97 N. W. (Neb.) 612. (*Inquiry from N. C., Dec., 1914, Jl.*)

Individual liability of officer signing corporation note

2371. A bank inquires whether, in a case where the president and secretary of a corporation signed to borrow money, the president and secretary would be personally liable for the payment of the obligation in case the company failed. *Opinion:* Whether the president and secretary would be personally liable depends upon whether the

note they signed for the borrowed money was executed in the name of the corporation by them as president and secretary or was signed as their personal obligation. If it was a corporation note, they would not be personally liable; if it was their individual note they would be. It would depend upon the form of the signature and the character of the obligation. (*Inquiry from Idaho, Oct., 1917.*)

Corporation note to own order signed by treasurer and secretary and indorsed by secretary

2372. A bank receives a note drawn by a company to its own order, indorsed by the secretary, and individually indorsed by the directors of the company. The bank inquired whether the signature of the treasurer on the back is necessary. *Opinion:* If the signature of both treasurer and secretary were necessary to drawing checks, as evidenced by the face of the instrument, the same signature would be necessary for the indorsement of the corporation. The question as to who is authorized to sign the corporation name is generally regulated by the board of directors or by by-laws. It would, of course, be legal in any case for a corporation to indorse with the name of its secretary alone if the by-laws or resolution of the directors so provided; but where the signature on the face of the check is made by both secretary and treasurer it would seem prima facie that the same officials should both indorse the name of the corporation. (*Inquiry from N. J., Dec., 1915.*)

Seal

Seal does not destroy negotiability

2373. Does the attachment of a seal to the signature of the individual maker of a note (i. e. non-corporate) render it non-negotiable? *Opinion:* Although at common law an instrument under seal was not negotiable, the Uniform Negotiable Instruments Act (applicable in Florida) expressly provides that "the validity and negotiable character of an instrument are not affected by the fact that it.....bears a seal." (*Inquiry from Fla., Aug., 1911, Jl.*) (*Similar Inquiry from S. C., Oct. 1913, Jl.* [citing *Weyman v. Perry*, S. C. 415. Bank v. R. Co., 5 S. C. 156])

2374. Is a note under seal a negotiable instrument? *Opinion:* The common law rule that an instrument under seal was not negotiable was held generally inapplicable

to notes of corporations. Under the provision of the Negotiable Instruments Act both individual and corporate notes under seal are negotiable. (*Inquiry from Pa., Feb., 1913, Jl.*)

Seal of corporation

2375. How does the presence or absence of a seal affect a note? *Opinion:* Unless the charter or governing statute requires it, the act of a corporation need not be evidenced by its corporate seal, except where a seal would be required in the case of individuals, and of course an individual note does not require a seal. Under the Negotiable Instruments Act the validity and negotiability of a note is not affected by the presence of a seal. 10 Cyc. 1006. *Hamilton v. Lycoming Mut. Ins. Co.*, 5 Pa. 339. (*Inquiry from Pa., Feb., 1913, Jl.*)

Seal to signature of judgment note

2376. Attached to the signatures of the two first makers of a judgment note were seals, but there was none to the signature of an accommodation maker. Is he liable? *Opinion:* The validity of a judgment note is not affected by the fact that it is not given under seal. The accommodation maker is liable. *Hazelton Nat. Bk. v. Kintz*, 24 Pa. Super. Ct. 456. *Alexander v. Alexander*, 85 Va. 353. (*Inquiry from Pa., Sept., 1911, Jl.*)

Seal to signature of indorser of judgment note

2377. Where a power of attorney to confess judgment appears on the back of a note should the signatures of all the indorsers be under seal or does the seal affixed to the signature of the first indorser suffice for the other indorsers? *Opinion:* The seal applies only to the single signature of the indorser to which it is affixed. However, in Pennsylvania a judgment note need not be under seal. *Hazelton Nat. Bank v. Kintz*, 24 Pa. Super. Ct. 456. *Kneedler's Appeal*, 92 Pa. St. 428. (*Inquiry from Pa., July, 1919.*)

Joint and several notes

Form of joint or joint and several notes

2378. What form should a bank use in notes to secure the joint and several liability of the makers? *Opinion:* At common law, a note drawn "We promise," etc., signed by two or more is joint only, but one drawn "I" promise, so signed, is joint and several, both at common law and under the Negotiable Instruments Act. By statute

in some states a note joint in form is made joint and several. In absence of statute, a bank desiring a joint and several note should have it read "We or either of us," or "We jointly and severally" promise. *Barnett v. Juday*, 38 Ind. 86. *Peaks v. Dexter*, 82 Me. 85. *Palmer v. Stevens*, 1 Den. (N. Y.) 471. *Farmers Exch. Bk. v. Morse*, 129 Cal. 239. *Kaestner v. First Nat. Bk.*, 170 Ill. 322. *Sully v. Campbell*, 99 Tenn. 434. *Monson v. Drakeley*, 40 Conn. 552. *Ely v. Clute*, 19 Hun (N. Y.) 35. *Warren First Nat. Bk. v. Fowler*, 36 Ohio St. 534. *Higerty v. Higerty*, 1 Phila. (Pa.) 232. *Dodge v. Chessman*, 10 Pa. Super. Ct. 604. *Kinsley v. Shenberger*, 7 Watts (Pa.) 193. *Leith v. Bush*, 61 Pa. 395. (*Inquiry from Ga.*, Sept., 1913, *Jl.*) (*Similar inquiry from Ill. Aug.*, 1912, *Jl. citing Pogue v. Clark*, 25 Ill. 33; *Ky.*, Aug., 1914.)

Note "we promise to pay" signed by A, Principal, and B, Surety

2379. What is the liability of the makers of a note, the body of which reads: "We promise to pay," and which is signed A, Principal, B, Surety, C, Surety? *Opinion:* The note is joint only, in the absence of a statute making it joint and several, and all the makers must be joined in an action thereon, but each maker is liable for the full amount. *Barnett v. Juday*, 38 Ind. 86. *Sharpe v. Baker*, (Ind.) 99 N. E. 44. *Bartlett v. Fraser*, (Cal.) 105 Pac. 130. *Salamon v. Hopkins*, 61 Conn. 49. *Maiden v. Webster*, 30 Ind. 317. *Hunt v. Adams*, 5 Mass. 358. *Latham v. Flour Mills*, 68 Tex. 130. *Birch Tree St. Bk. v. Brown*, (Mo.) 133 S. W. 860. (*Inquiry from W. Va.*, May, 1914, *Jl.*)

Note "I" promise to pay signed by two or more

2380. In making a note is it necessary to use the form "I, or we, or either of us promise to pay" or does the word "I" cover the case just as well, making same a joint and several note? *Opinion:* Where a note containing the words "I promise to pay" is signed by two or more persons they are jointly and severally liable thereon. *Ullery v. Brohm*, (Colo.) 79 Pac. 180. *Dill v. White*, 52 Wis. 456. (*Inquiry from Wis.*, March, 1920, *Jl.*)

Joint note of corporation and individual

2381. Does a note reading: "We promise to pay," and signed by a corporation, "The Johnson Co., Inc., H. Johnson, Pres."

and by John Smith and Henry Jones, create only a joint liability of the corporation and the two individuals? *Opinion:* It is generally held by the courts that a note signed by more than one person and beginning "We promise" is joint only. *Bartlett Estate Co.*, 11 Cal. App. 373. *Farmers' Exch. Bk. v. Morse*, 129 Cal. 242. *Barrett v. Funay*, 36 Ind. 86. *Sharp v. Baker*, (Ind. App.) 99 N. E. 44. *Taylor v. Roger*, 18 Ind. App. 466. *Dusenbury v. Albright*, 31 Neb. 345. *Humphreys v. Guillo*, 13 N. H. 385. *Elinger's Appeal*, 114 Pa. St. 505. *Thompson on Bills*, 156. *Daniel on Negotiable Instruments* (6th Ed.), Sec. 94. It would seem, therefore, that this note is a joint note of the corporation Smith and Jones. The common law rule is that parties who are jointly liable on a bill or note must, in general, be jointly sued, but in some states the joint makers are made severally liable by statute, and may be sued separately. Unless there is some statute in New Jersey such as above, the action on the note must be against all the makers. (*Inquiry from N. J.*, June, 1915.)

Right of joint maker taking up note to enforce against co-maker

2382. A joint note made by A and B contains a clause authorizing confession of judgment against both or either maker in favor of the holder. It bears an indorsement, dated after its maturity, signed by the payee bank, reading: "For a valuable consideration we hereby sell and assign the within note without recourse to B." Can B secure a valid judgment by confession against his joint maker, A? *Opinion:* The rule is well settled that the note is extinguished by payment, as a joint maker cannot purchase or acquire title to the instrument. Hence B cannot sue A on the note, nor enter up judgment by confession, but his right against A is limited to an action for contribution. *Exch. Nat. Bank v. Chapline*, (Ark.) 158 S. W. 151. *Davenport v. Green River, etc., Bank*, (Ky.) 128 S. W. 88. *Stevens v. Hannan*, (Mich.) 49 N. W. 874. *Williams v. Gerber*, 75 Mo. App. 18. Were B an accommodation maker another question would be presented. It is held in some jurisdictions that such a maker is secondarily liable only, and that where an instrument is paid by a party secondarily liable, it is not discharged, but that the accommodation maker, being a surety, is entitled to be subrogated to all the rights and remedies of the creditor. (*Pease v. Tyler*, [Wash.] 138 Pac.

310.) In other jurisdictions it is held that an accommodation maker is not secondarily but primarily liable, so that his sole recourse upon his co-maker is not upon the note, but in an independent action for contribution. (*Richards v. Market Exch. Bank*, [Ohio] 90 N. E. 1000. Ohio Rev. St. Sec. 3178a. [Neg. Inst. Law].) (*Inquiry from Ohio*, Oct., 1920, *Jl.*)

Corporations as parties

Note of municipal corporation

2383. A bank asks for a form of short-term note to be used by a municipality for borrowed money. *Opinion:* There seems to be no standard form of note for use in such cases. In the loaning of money to a municipality it would be necessary to investigate its statutory power to borrow money and to give its notes payable in the future; such powers are not implied from the usual powers of administration or from the power to levy taxes to defray necessary corporate expenditures. It would seem necessary to investigate just what municipal officers were authorized to execute the corporate obligation in such cases. (*Inquiry from N. J.*, Aug., 1918.)

Indorsement by corporation of renewal note

2384. A gave a note to B Corporation for goods sold, and at maturity, by arrangement with B for renewal of part of the debt, paid the note to the holding bank and executed a new note for a less amount. The B Corporation indorsed and discounted the renewal note. *Opinion:* The transaction constituted a renewal and not a payment, and the new note is based on the same consideration as the old note. The indorsement of the B Corporation is therefore not for accommodation, and the bank can hold the corporation in the event of non-payment by the maker. *Flanagin v. Hambleton*, 54 Md. 222. *McElwee v. Met. Lumber Co.*, 69 Fed. 302. *Lee v. Hollister*, 5 Fed. 752. (*Inquiry from Wis.*, Oct., 1915, *Jl.*)

By-law of co-operative association providing for members sharing liability on its notes

2385. A bank inquires as to the effect of the following by-law of a co-operative association as limiting the liability of the maker: "These notes shall be the property of the Association and shall be used by the Board of Directors as collateral security with which to borrow needed money for the Association's business. Whenever these notes are de-

posited as security for a loan all the members shall individually share the liability in proportion to the face value of their respective notes." *Opinion:* If the bank took the collateral notes without knowledge of the by-law, there would be no question as to their enforceability for the full amount due on the note of the co-operative association. A person to whom negotiable securities are pledged as collateral is a holder for value to the extent of the amount due to him. *Fifth Nat. Bank v. McCrory*, 177 S. W. (Mo.) 1058. But even assuming knowledge on the part of the bank of the by-law, it is to be construed as regulating the liability on the notes between the members and is not intended to limit the right of the holder of any of these notes as collateral to enforce payment from the maker up to the full amount thereof. (*Inquiry from Wash.*, Feb., 1918.)

Collateral notes

Form of collateral note

2386. A bank submits a form of collateral note which it desires to use in connection with a stock and bond power form for registered bonds and stocks. It contains clauses on the following subjects: increased interest after maturity; waiver of presentment, protest, etc.; guaranty of payment by each signer and indorser; charge of personal and separate estate of each party with payment of note; transfer of specified collateral for security; power of bank or its assigns to sell collateral in case of depreciation in value, with or without notice; power to apply surplus of collateral or proceeds to any other liability of maker; deduction of expense of realizing on collateral and application of net proceeds only; right of bank or assignees to purchase collateral; and other minor provisions. The bank asks if this is a good form. *Opinion:* The form submitted would seem to give the bank ample protection. Although probably not essential in the particular case, some forms provide that the collateral is delivered to secure "any note given in extension or renewal." Some forms also provide that the note and all other obligations of the maker to the bank shall become forthwith due and payable upon failure to make part payment or deliver additional securities upon three days' notice that the collateral has depreciated in value, upon the failure or insolvency of the maker or upon non-payment of any of the liabilities of the maker to the bank. It might be well to add some provision of this kind. (*Inquiry from Neb.*, Dec., 1918.)

Clause maturing note upon failure to deposit additional collateral

2387. Does a provision in a collateral note authorizing the holder to demand additional security from time to time and in default thereof immediately maturing the note render it non-negotiable? *Opinion:* Such a clause destroyed negotiability under the majority of earlier decisions, as it made the note uncertain as to amount and time of payment. Since the enactment of the Negotiable Instruments Law, the question of negotiability is still doubtful, except in Wisconsin, where a special provision of the Negotiable Instruments Law makes such a note negotiable, and it would be safer for a bank to regard such note non-negotiable until the question is decided. Where such a note is held negotiable and is indorsed, the question of precise date of maturity, whether the note immediately matures upon default or only at the option of the holder, is important (1) as respects the rights of subsequent purchasers; (2) as to charging indorsers. There is a difference between the Wisconsin and federal courts upon this question. *Lincoln Nat. Bk. v. Perry*, 66 Fed. 887. *Bk. v. McGeoch*, 73 Wis. 332. *Smith v. Marlin*, 59 Iowa 645. *Bk. v. Carson*, 60 Mich. 432. *Kimball v. Mellon*, 80 Wis. 133. *Bk. v. Brew. Co.*, 16 App. D. C. 186, 17 App. D. C. 100. *Hodge v. Wallace*, 129 Wis. 84. *Gillette v. Hodge*, 170 Fed. 313. (*Inquiry from Pa., June, 1910, Jl.*)

2388. What is the effect on negotiability of the clause in a collateral note that, upon failure to deposit additional security to cover decline in value, the note shall become instantly due and payable? *Opinion:* An examination of Virginia cases fails to bring to light any in which such a clause has been passed upon. There is a decision in *Kansas (Holliday State Bank v. Hoffman*, 116 Pac. 239) upon the following clause in a collateral note which is substantially similar to the one submitted: "If, in the judgment of the holder of this note, said collateral depreciates in value, the undersigned agrees to deliver, when demanded, additional security to the satisfaction of said holder; otherwise this note shall mature at once." The court held under the Negotiable Instruments Act that the clause destroyed the negotiability of the note because (1) it contained a promise to do an act in addition to the payment of money and (2) the date when it is to become due is uncertain. See, also, *Bank v. Dresser*, 132 La. 532. *Reynolds v. Vint*, 114 Pac. 526.

There are cases of somewhat contrary import in the Federal Court, i. e., *Kenedy v. Broderick*, 216 Fed. 137 (1914) and *Smith v. Nelson Land & Cattle Co.*, 224 Fed. 56 (1914). It seems, however, that in case the note was held non-negotiable, the accommodation indorser would be liable as guarantor of its payment. (*Inquiry from Va., Dec., 1915.*)

Clause maturing note if collateral depreciates or additional security not deposited

2389. Is negotiability of a note affected by the clause that it shall mature if in the opinion of the holder the collateral deposited as security depreciates or becomes insufficient and the maker or indorsers refuse to give additional satisfactory security without a provision that the holder must first make demand therefor? *Opinion:* The note is apparently non-negotiable. In *Holliday State Bank v. Hoffman*, 85 Kan. 71, a similar clause, providing, however, for demand by the holder, was held to render the instrument non-negotiable because (1) it contained a promise to do an act in addition to the payment of money; (2) the day when it is to become due is uncertain. It has also been held, under the Negotiable Instruments Act, that a note providing that whenever the payee deems himself insecure he may declare it due, even before maturity, is non-negotiable. *Reynolds v. Vint*, 144 Pac. (Ore.) 526. *Bright v. Offield*, 143 Pac. (Wash.) 159. (*Inquiry from Miss., Aug., 1917.*)

Clause permitting sale of collateral

2390. Is negotiability of a note affected by the clause that the holder may sell the collateral at public or private sale and apply the proceeds to payment of the note and that the holder may himself become the purchaser? *Opinion:* Negotiability is not affected. (*Inquiry from Miss., Aug., 1917.*)

Authority to sell collateral on non-payment

2391. Is negotiability of a note affected by a provision authorizing the sale of collateral if it is not paid at maturity? *Opinion:* Negotiability is not affected. (*Inquiry from Okla., May, 1918, Jl.*)

Provision authorizing holder to take and sell mortgaged property

2392. Is a combined note and chattel mortgage negotiable where it contains, among other things, a provision that if the holder shall at any time feel himself unsafe

he may seize and sell the mortgaged property? *Opinion:* The provision referred to renders the note non-negotiable in Iowa. See Iowa Nat. Bank v. Carter, 123 N. W. (Iowa) 237. (*Inquiry from Iowa, Aug., 1914.*)

Combined note and chattel mortgage

2393. Is it proper to use in Iowa an instrument in the nature of a combined note and chattel mortgage? *Opinion:* There is nothing illegal or invalid about a contract of this nature and if it was duly filed it would secure the pledged chattels. Its negotiability is treated infra, opinion 2392. (*Inquiry from Iowa, Aug., 1914.*)

Illinois Central stock interest certificates

2394. For many years a bank has carried Illinois Central stock interest certificates, payable with certain provisions and options, in the bond account with the approval of the bank examiner. The bank inquires whether they should be classed as stock or as collateral notes. *Opinion:* It seems these certificates might be classed as collateral notes more properly than as stock. The holder thereof does not receive dividends, but a fixed rate of interest. A certificate of stock represents a share in the ownership, while an interest certificate is a promise to pay. It seems, therefore, that these certificates should not be classed as stock, but as promises to pay. (*Inquiry from Ill., Oct., 1919.*)

Assignment of collateral

2395. Does the simple indorsement of the payee of a collateral note thereon transfer the collateral to the indorsee and give him the right to enforce the lien on the property? *Opinion:* It is a general rule that an assignment of a note secured by collateral operates as a transfer of the security unless there is an express agreement to the contrary. Campbell v. Roeder, 44 Mo. App. 324. Tilden v. Stilson, 49 Neb. 382. Langdon v. Buel, 9 Wend. (N. Y.) 80. It would be well, however, to make specific provision that the "assigns" of the payee have the same power as he is given to declare the note due before maturity and to sell the collateral and apply the proceeds on the note, as it is not entirely clear that the assignee would otherwise have the power. (*Inquiry from Ind., Jan., 1913.*)

Judgment notes

Advantages of judgment notes

2396. What advantages, if any, has a

judgment note over a plain promissory note? What action is necessary in Illinois on a past due judgment note? Does the note have to be a matter of record? *Opinion:* 1. The obvious advantage of a judgment note over a plain promissory note is the celerity with which the holder of the former can have his judgment entered, as compared with the drawing and service of pleadings and the trial of the action in the latter case. 2. The note, of course, must be made a matter of record. In Illinois, during the vacation of court, judgments by confession can be entered only by the clerk. No order by the judge is required; and in fact the judge has no power during the vacation to order the entry of judgments by confession. But during the term such judgments can be entered only in open court. Starr & Curtis Anno. Ill. Stat., Chap. 110, Sec. 66, also, Conklin v. Ridgely, 112 Ill. 36. Ling v. King, 91 Ill. 571. Durham v. Brown, 24 Ill. 93. Ottawa First Nat. Bk. v. Daly, 34 Ill. App. 173. Anderson v. Field, 6 Ill. App. 307. (*Inquiry from Ill., Sept., 1913.*)

Validity of judgment note

2397. Is a note containing a clause waiving presentment, etc., and confessing judgment if payment is not made at maturity valid? *Opinion:* The note is valid. (*Inquiry from Del., Feb., 1912, Jl.*)

Clause authorizing confession of judgment at any time

2398. The following clause appears in a note: "We, the makers and indorsers of this note hereby irrevocably authorize and constitute any attorney at law, for us and in our name and stead, at any time hereafter in any court of record, during term time or vacation to waive service of process and confess judgment herein and to file a cognovit therefor, releasing all errors, waiving the right of appeal and writ of error therein, and consenting to the immediate issue of execution, and we hereby ratify and confirm all our said attorney may do by virtue hereof." Does the clause affect negotiability? *Opinion:* The Negotiable Instruments Act provides that the negotiable character of an instrument otherwise negotiable is not affected by a provision which "authorizes a confession of judgment if the instrument be not paid at maturity." But this instrument authorizes confession at any time, and this would probably be held to destroy the negotiability of the note. Wisconsin Yearly Metting v. Babler, 115 Wis. 289, 91 N. W.

678. *Milton Nat. Bank v. Beaver*, 25 Pa. Super. Ct. 494. (*Inquiry from Colo., Oct., 1915.*)

2399. Does a clause in a note authorizing confession of judgment "at any time" destroy its negotiability? *Opinion:* Negotiability is destroyed. See preceding opinions. (*Inquiry from Pa., Nov., 1914, Jl.*)

2400. Does the provision in a note that the maker will "confess judgment for the above sum with 5 per cent. added for collection fees" affect negotiability? *Opinion:* Where a promissory note contains a clause authorizing confession of judgment without the restriction "if not paid at maturity" so that thereunder judgment may be entered at any time, negotiability of the note is destroyed. The Negotiable Instruments Act declares that negotiability is not affected by a provision which authorizes confession of judgment if the instrument is not paid at maturity and a note conforming to this provision would be negotiable. Pa. Laws, 1909, p. 260, No. 169 et seq. *Milton Nat. Bk. v. Beaver*, 25 Pa. Super. Ct. 494. *Hipple v. Stoner*, 14 Pa. Co. Ct. 631. Pa. Laws, 1901, p. 194. *Neill & Co. v. Dawson*, 11 Pa. Co. Ct. 633. *Elgin First Nat. Bk. v. Russell* 124 Tenn. 618, 139 S. W. 734. *Wisconsin Yearly Meeting v. Babler*, 115 Wis. 289, 91 N. W. 678. (*Inquiry from Pa., June, 1919, Jl.*) (*Similar inquiry from Pa., Dec. 1911, Jl.*)

Authority to confess judgment if not paid at maturity

2401. Is negotiability of a note affected by authorization therein to confess judgment if payment is not made at maturity? *Opinion:* Such authorization does not render the note non-negotiable. (*Inquiry from Del., Feb., 1912, Jl.*)

Unfilled blanks in confession of judgment clause

2402. A bank submits a note containing the following clause with the blanks unfilled: "And further...do hereby empower any Attorney of any Court of Record within the United States or elsewhere to appear for . . . and after one or more declarations filed, confess judgment against . . . as of any term for the above sum with Costs of suit and Attorney's commission of . . . per cent for collection and release of all errors, and without stay of execution, etc." Does the clause in that form affect negotiability? What if the blanks were properly filled out? *Opinion:* If the blanks are not filled, ne-

gotiability of the note is not affected. However, if the blanks are filled, the rule is applicable that a clause authorizing the confession of judgment before maturity destroys negotiability, for the clause seems to authorize the confession of judgment at any time. *Sweeney v. Thickstun*, 77 Pa. 131. *Overton v. Tyler*, 3 Barr (Pa.) 346. *Wisconsin, etc., Meeting v. Babler*, 115 Wis. 289. (*Inquiry from Pa., May, 1915.*)

Negotiability of judgment note

2403. A promissory note contains a clause empowering any attorney of record "to appear for and confess judgment for the above sum, with or without declaration, with costs of suit, release of errors, without stay of execution." *Opinion:* The provision would destroy negotiability of the note, as thereunder judgment could be entered up before maturity. Such notes were held non-negotiable in Pennsylvania before the Negotiable Instruments Act, and that act makes the note negotiable only where the clause authorizes confession of judgment "if the instrument be not paid at maturity." *Overton v. Tyler*, 3 Barr (Pa.) 346. *Milton Nat. Bk. v. Beaver*, 25 Pa. Super. Ct. 494. *Wisconsin, etc., Baptists v. Babler*, 115 Wis. 289. *First Nat. Bk. v. Russell*, (Tenn.) 139 S. W. 734. (*Inquiry from Pa., May, 1915, Jl.*)

Suggestion of negotiable form of confession of judgment

2404. Judgment notes in the following form are held non-negotiable in Wisconsin: "I hereby authorize any attorney of any Court of Record to appear for me in such Court at any time hereafter, and confess a judgment without process, in favor of the holder of this note, for such amount as may appear to be unpaid thereon, whether due or to become due, etc." *Clark v. Tallmadge*, 176 N. W. (Wis.) 906. A bank asks for a form which will be negotiable. *Opinion:* Under the Negotiable Instruments Act the negotiability of an instrument is not affected by a provision which "authorizes a confession of judgment if the instrument be not paid at maturity." The trouble with the above form is that it authorizes a confession "at any time hereafter," and the courts of Wisconsin hold that a note authorizing a confession of judgment before maturity is not negotiable. *Clark case, supra*; *Wisconsin Yearly Meeting, etc., v. Babler*, 115 Wis. 289, 91 N. W. 678. To render the form negotiable it should be changed to read as

follows: "I hereby authorize any attorney of any court of record to appear for me in such court at any time *after maturity* and confess a judgment without process in favor of the holder of this note for such amount as may appear to be unpaid thereon." (*Inquiry from Wis., Jan., 1921.*)

Power of attorney on back binds first indorser only

2405. On the back of a note there is an assignment thereof with power of attorney to confess judgment which form is entirely enclosed in a box or border. Can judgment be entered against other indorsers than the person signing the assignment under seal and within the box? *Opinion:* It seems that even without the border line the confession of judgment would bind only the indorser signing the same and not subsequent indorsers. This is in analogy to the provision of the Negotiable Instruments Act that where a waiver is embodied in the instrument itself, it is binding upon all the parties thereto, but where it is written above the signature of an indorser it binds him only. A power of attorney to confess judgment is strictly construed against the party in whose favor it is given. *Morris v. Bank of Commerce*, 4 S. W. (Tex.) 246. *Vincent v. Herbert*, 2 Houst. (Del.) 425. *Kahn v. Lesser*, 72 N. W. (Wis.) 739. It would be well that the face of the note contain a clause authorizing confession of judgment against all makers and indorsers. (*Inquiry from Pa., July, 1919.*)

Entry of judgment against indorser

2406. Can judgment be entered against the indorser of a judgment note without suit? *Opinion:* Whether judgment can be entered against the indorser depends upon whether the power of attorney so provides or is limited to the entry of judgment against the maker. (*Inquiry from Ill., March, 1919.*)

Discharge of surety

2407. Is a surety who consents to the entry of judgment on a judgment note prior to maturity discharged by such entry? *Opinion:* The liability of the surety is not affected by the entry. (*Inquiry from Pa., Nov., 1914, Jl.*)

Judgment note does not cover new loan

2408. A, who borrowed \$5,000 from a bank, executed a promissory note for \$5,000 and also a judgment note for a like sum which was duly filed with the prothonotary

of the county. After he had paid \$3,000, he requested a new loan of \$3,000. The bank questions the advisability of taking a new judgment note or of permitting the old judgment note to cover the old and new debts. *Opinion:* The old judgment note would not be enforceable for the amount of the new loan, and a new judgment note should be taken. *Stew. Pur. Pa. Dig.* (13th Ed.), Vol. 2, 2036, 2037. *Borough v. Hallett* (Pa.) 83 Atl. 66. *Philadelphia v. Johnson*, 208 Pa. 645. *Ely v. Karmany*, 23 Pa. 314. *Neff v. Barr*, 14 Serg. & R. (Pa.) 166. *Martin v. Rex*, 6 Serg. & R. (Pa.) 296. *Fraley's Appeal*, 76 Pa. 42. *Sweeney v. Thickstun*, 77 Pa. 131. *Overton v. Tyler*, 3 Barr Pa. 346. *Pearce v. Walters*, (Pa.) 78 Atl. 832. *Citizens Nat. Bk. v. Hileman*, (Pa.) 82 Atl. 770. (*Inquiry from Pa., Sept., 1916, Jl.*)

Installment notes

Transferee of note where installment overdue not a holder in due course

2409. A note reads as follows: "In installments of \$50 per month, beginning with August 1, 1918, I promise to pay to the order of John Doe the amount of \$2,000, with interest at the rate of 6 per cent. per annum, payable monthly. Value received. (Signed) Wm. Smith." The reverse side of the note showed that the installment due September 1, 1918, was not paid until September 15, 1918, and that the payment due January 1, 1919, was not paid until January 28, 1919. Would the subsequent purchaser of this note be considered a holder in due course? What procedure would have to be taken to preserve the liability of the indorser who indorsed unqualified in case one or several of the installments should not be paid at their respective maturities? In other words, would notice have to be given to the indorser immediately upon the failure of the maker of the note to meet the installment when due? *Opinion:* In the case of a note payable in installments, if an installment is overdue at the time the instrument is transferred, the purchaser takes the whole note as overdue paper and is not a holder in due course. *Hall v. Wells*, 24 Cal. App. 238, 141 Pac. 53. *Field v. Tibbetts*, 57 Me. 358. *Vinton v. King*, 4 Allen (Mass.) 562. *Blank River Sav. Bank v. Edwards*, 10 Gray (Mass.) 387; *McCorkle v. Miller*, 64 Mo. App. 153. *Norwood v. Leeves*, (Tex. Civ. App.) 115 S. W. 53. In case the defaulted installment is paid before the transfer of the note, some authorities indicate that a subsequent purchaser for

value before the due date of the note is a holder in due course (*Vette v. LaBarge*, 64 Mo. App. 179); but under the Negotiable Instruments Law, which provides that a holder must have acquired the instrument without notice that it had been previously dishonored, the question is uncertain. An indorser is released by failure to give notice of dishonor upon non-payment of an installment, but, according to some authorities, the release applies only to the particular installment and not to subsequent installments, notice of non-payment of which is given. (*Inquiry from Colo., Nov., 1919, J.L.*)

Note payable to order of bank to be paid into maker's industrial savings account

2410. A note promising to pay to order of a bank a stated amount, in installments, contains on its back a provision for payment into the maker's "Industrial Savings Account No. \$..... in the manner and on the dates following And I do hereby assign and transfer all my right, title and interest in an to said Savings Account No. to the said bank," with the right in it to apply all money in the account upon the note until fully paid." Is such note legal and negotiable? *Opinion:* The note no doubt is an enforceable legal contract according to its terms, but it probably would be held not sufficiently definite and certain, as to time and manner of payment, to comply with the requirements of negotiability. It is made payable to the bank, but this is qualified by making the money payable into the maker's account, and by the right in the bank to take it out of the account at any time. (*Inquiry from Wis., July, 1917.*)

Conditional sales notes

Filing of copy

2411. Is it necessary in order to preserve the lien to file an original conditional sales note with the county register of deeds or will a certified copy of the note do as well? *Opinion:* A true copy will do as well as the original under the law of Minnesota. (*Inquiry from Minn., Feb., 1921.*)

Live-stock notes

Negotiability affected by provisions as retaking possession, keeping and non-removal of stock

2412. A note given for the purchase price of live-stock contains the following

provisions: "This note is given for the purchase of _____ which are to remain the property of The Peoples State Savings Bank until this note is paid in full. In case of any default of mine in the performance of any condition herein, the owner of this obligation is entitled to retake possession of said property without notice or demand. Said _____ are to be kept on the farm of _____ in the Township of _____ Lenawee County, Michigan, and are not to be removed without the written consent of said Peoples State Savings Bank." The Federal Reserve Bank holds the note non-negotiable. Is it negotiable? The Peoples State Savings Bank desires a form of note which will hold the stock as security and still be negotiable. *Opinion:* The statement of the consideration for the note does not affect its negotiability, nor does the statement that the title to the property is to remain in the payee until full payment. *Chicago Railway Equipment Co. v. Merchants National Bank*, 136 U. S. 268. The objectionable features on the score of negotiability are doubtless the provisions respecting retaking of possession, the place of keeping the stock and the non-removal without consent. The Negotiable Instruments Act provides that an instrument which contained an order or promise to do any act in addition to the payment of money is not negotiable, and the features last mentioned are doubtless deemed by the Federal Reserve Bank, and might be held by the courts, to destroy the negotiability of the note.

It might be wise to frame an ordinary form of negotiable note and then have a separate document containing the agreement as to these other matters. (*Inquiry from Mich., Feb., 1921.*)

Consideration

Note signed by A and proceeds credited to B

2413. A building contractor asked if the owner had made a deposit of \$1500 for him, stating that the owner owed him that amount, and was informed by the bank that there had been no such deposit. Two or three days later the owner told the bank, "I want to sign up a note for" the contractor for \$1500. The note was signed by the owner and the amount credited to the contractor. The contractor defaulted and when the bank notified the owner that his note was coming due, the latter denied liability because of the omission of the contractor's signature, notwithstanding that nothing

had been said as to his signing the note. Can the bank enforce the note? *Opinion:* Assuming the facts can be established as stated, the case is simply one where A owed B \$1500, borrowed the money from the bank, giving his note therefor and the bank paid the proceeds to B, virtually by his direction. The transaction was not of such a character as would call for B signing the note as surety, and there would be no defense on the ground that the note was not completed because B did not sign it. The sole controversy in the case will be over the question of fact whether the bank was authorized by A to place the money to B's credit. If so, A could make no defense against the note of want of consideration. (*Inquiry from Mont., Sept., 1918.*)

Negotiability

Necessity that note be payable to order or bearer

2414. An agent took orders for books and magazines in the following form: "Please enter my subscription for 120 copies H— Weekly and World's Great War Book, for which I promise to pay \$13.00 six months after date." These orders were discounted at a bank, which on maturity of the orders notified the signers to pay. No magazine and no book was ever received. The company for which the subscriptions were taken, The G— W— Circulation Company, had gone out of business. Are the signers of the orders liable to the bank? *Opinion:* The test of liability is whether or not the orders are negotiable. Assuming that they name a payee, namely, the one to whom addressed, still they lack that essential of negotiability which is that the instrument should be payable to order or to bearer. The signers of the order may make any defense against the bank which they could have made against the original payee, and can make the defense of failure of consideration. (*Inquiry from Wis., Feb., 1921.*)

Negotiability of note payable to "order of myself"

2415. Is a note payable "to the order of myself" and indorsed over to another by the maker-payee negotiable? *Opinion:* Where the maker makes a note payable to his own order and indorses it over to another, it is equally negotiable as where it is made payable and delivered to such other person in the first instance. A note drawn payable to the order of the "drawer or maker" is expressly made negotiable by the

Uniform Negotiable Instruments Act, which further provides that "where a note is drawn to the maker's own order, it is not complete until indorsed by him." (*Inquiry from Fla., Aug., 1911, Jl.*)

Word "non-negotiable" written across face

2416. Does a note otherwise negotiable become non-negotiable by the writing of the word "non-negotiable" across its face before delivery? Is payment thereof to be had only between the payor and payee? *Opinion:* Negotiability is destroyed. The words "order" or "bearer" confer negotiability, but in this case their effect is negated by expressly writing across the face of the instrument a statement to the effect that it is non-negotiable. The note would still be assignable by the payee but it would be a mere non-negotiable contract subject in the hands of the assignee to equities between the original parties. (*Inquiry from Ida., Feb., 1921.*)

Recital of consideration

2417. Is negotiability of a note destroyed by a recital therein of the consideration therefor? *Opinion:* Negotiability is not affected. (*Inquiry from Mich., Feb., 1921.*)

Statement of transaction

2418. A promissory note had the following clause added, "The foregoing note is made and delivered in pursuance of the escrow agreement between John Smith and John Brown, dated the 31st day of May, 1917." Does the clause affect the negotiability of the instrument? *Opinion:* A note promising to pay the amount "in pursuance of escrow agreement" between A and B would probably be held negotiable on the ground that the quoted phrase was a mere statement of the transaction giving rise to the instrument rather than one making payment subject to the terms of the escrow agreement. *Klotz Throwing Co. v. Mfg. Commer. Co.*, 179 Fed. 813. *McComas v. Haas*, 107 Ind. 512. *Amer. Exch. Bk. v. Blanchard*, 7 Allen (Mass.) 333. *Post v. Kinzua Hemlock R. Co.*, 171 Pa. 615. *Parker v. American Exch. Bk.*, (Tex.) 27 S. W. 1071. *Dilley v. Van Wie*, 6 Wis. 209. *Sherman Bk. v. Apperson*, 4 Fed. 25. *Newberry v. Wentworth*, 218 Mass. 30. *Taylor v. Curry*, 109 Mass. 36. *Bates v. Independent School Dist.*, 25 Fed. 192. *Independent School Dist. v. Stone*, 106 U. S. 183. (*Inquiry from Okla., May, 1918, Jl.*)

Recital of executory consideration

2419. A note contained the provision: "this note is given for six drain heads to be delivered in good condition at (name of place)." The note was negotiated to a purchaser for value. The drain heads were never delivered. *Opinion:* The holder can enforce against the maker, because the note is negotiable. The provision above quoted is a statement of the transaction which gives rise to the instrument, and the fact that it is an executory contract which may never be performed does not make the promise to pay conditional, nor destroy negotiability according to the weight of authority. *Sears v. Wright*, 24 Me. 278. *Siegel v. Chicago Tr., etc., Bk.*, (Ill., 1890) 23 N. E. 417. *Bk. v. Cason*, 39 La. Ann. 865. *Henneberry v. Morse*, 56 Ill. 294. (*Inquiry from Minn., Oct., 1914, Jl.*)

2420. A note contains the following promise, "Please enter my name for 110 weeks' subscription to (certain publications named), for which I promise to pay to your order \$5.50 six months from date. Signed, John Smith." Is it negotiable? *Opinion:* Where a note recites that it is given for a consideration to be performed in the future, a majority of courts hold that such recital does not affect negotiability nor prevent the indorsee from enforcing free from defenses, unless at the time of acquiring the note he has knowledge of the breach of the executory agreement. The courts in a few states hold, to the contrary, that the indorsee takes subject to the performance of the executory consideration. *McKnight v. Parsons*, 136 Iowa 390. *Jennings v. Todd*, 118 Mo. 296. *Miller v. Finley*, 26 Mich. 249. *Ruble v. Davis*, 33 Neb. 283. *Porter v. Steel Co.*, 122 U. S. 267. *Sumter Co. St. Bk. v. Hayes*, (Fla.) 67 So. 109. *Heard v. Shedden*, 113 Ga. 162. (*Inquiry from Tenn., Oct., 1917, Jl.*)

2421. A bank discounted a note for \$900 given by A to B. The bank gave B for this a past due note of \$500, fully secured, and 400 cash, less discount. The \$900, note bore this notation: "For part payment of pecan trees to be delivered in November." How does the defense of payment to B affect the bank? *Opinion:* The words quoted constitute a promise to pay upon a consideration to be executed in the future. The majority of courts hold that such recital of consideration does not affect the negotiability. Assuming the note of \$900 negotiable and that the bank acquired same before maturity, it having given full value therefor,

the bank would be a holder in due course, and, it seems, could recover from A thereon free from his defense that he had paid B the \$900. (*Inquiry from Ark., Feb., 1919.*)

2422. A bank presents a form of note wherein the maker promises to pay to the order of a specified payee a sum certain on or before a definite date. It also contains an order for delivery of merchandise which constitutes the consideration thereof, and inquires whether the same contains all the elements of a negotiable promissory note. *Opinion:* The note contains all the elements of a negotiable promissory note, and the fact that it also contained an order for delivery of merchandise which constitutes the consideration did not, it seems, destroy its negotiability. There has been conflict of authority whether a note based on an executory consideration is negotiable, but the weight of authority is to the effect that where a note is given in consideration of an executory agreement or contract of the payee which has not been performed, this will not deprive the indorsee of the character of a bona fide holder unless he also has notice of the breach of the agreement or contract. See *Davis v. McCready*, 17 N. Y. 230. (*Inquiry from N. Y., Jan., 1920.*)

Note payable to "A and others" non-negotiable

2423. A note is made payable to "A, B, C, and others" because there is not room enough to insert the names of all the payees. The negotiability of the note is questioned and it is also asked how a negotiable form of note could be drawn to cover such case. *Opinion:* The note is not negotiable because of uncertainty as to the payee. Where it is desirable to draw a note to a number of payees and the blank form of the note does not provide sufficient space for their names, a special blank form with sufficient space should be provided. *Gordon v. Anderson*, 83 Iowa 224. (*Inquiry from Del., Jan., 1913, Jl.*)

Negotiability of note not payable at bank

2424. Is a note not payable at a bank negotiable? *Opinion:* Under the law of Indiana, differing from the rule under the Uniform Negotiable Instruments Law, a note to be negotiable must be payable at an Indiana bank. (*Inquiry from Ind., Jan., 1913.*)

Note: Subsequently to the rendition of this opinion the Uniform Negotiable Instruments Law was adopted in Indiana and the statutory requirement that a note, to be

negotiable, must be payable at a bank in the state is no longer in force.

"Payable at bank" clause not necessary to negotiability

2425. Bank presents a form of note and desires to know whether, under the Negotiable Instruments Law, it is best to have incorporated in the note "Payable at the S Bank," or would it be best to leave this clause out, and whether the note would be negotiable were the clause omitted. *Opinion:* The clause "payable at S Bank" is not necessary to the negotiability of the note. If the clause is retained, the note would be payable at the bank. Under the Negotiable Instruments Law, if A makes his note to order of B, payable at C Bank, and B or his indorsee presents the note to the bank for payment at maturity, the bank is not only authorized but is obliged to pay the note, the same as it would A's check, without first obtaining A's express instructions to do so. If the note was not payable at the bank, it would be necessary to make demand at the place of business or residence of the maker, while, if the note was made payable at the bank, the having it in bank at maturity would be sufficient presentment and demand. (*Inquiry from Miss., July, 1916.*)

Compound interest clause

2426. Is negotiability of a note destroyed by the clause that if any of the interest shall not be paid when due it shall itself bear interest from such time? *Opinion:* It has been held in several cases that a note is not rendered uncertain in amount or non-negotiable because of such a provision. *Gilmore v. Hurst*, 56 Kan. 626, *Brown v. Vassen*, 112 Mo. App. 676, *Barker v. Sartori*, 66 Wash. 260. (*Inquiry from Iowa, May, 1918.*) (*Similar inquiry from Iowa, Feb., 1919; Okla., Dec., 1917.*)

Effect of extension clause on negotiability

2427. A note provides that "the makers, sureties, indorsers and guarantors of this note hereby severally . . . consent that time of payment may be extended without notice thereof." Does this destroy negotiability? *Opinion:* There are cases in a few states holding that a stipulation to the effect that the indorser's consent that the time of payment may be extended without notice makes the time of payment uncertain and destroys negotiability. *Gidden v. Henry*, 104 Ind. 278, *Roseville Bk. v. Heslet*, 84 Kan. 315, *Union Stock Yards Nat. Bk. v.*

Bolan, 14 Idaho, 87, *Bk. v. Wheeler*, 75 Mich. 546. On the other hand, it is held that as such a stipulation neither confers upon the maker the right to demand an extension, nor imposes upon the payee or indorsee any duty to grant one, it cannot have such effect. *Longmont Nat. Bk. v. Lonkonen*, 53 Colo. 489, *De Groot v. Focht*, 37 Okla. 267, *First Nat. Bk. of Pomeroy v. Buttery*, 17 N. D. 326, 116 N. W. 341, *Stitzel v. Miller*, 157 Ill. App. 290. According to the weight of authority and the better reasoning, the stipulation in the note would not affect negotiability. *Cudahy Packing Co. v. Bank of St. Louis*, 134 Fed. 538, *City Nat. Bk. v. Goodlo, etc., Co.*, 93 Mo., A 125, *Nat. Bank of Commerce v. Kenny*, 98 Tex. 293. (*Inquiry from Ariz., Oct., 1918.*) (*Similar opinions rendered to inquiries from: La., Sept., 1912, Jl.; N. Y., July, 1914; S. D., Feb., 1911, Jl.; Utah, Oct., 1915.*)

Extension clause in Arizona

2428. Does the clause in a note that "each party signing or indorsing this note consents that time of payment may be extended without notice" destroy negotiability? *Opinion:* While there are apparently no Arizona cases on the question, *Navajo County Bank v. Dolson*, 163 Cal. 485, 126 Pac. 123, construing the Negotiable Instruments Law of Arizona, held that an extension agreement limited by the phrase "after maturity" did not affect negotiability. If the provision submitted here should be construed as limited to an extension "after maturity," the decision referred to would be exactly in point. (*Inquiry from Ariz., May, 1920.*)

Extension clause in Colorado

2429. A note provides that "after maturity the time of payment may be extended at the request of anyone liable hereon without releasing any maker or indorser hereof." Does this affect negotiability? *Opinion:* In Colorado such a clause does not destroy negotiability. *Longmont Nat. Bk. v. Lonkonen*, 53 Colo. 489, held that the negotiability of a note in the ordinary form is not destroyed by a stipulation therein that the makers and indorsers will consent to an extension of time of payment and partial payments, before or after maturity, as a definite time when the holder may demand payment is stated, and the period of maturity fixed, and there is nothing in the note which gives the maker, or anyone else, a

right to demand an extension or which binds the holder to give it. (*Inquiry from Colo., May, 1918.*)

Extension clause in Idaho

2430. Is negotiability of an Idaho note affected by the provision that "the drawers and indorsers severally waive . . . all defense on the grounds of extension that may be given by the holder or holders or either of them?" *Opinion:* Under the Idaho law the provision destroys negotiability. *Union Stock Nat. Bk. v. Bolan*, 93 Pac. (Ida.) 508. (*Inquiry from Utah, Oct., 1915.*)

Extension clause in Iowa

2431. Does an extension clause affect the negotiability of a note? *Opinion:* A clause in a promissory note that indorsers and guarantors agree to an extension of time without notice does not destroy its negotiability under Iowa decisions (*Farmer v. Bank of Graettinger*, 130 Iowa 469), differing from a clause whereby all parties consent to such extension, which is held in Iowa to destroy negotiability. (*Cedar Rapids Nat. Bank v. Weber*, [Iowa, 1917] 164 N. W. 233. *Quinn v. Bane*, [Iowa, 1917] 164 N. W. 788). (*Inquiry from Iowa, Jan., 1920, Jl.*)

2432. Is negotiability of a note affected by a clause providing that the makers, indorsers, etc., consent to extensions of time of payment without notice "but not for a period or periods aggregating more than ten years from this date?" *Opinion:* Under the Iowa decisions, it would seem that negotiability is destroyed, unless it could be held that the words within the quotation marks make the time of payment sufficiently certain to preserve negotiability. See *State Bank v. Bilstad*, 162 Iowa 433, where the court stated: "If the contract made is certainly to be performed at some definite time in the future its negotiability is not destroyed." (*Inquiry from Iowa, May, 1918.*)

2433. Does the following clause in a note affect its negotiability? "We further agree to the extension of this note on payment of the interest by either of us." *Opinion:* Presumably one of the makers is principal and the others sureties, but, however this may be, it provides a consent by the makers that time of payment may be extended on payment of interest. The extension clause does not give the holder, of his own motion, an absolute right to extend

the time of payment, but contemplates a future agreement of extension between the holder and some one of the makers. Under the reasoning of the Supreme Court of Iowa the clause would destroy the negotiability of the note, because the time of payment is uncertain to all of the makers save one. The clause, "The indorsers and guarantors of this note consent that time of payment may be extended without notice thereof," would not destroy the negotiability of the note because neither the maker nor the holder could of his own motion postpone the time of payment. *Woodbury v. Roberts*, 59 Iowa 348. *Farmer v. Bk. of Graettinger*, 130 Iowa 469. *Cedar Rapids Nat. Bk. v. Weber*, (Iowa, 1917) 164 N. W. 233. *Quinn v. Bane*, (Iowa, 1917) 164 N. W. 788. (*Inquiry from Iowa, March, 1918, Jl.*)

Extension clause in Kansas

2434. A note contains the clause: "We, the makers, sureties and indorsers hereof severally . . . consent that that the maturity may be extended without notice thereof to any of the sureties." Does this affect negotiability? *Opinion:* Consent that maturity may be extended without notice to any of the sureties destroys negotiability in Kansas. In *Bank v. Guthrie*, 67 Kan. 227, followed in *Sykes v. Bank*, 69 Kan. 134 and 78 Kan. 688, a provision that the makers and indorsers agreed to all extensions before or after maturity was held to destroy negotiability. An agreement to extension after maturity would not affect negotiability. *Roseville State Bank v. Meslet*, 84 Kan. 315. (*Inquiry from Kan., March, 1919.*)

Extension clause in Missouri

2435. A note provides that "all indorsers hereto jointly and severally . . . agree to all extensions and partial payments, before or after maturity." Does this provision affect negotiability? *Opinion:* Under the law of Missouri, negotiability is not affected. *Davis v. McColl*, 179 Mo. App. 198. *City Nat. Bank v. Goodloe-McClelland Co.*, 93 Mo. App. 123. The phrase "before or after maturity" deserves special attention because in some jurisdictions, notably Kansas, such clause destroys negotiability, while a clause worded simply "after maturity" would not have such an effect. *Roseville State Bank v. Meslet*, 84 Kan. 315. (*Inquiry from Mo., Jan., 1919.*)

2436. Is negotiability of a Missouri note affected by the provision that "the

makers and indorsers each...severally agree that the time may be extended without notice?" *Opinion*: Under the Missouri law negotiability is not affected. *Davis v. McColl*, 179 Mo. App. 198. (*Inquiry from Missouri, May, 1918, Jl.*)

Extension clause in Oklahoma

2437. Is negotiability of a note affected by the provision that "the drawers, indorsers, sureties and guarantors severally...agree that the time of payment may be extended without notice to them or without their consent and without affecting their liability?" *Opinion*: This provision does not affect negotiability in Oklahoma. *City Nat. Bank v. Kelly*, 151 Pac. (Okla.) 1172. This rule does not apply in all jurisdictions. (*Inquiry from Okla., Dec., 1917.*) (*Similar inquiry from Okla., May, 1918, Jl.*)

Extension clause in Tennessee

2438. Is negotiability of a note affected by an indorsement providing that the makers and indorsers agree to all extensions before or after maturity without prejudice to the holder? *Opinion*: The note would be negotiable under the law of Tennessee. In *Bank of Whitehouse v. White*, 191 S. W. 332, decided by the Supreme Court of Tennessee, the note contained a clause as follows; "We authorize the holder hereof to extend the payment of the same, or any part thereof, without impairing our joint and several liabilities, and the sureties agree to waive notice of any extension of time." The court held that the negotiability of the note was not destroyed by the above provision. It said: "We construe the clause in the note, quoted above, to relate and to give assent to extensions that may be granted at or after maturity, the date of which is set forth with certainty in the note; or to an extension which, if made prior to maturity, has operative effect as from the time when the note falls due according to tenor; and we are of opinion that when so construed the clause should not render the note non-negotiable, whether we view the question from a standpoint of principle, precedent, or policy. (*Inquiry from Tenn., Sept., 1918.*)

Clause that sureties agree to renew

2439. A bank desires to know if the following clause in a promissory note will affect its negotiability: "The...sureties agree to renewal of same without notice to them." *Opinion*: In Kansas a distinction

has been drawn in at least one decision between provisions which authorize an extension of time of payment "after" maturity and those which authorize an extension of time "before" maturity, it being held that the authority to extend the time, where it can be exercised only after maturity, does not affect negotiability, but, if the authority is to extend "before" or "before or after" maturity, the instrument is not negotiable. (*Rossville State Bank v. Heslet*, 84 Kan. 315, 113 Pac. 1052. And see *City Nat. Bank v. Gunter*, 67 Kan. 227, 72 Pac. 842.) A renewal, as distinguished from a mere extension, is usually evidenced by a new note or other instrument. If "renewal," as used in the form of note under consideration, is to be held synonymous with "extension" then, under authority of 84 Kan. 315, 113 Pac. 1052, this note would be held non-negotiable in Kansas. In order to render this form of note negotiable beyond any cavil or question, the clause with regard to extension might be made to read: "And the makers, sureties and indorsers of this instrument severally agree to any renewal of same at or after maturity without notice to them. (*Inquiry from Kan., Nov., 1920.*)

Negotiability of note containing statement that instrument is renewal note

2440. A form of note is submitted containing the following clause: "This note is executed, delivered and accepted, not in payment, but for the purpose of extending the time for payment of a certain note dated ———, which note is secured by a chattel mortgage" * * * A bank desires to know its effect as to negotiability and validity. *Opinion*: Such form of note has apparently not come before the courts for interpretation. The Negotiable Instruments Act provides that the promise to pay is unconditional and the note negotiable "though coupled with * * * a statement of the transaction which gives rise to the instrument." The note appears to be negotiable. (*Inquiry from S. D., Feb., 1919.*)

Provision that unpaid interest and principal shall bear increased rate after maturity

2441. Is negotiability of a note affected by a provision that unpaid interest and principal shall bear interest at a greater rate after than before maturity? *Opinion*: Such a stipulation does not affect negotiability. *Merrill v. Hurley*, 6 S. D. 592, 62 N. W. 958. (*Inquiry from S. D., Aug., 1919, Jl.*)

Clause giving justice of peace jurisdiction up to \$300

2442. What effect has the provision in a note consenting that any justice of the peace may have jurisdiction up to the amount of \$300? *Opinion:* This clause does not affect negotiability but is useless and might well be omitted, as jurisdiction cannot be conferred by the consent of the parties. However, in the present instance, justices of the peace have jurisdiction up to the stated amount under the Iowa code. (*Inquiry from Iowa, May, 1918.*) (*Similar inquiry from Iowa, Feb., 1919.*)

Option to holder to declare note due before maturity

2443. A note contains a clause: "It is agreed that failure to pay any one note at maturity shall, at the option of the holder, mature all unpaid notes of this series." *Opinion:* There is conflict of authority as to the effect this clause has upon the negotiability of the note, and it would not be safe for a bank to treat it as negotiable unless located in a jurisdiction where the law was known to be favorable. *Chicago Ry. Co. v. Merchants Bk.*, 136 U. S. 268. *Ackley School Dist. v. Hall*, 113 U. S. 135. *Story Prom. Notes*, Sec. 27. *Cota v. Buck*, 7 Metc. (Mass.) 588. *Clark v. Skeen*, 61 Kan. 526. *First Nat. Bk. v. Garland*, 160 Ill. App. 407. *Pierce v. Talbot*, (Mass. 1913) 100 N. E. 553. *Stutts v. Silva*, 119 Mass. 137. *Nat. Bk. v. Cartes*, (Iowa) 123 N. W. 237. (*Inquiry from Md., May, 1913, Jl.*)

2444. Does the clause: "Both the maker and indorser agree it may become due on demand at the option of the holder" destroy the negotiability of a note? *Opinion:* A clause giving the holder the option to mature the note upon demand probably destroys the negotiability of the note in Iowa. *Bank v. Arthur*, 163 Iowa 205. *Iowa Nat. Bank v. Carter*, 144 Iowa 715. But see *State Bank v. Bilstad*, 136 N. W. (Iowa) 204. So far as other jurisdictions are concerned, a certain line of decisions indicates that the giving of such unconditional power to the holder renders the note non-negotiable. *Mahoney v. Fitzpatrick*, 133 Mass. 151. *Richards v. Barlow* 6 N. E. (Mass.) 68. A like rule has been applied where the holder is given the option to declare the whole note due whenever he deems himself insecure. *New Windsor, etc., Bank v. Bynum*, 84 N. C. 24, *Machine*

Co. v. Burnett, 82 Ore. 174, 161 Pac. 384. *Continental Nat. Bank v. McGeoch*, 73 Wis. 332. *Kimpton v. Studebaker Bros. Co.*, 14 Ida. 552, 94 Pac. 1039. *Puget Sound Nat. Bank v. Nat. Paving Co.*, 94 Wash. 504, 162 Pac. 870. *Carroll County Sav. Bk. v. Strother* 28 S. C. 504. *Contra: Heard v. Dubuque County Bank*, 8 Neb. 10. (*Inquiry from Iowa, Jan., 1920, Jl.*)

Option to declare note due on non-payment of interest

2445. A note contained the following provision: "Said interest payable quarterly, and if not paid when it becomes due, the principal and all accrued interest shall at the election of the payee immediately become due and payable." *Opinion:* In California this provision destroys the negotiability of the note, but this is contrary to the weight of authority. *Smiley v. Watson*, (Cal.) 138 Pac. 367. (*Inquiry from Cal., Oct., 1914, Jl.*)

Note: The Uniform Negotiable Instruments Act, adopted in California in 1917 (subsequent to the above opinion), expressly provides that "the sum payable is a sum certain within the meaning of this act, although it is to be paid *** 3, by stated installments, with a provision that upon default in payment of any installment or of interest, the whole shall become due." This Act changes the previous rule in California.

2446. Does the clause in a note that "the holders may elect to consider the whole amount due and collectible at once if the interest is not paid at the time specified" destroy negotiability? *Opinion:* The option to hasten maturity upon default in the payment of interest does not affect negotiability. *Merrill v. Hurley*, 6 S. D. 592, 62 N. W. 958. (*Inquiry from S. D., Aug., 1919.*)

Negotiability of note payable "In New York Exchange"

2447. A bank is offered for discount three notes payable at Richmond, Virginia, "in New York exchange," and questions whether this phrase makes the notes non-negotiable. *Opinion:* It would be safer for the bank to proceed on the theory that the notes were non-negotiable, as the decisions conflict upon the negotiability of notes so payable. *Chandler v. Calvert*, 87 Mo. App. 362. *Hogue v. Edwards*, 9 Ill. App. 153. *Security Tr. Co. v. Des Moines County*, 198 Fed. 331. (*Inquiry from Va., Jan., 1916, Jl.*)

Negotiability of note payable "On or before" specified date

2448. Is a note payable "on or before" a specified date negotiable? *Opinion:* It is a negotiable instrument and to hold the indorser must be presented at maturity and the indorser notified. The provision "on or before" gives the maker an option to pay before maturity and possibly save interest. (*Inquiry from N. Y., Nov., 1909, Jl.*)

Clause agreeing that sureties shall be liable as principals and consenting that holder may release other makers on renewals

2449. A bank desires to be informed whether the following clause would affect the negotiability of a promissory note: "It is further agreed that the signers of this note, whether sureties in fact or not, shall all be regarded as principals as between them and the holders hereof, and we hereby consent that any or all other makers, sureties, guarantors or indorsers may be released by the holder hereof on renewal notes without previously securing our consent to that effect." *Opinion:* In *Hatch & Co. v. Nat. Bk. of Chambersburg*, 79 Ga. 542, it was held that a clause in a promissory note providing that the indorsers contract as makers and agree as to the holders to be held liable as makers did not affect negotiability. With respect to the release of prior parties, the rule is, both under the law merchant and the Negotiable Instruments Act, that if the maker, the acceptor, or any other party is released by the holder of the paper, this will operate as a discharge of all subsequent parties to the instrument, unless they consent thereto. *Mulnix v. Spratlin*, 10 Colo. App. 390, 50 Pac. 1078. *Rockville Nat. Bk. v. Holt*, 58 Conn. 526. *Ludwig v. Inglehart*, 43 Md. 39. *Arlington Nat. Bk. v. Bennett*, 214 Mass. 352. *Bruen v. Marquard*, 17 Johns. (N. Y.) 58. *Davis v. Gutheil*, 87 Wash. 596. Since this rule is obviously for the protection of the obligor, it may undoubtedly be waived by the obligor, and there is no reason why the consent may not be given in advance. The clause in question, it would seem, would not affect the negotiability of the instrument. (*Inquiry from Iowa, June, 1910.*)

Note retaining vendor's lien

2450. Negotiability of the following note is questioned: "This note is secured by a vendor's lien retained on the (description of real estate)

.....Jan.....1917.

On or before.....after date I promise to pay to the order of \$500.00 Five Hundred and no/100 Dollars with interest from date at the rate of per cent. until paid.

Value received.

Signed....."

Opinion: In most jurisdictions, including Arkansas, a provision in a note reserving title or retaining lien upon the property for which the note is given, until payment, does not destroy negotiability. But a provision that the note is subject to a certain deed would make the instrument non-negotiable, *South Bend Iron Works v. Paddock*, 37 Kan. 510. *Killam v. Schoeps*, 26 Kan. 310. *Montgomery First Nat. Bk. v. Slaughter*, 98 Ala. 602. *Exch. Nat. Bk. v. Steele*, 109 Ark. 107. *Farmer v. First Nat. Bk.*, 89 Ark. 132. *Pyson v. Ruohns*, 120 Ga. 1060. *Fleetwood v. Dorsey Mach. Co.*, 95 Ind. 491. *Ex. p. Bledsoe*, 180 Ala. 586. *Jenkins v. Caddo Parish*, 7 La. Ann. 559. *Sherman Bk. v. Apperson*, 4 Fed. 25. *Wilson v. Campbell*, 110 Mich. 580. (*Inquiry from Ark., April, 1917, Jl.*)

Negotiability not affected by waiver of presentment, protest and notice

2451. Does a clause in a note waiving presentment, protest and notice destroy negotiability? *Opinion:* Under the negotiable Instrument Law such a clause does not affect negotiability. (*Inquiry from Del., Feb., 1912, Jl.*) (Similar replies to inquiries from Iowa, May, 1918; Kan., March, 1919; La., Sept., 1912, Jl.; Mo., Jan., 1919, May, 1918; N. Y., July, 1914; Okla., Dec., 1917 (citing *City Nat. Bank v. Kelly*, 151 Pac., (Okla.) 1172; S. C., Feb., 1918, S. D., Feb., 1911; Utah, Oct., 1915.)

Negotiability not affected by waiver of homestead and exemption rights

2452. Does a waiver of homestead and exemption rights affect the negotiability of a note? *Opinion:* The Negotiable Instruments Act expressly provides that negotiability is not affected by a provision which "waives the benefit of any law intended for the advantage or protection of the obligor." The provision in question does not destroy negotiability. (*Inquiry from Fla., Aug., 1911, Jl.*) (Similar inquiries from Colo., Oct. 1915; La., Sept, 1912, Jl; Utah, Oct. 1915.)

Reasonable time for negotiation of demand note

2453. Is it a good defense against a

demand note by one who purchased it four months after its date that it had been paid to the payee who was not required to surrender it? As evidence of payment the maker has his returned check for the amount of the note, without interest, dated twelve days after the issuance of the note and his testimony that he did not take up the paper because he believed the payee's statement that it had been destroyed. Is this sufficient proof of payment where the note does not bear interest? Is the maker estopped because of his failure to take up the note?

Opinion: The right of recovery both at common law and under the Negotiable Instruments Act depends upon whether the negotiation of the note four months after its date is within a reasonable time so as to constitute the purchaser a holder in due course free from such defenses as that set up. Under the act, in determining what is a reasonable time, regard is to be had to the nature of the instrument and the facts of the particular case. The authorities vary greatly as to the time at which a demand note becomes overdue. For example, paper payable on demand has been held not to be overdue, under the circumstances of the particular case, when transferred in one day, (*Poorman v. Mills*, 39 Cal. 345); two days, (*Dennett v. Wyman*, 13 Vt. 485); five days, (*Stewart v. Smith*, 28 Ill. 397); seven days, (*Seaver v. Lincoln*, 21 Pick. [Mass.] 267); twenty-three days, (*Mitchell v. Catchings*, 23 Fed. 71); one month (*Ranger v. Cary*, 1 Metc. [Mass.] 369); five weeks, (*Wethey v. Andrews*, 3 Hill [N. Y.] 582); five months, (*Sanford v. Mickels*, 4 Johns. [N. Y.] 224); ten months, (*Chartered Mercantile Bank v. Dickson*, L. R. 3 P. C. 574); or two years, (*Tomlinson Carriage Co. v. Kinsella*, 31 Conn. 268). On the other hand, such paper has been held overdue in two months, (*Camp v. Scott*, 13 Vt. 387); ten weeks, (*Losee v. Dunkin*, 7 Johns. [N. Y.] 70); three months, (*Herrick v. Woolverton*, 41 N. Y. 581); four months, (*La Due v. Kasson First Nat. Bank*, 31 Minn. 33); five months, (*Bull v. Kasson First Nat. Bank*, 14 Fed. 612 [rev'd 123 U. S. 105, on ground that drawer was not injured]); six months, (*Thompson v. Hale*, 6 Pick. [Mass.] 259); eight months, (*American Bank v. Jenness*, 2 Metc. [Mass.] 288); ten months, (*Emerson v. Crocker*, 5 N. H. 159); one year, (*McAdam v. Grand Forks Mercantile Co.*, 24 N. D. 645, 140 N. W.

reasonable time after its date, and there are practically no authorities which hold that such reasonable time can be extended beyond a year.")); thirteen months, (*Cross v. Brown*, 51 N. H. 486); fourteen months, (*Wylie v. Cotter*, 170 Mass. 356); two years, (*Loomis v. Pulver*, 9 Johns. [N. Y.] 244); three years, (*Shirley v. Todd*, 9 Me. 83); four years, (*Miller v. Del Rio Min., etc., Co.*, 25 Ida. 83, 136 Pac. 448); or six years, (*Gregg v. Union County Nat. Bank*, 87 Ind. 238). No West Virginia cases have been found upon the point.

Whether negotiation of a demand note six months after date was within a reasonable time has been held a question of fact. *Philpott's Estate*, 169 Iowa 555, 151 N. W. 824. So in the present case negotiation four months after the date of the demand note presents a question for the jury, dependent upon the circumstances of the particular case. The decision of this point by the jury would seem to be the decisive one in the case, for the proof of payment would apparently be sufficient for the jury, especially since the non-inclusion of the interest would not be material as the note did not bear interest. The maker is not estopped because of his failure to take up the note. (*Inquiry from W. Va., May, 1921, Jl.*)

Negotiable advantage of demand note over note payable one day after date

2454. Is it better for a bank to have paper from its customers payable on demand or one day after date? *Opinion:* The only obvious advantage of demand paper over paper payable one day after date—and in many instances it may prove of great importance—is that the former may be freely transferred for a reasonable time after its execution and delivery without being subject to equities in the hands of a bona fide holder; whereas an instrument payable one day after date is subject to any defenses in the hands of a holder to whom it is transferred *two* days after its date that it would be subject to in the hands of the payee; such holder not being a holder in due course, since it was transferred to him after its maturity. The Negotiable Instruments Act provides that where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course; and further that in determining what is a reasonable time, regard is to be had to the nature of the instrument and the facts of the particular case. See *McLean v. Bryer*,

holding that "it is well established that paper payable on demand is due within a

24 R. I. 599, 54 Atl. 373. See, also, *Easley v. Bank*, 138 Tenn. 369, 198 S. W. 66. (*Inquiry from Kan., June, 1919.*)

Rights of holder

Enforceability of homestead exemption waiver clause against bankrupt

2455. The maker of a note containing a homestead exemption waiver clause, at once upon filing his petition in bankruptcy, prayed that his homestead be set aside as exempt. The petition was granted. Thereupon the maker assigned the property in good faith to be applied on pre-existing debts, thus leaving the holder of the note with no better security than other creditors. What are his rights? *Opinion:* The right of a bankrupt to assign exempt property was upheld in *Taylor Company v. Williams*, 139 Ga. 581, and the petition of a holder of notes containing the homestead exemption clause for an injunction to prevent the assignment was denied. The bankrupt has an assignable interest in his exempt property, and the title to such property obtained by a bona fide purchaser cannot be set aside at the instance of the holder of homestead waiver notes. The only course for the holder of such notes to take in order to protect his interest is to present his claim against the exempt property immediately upon the filing of the bankruptcy petition, and by his vigilance defeat the possibility of an assignment of such property by the debtor to a bona fide holder. (*Inquiry from Ga., June, 1915.*)

Recital that note secured by vendor's lien as notice of contents of deed

2456. The purchaser of a note reciting that it was secured by a vendor's lien took without notice that the deed allowed the grantee of the land to make payments before they were due and thus save interest. Is he chargeable with notice because of the recital and hence compelled to accept payments and allow interest in accordance with the terms of the deed, which was recorded. *Opinion:* This point does not appear to have been decided in West Virginia. It has, however, been held in some states that where a note recites that it is secured by a mortgage, the purchaser is bound to make inquiry and is put on notice of the terms of the mortgage. See, for example, *National Warehouse Co. v. Sherwood*, 165 Cal. 1, to the effect that such a note, although negotiable in form, is not negotiable in law, and that the purchaser

takes it subject to equities. But see, contra, *Thorp v. Mindeman*, 123 Wis. 149; and there are other conflicting decisions. From the above it would appear that the question is doubtful in that in some states the purchaser of the note, such as the one referred to, would take subject to the agreement in the recorded deed, while in other states the purchaser before maturity could enforce the note free from equities. (*Inquiry from W. Va., Dec., 1916.*)

Maker's defense against payee not available against discounting bank, holder in due course

2457. A bank discounted a note for \$312, given by A to the B corporation for the purchase price of stock in the corporation. Upon maturity of the note A refuses to pay same, claiming that he had an agreement with the corporation, the payee, that they would furnish him enough medical examination to pay for said note before its maturity, and in case they did not, the note would be delivered back to the maker. Can the bank legally collect this note? *Opinion:* If the note was in negotiable form, and the bank acquired same before maturity, for value, without notice of the agreement between the maker and the payee, it would have a right to recover the full amount from the maker, free from any defense which he might have against the payee corporation. (*Neg. Inst. Law S. D., Secs. 52, 57.*) (*Inquiry from S. D., March, 1917.*)

Bank holding note not obliged to charge to indorser's account in relief of maker

2458. A bank discounted for its customer three notes, the proceeds of which were credited to the indorser's account. At maturity of the notes payment was refused by the makers, who claimed fraud. The indorser checked out the credit he had received from the bank, but has a deposit with the bank sufficient to meet the notes. *Opinion:* The bank at maturity of the notes can require payment from the makers free from the defense of fraud in procurement, provided the proceeds credited to the indorser were withdrawn prior to maturity. The bank is not obliged to apply a sufficient deposit of the indorser in satisfaction of the notes, in preference to suing the makers. *Citizens Bk. v. Carson*, 32 Mo. 191. *Choateau Tr., etc., Co. v. Smith*, (Ky.) 118 S. W. 279. *Martin v. Mechanics Bk.*, 6 Harr. & J. (Md.) 235. *Fredonia Nat. Bk. v. Tommei*, 131 Mich. 674. *First Nat. Bk.*

v. McNairy, 122 Minn. 215. Dreilling v. Bk., 43 Kan. 197. Shawmut Nat. Bk. v. Manson, 168 Mass. 425. Sec. Nat. Bk. v. Weston, 170 N. Y. 250. Oppenheimer v. Radke & Co., 20 Cal. App. 518. McCasland v. South. Ill. Nat. Bk., 127 Ill. App. 37. Symonds v. Riely, 188 Mass. 470. Merchants Nat. Bk. v. Santa Maria Sugar Co., 147 N. Y. S. 498. Md. Neg. Inst. L., Sec. 78. (*Inquiry from Med., Feb., 1916, Jl.*)

Right of bank to enforce notes obtained by payee in fraudulent deal

2459. Notes were obtained by the payee in a fraudulent deal and were turned over to a bank. The maker refuses to pay one of the maturing notes. Can the bank enforce payment from the maker? *Opinion:* The right of the bank to recover will depend on whether it was a bona fide purchaser for value without notice of the fraudulent consideration. If so, it will be able to recover; but if it had knowledge of the fraudulent consideration, the notes would be subject to the defense of fraud in its hands (*Inquiry from Me., May, 1917.*)

Enforceability by holder in due course where note procured by trickery

2460. A note was obtained by trickery, the maker being under the impression that he was signing a receipt. Can a purchasing bank enforce payment? Would it be different were the note signed under duress? *Opinion:* At common law there was considerable diversity of decision as to the enforceable rights of a bona fide holder of a negotiable instrument the signature to which had been procured from the maker in the belief that he was signing an instrument of a different character; (see Putnam v. Sullivan, 4 Mass. 45; Walker v. Ebert, 29 Wis. 96, *pro.* and see Ort v. Fowler, 31 Kan. 478, *contra*); but under the Negotiable Instruments Law the title of a person who obtains a signature to a negotiable instrument by fraud or duress is not wholly void, but is defective only, and a holder in due course can enforce such instrument against the maker. (Sec. 55 Neg. Inst. Law; Gen. Stat. Kan. Sec. 6582.) (*Inquiry from Kan., Jan., 1920, Jl.*)

Knowledge of director from whom note purchased not chargeable to purchasing bank

2461. A bank purchased a note from one of its directors, who had knowledge of an infirmity which would ordinarily render the

instrument unenforceable. *Opinion:* The bank is not chargeable with knowledge possessed by its director in a case such as this where it is to his personal interest to conceal his knowledge from the bank. City Bk. of Wheeling v. Bryan, 78 S. E. (W. Va.) 400. Citizens St. Bk. v. Garceau, 134 N. W. (N. Dak.) 882. (*Inquiry from N. D., Aug., 1913, Jl.*)

Liability of parties

Indorsement of note without recourse

2462. Question is asked as to the extent of liability of a bank indorsing a note without recourse, wherein it has participated in the benefits through receiving a lower rate at the time of discount, or accommodating a customer for an excessive amount loaned. *Opinion:* An indorsement without recourse relieves the indorser from liability in case of dishonor of the instrument, but the indorser warrants the genuineness of the note and that he has knowledge of no fact which would impair its validity or render it valueless. If a bank loans money on a note at ten per cent., assuming this to be a legal rate, and rediscounts it with another bank at six per cent., indorsing it without recourse, it seems the bank would not be liable on its indorsement. If the national bank in so doing makes excess loans to its customer, beyond the 10% limit of capital and surplus to any one borrower, this is a violation of the National Bank Act. The penalty for violation is the liability which the bank incurs of forfeiture of its franchise; but the note is not invalidated for this reason and the full amount may be recovered from the borrower. (*Inquiry from Okla., Feb., 1917.*)

Note broker's liability

2463. Is a note broker liable to a purchaser through him of a note which the treasurer of a corporation, who was not authorized to borrow money for it, drew in the name of the corporation payable to it, and indorsed also in the corporate name? *Opinion:* The law makes the note broker liable for genuineness of the note and for capacity of prior parties to contract and for guilty knowledge, unless the broker "discloses the name of his principal and that he is acting only as agent." Otherwise, to procure his personal liability, his indorsement should be required; except, it may be presumed, he would be held liable in any event if he knew the paper was fraudulent. (*Inquiry from N. Y., April, 1917.*)

Provision that all parties be regarded as principals

2464. A bank sends form of note containing this clause: "It is agreed by any person, firm or corporation who writes his, her or its name on the face or back of this instrument, whether they are makers, indorsers, sureties or guarantors or not, that they or any of them shall be regarded as principals as between them or either of them and the holder hereof." The bank asks whether under this clause it can hold all the parties, whether they sign on face or back, at any reasonable time after maturity without necessity of same being protested. *Opinion:* Many forms of note contain an express waiver of protest by the parties contingently liable, and the courts have held that such waiver printed on the face of the note binds the parties who sign on the back. In the instant form of note there is an agreement on the face that indorsers, sureties or guarantors shall be regarded as principals as between them and the holder. This agreement would be binding on those signing either on the face or back, and the same would, it seems, be construed as waiving the necessity of protest as it is not necessary to make protest or give notice of dishonor to hold liable the principal on a note. (*Inquiry from Ark., Dec., 1914.*)

Extension and renewal

Binding nature of extension

2465. Is a note which has been extended past due paper or has it the standing of a renewal note? *Opinion:* Where there is a binding agreement supported by a valid consideration between the holder and maker to extend the time of payment of a note, the extension is just as binding if the contract is evidenced by indorsement on the note and the giving of a receipt for the interest for the extended period, as if a new note is taken in renewal. The effect of such an agreement indorsed on the note is to postpone the holder's right of action and the commencement of the running of the statute of limitations until expiration of the period for which extension is granted. *Ferguson v. Hill*, 3 Stew. (Ala.) 485. *Bridge v. Conn. Mut. L. Ins. Co.*, 167 Cal. 774. *Gledden v. Henry*, 104 Ind. 278. *Pearl v. Wells*, 6 Wend. (N. Y.) 291. *Condon Nat. Bk. v. Rogers*, 60 Ore. 189. *Com. Bk. v. Hart*, 10 Wash. 303. *Jones v. Fleming*, 15 La. Ann. 522. *Warren Academy v. Starrett*, 15 Me. 443. *Cook v. Landoum*, 26 Ky. Law Rep. 813. (*Inquiry from Fla., Feb., 1918, Jl.*)

Extension of demand note by payment of interest in advance

2466. Where interest has been paid in advance on a demand note, may the holder demand payment prior to the date to which interest is paid? *Opinion:* Although there is some conflict, payment of interest in advance is generally held prima facie evidence of an extension of the time of payment. Most of the cases so holding involve time notes. *Bank of British Columbia v. Jeffs*, 18 Wash. 135. *Skelly v. Bristol Savings Bank*, 63 Conn. 83, holds the general rule applicable to a demand note. *Crosby v. Wyatt*, 10 N. H. 318, holds the general rule applicable to a time note and states by way of dictum that it applies to demand notes except where the advance interest is paid at the time of execution of the note and is *not indorsed* thereon, invoking, to support the exception, the rule that a parol contemporaneous agreement may not be admitted to contradict a written contract. Even should the exception in the dictum in the *Crosby* case be good law its applicability in actual practice would be very limited. (*Inquiry from Fla., Nov., 1917.*)

Release of accommodation indorser by holder receiving interest in advance

2467. Does the extension of a note by paying up the interest for a definite period in advance affect the liability of a joint accommodation maker or an accommodation indorser? *Opinion:* Under the Negotiable Instruments Act an extension of time to the principal debtor without the consent of the accommodation joint maker does not discharge him as he is primarily liable. An accommodation indorser is only secondarily liable and is discharged under the express provisions of the act. If the receipt of interest in advance be held a binding agreement to extend for the period for which interest is paid, the indorser but not the maker is discharged. (*Inquiry from S. C., Feb., 1918.*)

Receipt of past due interest after maturity not an extension

2468. A bank, holding a note on which the liability of the indorser had been duly fixed, allowed it to remain unpaid for some two years without attempting to collect it, although several payments of past due interest were received from the maker. Is the indorser discharged because of an "extension of time?" *Opinion:* There was no extension of time such as would release the

indorser. However, had the payments of interest been made in advance they might have been prima facie evidence of an agreement to extend the time of payment. (*Inquiry from Wis., Oct., 1918.*)

Receipt of accrued interest not an extension but payment of advance interest prima facie evidence of extension

2469. Does an indorsement on a note of accrued interest operate as an extension of time, when accompanied by a partial payment of principal? Does payment of interest in advance after maturity operate as an extension of time of payment? *Opinion:* The indorsement of accrued interest would not be construed as an extension of the note although accompanied by a partial payment of the principal. As to the second question, according to the consensus of judicial opinion, proof that the holder, after maturity, received interest in advance for a period beyond its maturity is not conclusive evidence of an agreement extending the time of payment. *Uniontown Bk. v. Mackey*, 140 U. S. 220. The general rule, however, is that such payment is prima facie evidence of such an agreement. *St. Paul Trust Co. v. St. Paul Chamber of Commerce*, 64 Minn. 439, holding that a contract to extend the time of payment of a note need not be an express one, but may be implied. (*Inquiry from Minn., Feb., 1917.*)

Extension to assignee of mortgaged property

2470. Before maturity of a note secured by a mortgage the maker (mortgagor) sold the property and had the purchaser assume the obligation. The holder asks whether the making of an indorsement on the note, that payment be extended, subject to all the conditions of the mortgage securing the same, would release the maker. *Opinion:* The extension of time to the indorser would not discharge the maker of the note. The maker would remain bound for the full statutory period. *Whiting v. Western Storage Co.*, 20 Iowa, 554. (*Inquiry from Colo., Aug., 1919.*)

Surety makers not discharged by extension

2471. A note contained the following words: "The joint signers agree to waive any extension of time without notice." *Opinion:* Such clause constitutes an express consent by the surety-makers to the extension. But even though consent were not given by the surety-makers they are primarily liable under the Negotiable Instru-

ments Act, and are not released by the extension. *Edmondston v. Ascough*, 43 Colo. 55. *Vanderford v. Farmers Bk.*, 105 Md. 164. (*Inquiry from Ill., July, 1916, Jl.*)

Non-discharge of surety-maker by extension

2472. A joint and several note of \$150 was executed by two makers, one of whom was a surety. \$75 was paid on the note after maturity, in consideration of which an extension of time was given the principal maker to pay the balance. The principal maker did not pay as agreed and became insolvent. *Opinion:* The surety was not released by such extension of time because (1) the agreement was not binding, being without valid consideration, and even if otherwise, (2) under the Negotiable Instruments Act a surety-maker is not discharged by the extension given the principal maker without his consent. The Statute of Limitations (five years in Kentucky, where the note was made) begins to run from the date of maturity of the note. *Liening v. Gould*, 13 Cal. 598. *Halliday v. Hart*, 30 N. Y. 474. *Sully v. Childress*, 106 Tenn. 109. *Ky. St.*, 1909, Ch. 80, Sec. 2515. *Walden v. Crafts*, 2 Abb. Pr. (N. Y.) 301. *Horner v. Speed*, 2 Pat. & Hen. (Va.) 616. *Cooper v. Cooper*, 61 Miss. 676. (*Inquiry from Tenn., Aug., 1914, Jl.*)

2473. Is a surety bound by an extension of time without notice where the note contains the following clause: "Sureties consent that time of payment may be extended without notice thereof?" *Opinion:* The quoted provision is binding upon the surety and an extension of time without notice to him does not discharge him from liability. (*Inquiry from Iowa, Sept., 1917.*) (*Similar inquiry from Kan. March, 1919.*)

Indorsers consenting to extension after maturity released by extension before maturity

2474. A note contains a waiver of protest and an extension clause providing that "after maturity the time of payment may be extended," etc., so worded to remove any question of negotiability of note. The question arises whether, if a bank extends the note before maturity, the other makers and indorsers would be released. *Opinion:* The consent to extension applies only when made after maturity, and extension by the holder to the principal debtor before maturity would release the sureties, except those who signed on the face as makers. *Richards v. Market Exch. Bk. Co.*, (Ohio) 90

N. E. 1000. Edmonston v. Ascough, 43 Colo. 55, 95 Pac. 313. Vanderford v. Farmers Bk., 105 Md. 164, 66 Atl. 47. Lane v. Hyder, (Mo.) 147 S. W. 514. Wolstenholme v. Smith, (Utah) 97 Pac. 329. Cellers v. Meachem, (Ore.) 89 Pac. 426. Northern St. Bk. v. Bellamy, (N. Dak.) 125 N. W. 888. (*Inquiry from Okla., Nov., 1915, Jl.*)

Release of non-consenting indorser by extension

2475. A's note was indorsed by B and C who guaranteed payment. The holder extended the time of payment of the note in consideration of A's payment of 30 days' interest in advance. *Opinion:* The extension of the time of payment by the holder without the consent of B and C released them from liability. If B and C had signed the note as surety-makers they would not have been released from liability under the Negotiable Instruments Law. Cellers v. Meachem, 49 Ore. 186, 89 Pac. 426. Vanderford v. Farmers Bk., 105 Md. 164, 66 Atl. 47. Bradley Engineering Co. v. Heyburn, 56 Wash. 628. Rouse v. Wooten, 140 N. C. 557. North St. Bk. v. Bellamy, (N. Dak.) 125 N. W. 888. (*Inquiry from Okla., Aug., 1911, Jl.*)

2476. A gave B his negotiable promissory note, due in six months, payment of which was guaranteed by B, who discounted it at the bank. At maturity the bank extended A's time of payment thirty days. The note also contained the accommodation indorsement of C. *Opinion:* An indorser who guarantees payment is secondarily liable under the Negotiable Instruments Act and if a binding extension of time is granted to the principal maker without his consent he is discharged from liability. Under the Negotiable Instruments Act a surety who signs as maker is not discharged by such extension, the common law being changed in this particular. Gen. Laws Ore., Sec. 5953. North St. Bk. v. Bellamy, (N. Dak.) 125 N. W. 888. Cellers v. Meachem, (Ore.) 89 Pac. 426. (*Inquiry from Ore., Feb., 1917, Jl.*)

Surety-makers not discharged by extension granted on forgery of their consent

2477. A's note in payment of a loan was signed on its face by B and C. There was no waiver of demand and protest. After maturity A, upon a forged order purporting to be signed by B and C, obtained an extension of the time of payment, which was duly

granted by the holder. B and C contest liability because as indorsers they were discharged for failure to protest the note, and because of the extension agreement given without their consent. *Opinion:* B and C signed as makers and were not entitled to protest. Under the Negotiable Instruments Act the surety-makers of a note are primarily liable and are not discharged by the extension of the time of payment granted to the principal maker without their consent. Stones River Nat. Bk. v. Walter, 104 Tenn. 11. Reeder v. Bk., 2 Tenn. Civ. App. 713. Dwinnell v. McKibben, 93 Iowa 331. Red River Nat. Bk. v. Bray, (Tex.) 132 S. W. 968. Cowan v. Ramsey, 15 Ariz. 533. Union Tr. Co. v. McGinty, 212 Mass. 205. Vanderford v. Farmers Bk., 105 Md. 164, 66 Atl. 47. First St. Bk. v. Williams, 165 Ky. 143. Cellers v. Meachem, 49 Ore. 186, 89 Pac. 426. Hardy v. Carter, (Tex.) 163 S. W. 1003. Wolstenholme v. Smith, 34 Utah 300, 97 Pac. 329. Bradley, etc., Co. v. Heyburn, 56 Wash. 628. Richards v. Washington Exch. Bk., 81 Ohio St. 348. (*Inquiry from Tenn., Aug., 1916, Jl.*)

Stamping original "paid" on taking of renewal

2478. Where a note is renewed in full or in part, is it wise to stamp the old note "paid?" *Opinion:* In some cases it is held that the receipt and acceptance of the renewal note and the surrender and cancellation of the former note constitute a payment of the former. This is subject, however, to proof as to the intention of the parties and the more general rule is that the delivery or surrender to the maker of the old note, upon its being renewed, does not in itself raise a presumption of its extinguishment by the new, it being considered as a conditional surrender and that its obligation is restored and revived if the new note be not duly paid. Assuming the foregoing to be the rule in Connecticut, it would, nevertheless, be best not to stamp the original note "paid" as this would be an indication that the old note was extinguished and it might be important, in some cases, to preserve the obligation as evidenced by the old note. (*Inquiry from Conn., Feb., 1916.*)

Renewal note taken without signature of surety on retained original note

2479. A renewal of a note is taken without the signature of a surety on the original note, but the old note is held as collateral to the new one. The original note

provides that an extension of time shall not release any parties to the note. Does the surety remain liable? *Opinion*: An original note left as collateral for a renewal note is not considered as paid. *Chattanooga Sav. Bank v. Lumby*, 185 Ill. App. 111. *East River Bank v. Butterworth*, 45 Barb. (N. Y.) 476. *Greening v. Patten*, 51 Wis. 146. See also *Merchants' Trust, etc., Co. v. Jones*, 95 Me. 335, 50 Atl. 48. Hence the only effect of the renewal note is to postpone the time for payment; the original debt is not extinguished. According to the express provision of the note the extension of time does not release the surety on the original note. (*Inquiry from Iowa, Jan., 1921.*)

Additional surety signing at maturity as condition for renewal

2480. A loans B \$10,000, and C signs the note as surety. When the same becomes due, A becomes dissatisfied with the loan and, upon the bank's demand for an additional surety, B procures D to sign same as a condition for its renewal. The bank asks whether D, the last signer, would be liable on the note. *Opinion*: There being a sufficient consideration for the additional signature, i. e., the renewal of the note, D became bound as a surety and is liable thereon. *Ellis v. Clark*, 110 Mass. 389. (*Inquiry from Okla., April, 1920.*)

Taking new note and retaining old

2481. A, B and C were makers of a note held by a bank. The bank, not wishing to carry the note as overdue paper, caused A and B to execute a new note in renewal of the indebtedness, which C, because of sickness, was unable to sign. The bank did not destroy the old note but kept both. *Opinion*: Where a new note is given in renewal of an old note and the latter is retained, the weight of authority is to the effect that the old note is not extinguished unless the intention is to accept the new note in satisfaction and discharge of the first. *Kendrick v. Lomax*, 2 Crompt. & J. 405. *Bishop v. Rowe*, 3 Maule & S. 362. *Cumber v. Wayne* 1 Strange 462. *Woods v. Woods*, 127 Mass. 141. *McQuire v. Gadsby*, 3 Cal. 234. *Hart v. Boller*, 15 Serg. & R. (Pa.) 162. *East River Bk. v. Butterworth*, 45 Barb. (N. Y.) 476. *Moses v. Price*, 21 Gratt. (Va.) 556. *Slaymaker v. Gundacher*, 10 Serg. & R. (Pa.) 75. *Phoenix Ins. Co. v. Church*, 81 N. Y. 226. (*Inquiry from Pa., Oct., 1913, Jl.*) (*Similar inquiry from Mich., June, 1915, Jl., citing Ellis v. Ballou, 129 Mich. 303;*

Koons v. Vanconstant, 129 Mich. 260; *McMorran v. Murphy*, 68 Mich. 246; *Riverside Iron Works v. Hall*, 64 Mich. 165; *Mich. Mut. L. Ins. Co. v. Bowes*, 42 Mich. 19; *Sage v. Walker*, 12 Mich. 425.)

Taking new and holding old note as collateral

2482. Is it good practice for a bank in renewing a note secured by chattel or real estate mortgage to take a new note and hold the old note as collateral to the new, marking the old note "collateral" and holding the original mortgage as security? *Opinion*: It is a general rule that, where a new note is given in renewal of the original which is retained and not surrendered, the new note does not operate as payment of the original, but only as a suspension of the debt evidenced thereby. It seems that the practice of taking a new note and holding the old note is proper. It was held (*Hull v. Diehl*, 21 Mont. 71) that the renewal of a note secured by mortgage is not payment thereof and in the absence of some agreement, or plain manifestation of a contrary intention, the security will remain intact. (*Inquiry from Mont., Nov., 1915.*)

Death of maker after execution of renewal but before maturity of original note

2483. A bank writes: "A renews a note 30 days before it comes due, but dates his renewal note the day the old note is due. The bank releases the old note to A. Suppose A should die within the 30 days, can the bank realize on the new note before the 30 days are up? If the new note is marked renewal can the bank realize on it?" *Opinion*: If the debt was evidenced by the old note and the acceptance of the renewal was only provisional, to take effect at the time the old note matured, it seems the bank could realize on the amount at the date of maturity of the old note but it would seem that, by the surrender of the old note and the acceptance of the new, a valid renewal was effected, so that the debt would not be due and payable until the time of maturity of renewal note. If this conclusion be correct, then the death of the maker would not entitle the bank to collect the renewal note before its maturity. The general rule is that claims against a decedent which are not yet due but run to a certain maturity must be presented for allowance within the statutory period for filing claims against the estate; but the death of the maker of a note does not *ipso facto* mature the note so as to make it immediately payable. If the bank held

the deposit of a maker, a different question would be presented; whether it would have the right, upon the death of the maker, to apply his deposit in payment of the decedent's unmatured note. Upon this question there is very little satisfactory authority and what there is seems to be in conflict. (*Inquiry from W. Va., Sept., 1920.*)

Guaranty of payment

Letter construed as guaranty of payment

2484. Sam Jensen sent to a bank the following letter: "I stand good for any note my daughter May signs and will pay same in full if she don't, in proper time." What is the effect of this? *Opinion:* The letter is a guaranty of payment of any note signed or indorsed by May Jensen, upon which the bank advanced value. He is liable to pay any such note at maturity if his daughter does not. (*Inquiry from Wis., May, 1920.*)

Guaranty of payment by separate instrument

2485. A bank discounts many small notes for a corporation, which are generally not paid at maturity but require renewals. The bank desires an agreement which will bind two individuals to direct liability for payment of principal and interest in full of any notes thus discounted, before or after renewal. *Opinion:* Guaranties of payment of bills and notes may, of course, be by separate instrument as well as on the instrument guaranteed. There is no known published form which would exactly fit the transaction in instant case. *Tidionte Sav. Bank v. Libbey*, 101 Wis. 193, 77 N. W. 182, indicates a form of guaranty whereby "in consideration of \$100 to each of them in hand paid and in consideration of the granting of credit and discount by W. T. R. & Co. (bankers) to F. & L. Co., L and others guaranteed to the said W. T. R. Co., their heirs, executors, administrators and assigns the payment of any and all indebtedness now due or hereafter to become due to W. T. R. & Co. growing out of or occasioned by any or through any act or acts of the said "F. & L. Co." This was held to be a general continuing guaranty which enured to the benefit of any parties to whom W. T. R. & Co. subsequently transferred notes of third persons which the F. & L. Co. had discounted with them. The opinion in this case gives an instructive statement of the law of guaranties. (*Inquiry from Wis., June, 1916.*)

Guaranty of payment by payee after indorsing note without recourse

2486. Is the guaranty of payment by a payee of a note binding when it is made after he has indorsed the note without recourse? *Opinion:* The effect of the indorsement without recourse is to constitute the indorser a mere assignor of the note, with warranty of genuineness but without any liability to pay in the event of dishonor by the maker. The guaranty is not enforceable if given subsequent to the discount of the paper, as it would be without consideration, but if given as part of the same transaction, contemporaneously or even subsequently, if in pursuance of a previous promise, the discounting would constitute a sufficient consideration, and the guaranty might then be enforceable although it virtually nullifies the indorsement without recourse. (*Inquiry from Kan., Feb., 1914.*)

Liability of guarantor when cashier buys his own note for bank

2487. The cashier of a bank gave his own two-year note for a personal indebtedness to John Doe, and then used the bank's funds to buy the note, which contained a guaranty of payment by John Doe. The cashier died almost six years after the maturity of the note, which had never been paid, and the bank seeks to hold Doe liable. *Opinion:* John Doe would be held liable to the bank on his guaranty of payment, which right could be enforced within six years after the date of maturity of the note. Upon the question whether Doe could be held upon the note as participant in a breach of trust, it is likely that the discount of the note by the bank for Doe with his personal guaranty thereon, especially as Doe was an innocent party free from actual fault, would be held a sufficiently legitimate transaction to make him not chargeable as constructive trustee. *Pomeroy Equity*, Vol. 2, Sec. 1079. *Gale v. Chase Nat. Bk.*, 104 Fed. 214. *Home Sav. Bk. v. Otterbach*, 135 Iowa 157. *Kitchens v. Teasdale Com. Co.*, 105 Mo. App. 463. *Hier v. Miller*, 68 Kan. 258. *Conyngham's Appeal*, 57 Pa. 474. *Klein v. Kern*, 94 Tenn. 34. *Irvine v. Grassfield*, 10 Heisk. (Tenn.) 425. *Taylor v. Ross*, 3 Yerk. (Tenn.) 230. *Cowan v. Roberts*, 134 N. C. 415, 46 S. E. 979. *Miller v. Lewiston Nat. Bk.*, (Ida.) 108 Pac. 901. *Sentinel Co. v. Smith*, (Wis.) 127 N. W. 943. (*Inquiry from Tenn., Jan., 1914, Jl.*)

Guaranty of payment by a president

2488. A note executed by a corporation by its president and secretary is indorsed as follows: "For value received we hereby guarantee the collection and payment of the within note and consent to any extension of time of payment, waiving demand of payment, protest, presentment and notice of non-payment." Signature, President—Signature, Secretary. Does the addition of the title make the indorser free from personal liability in the state of Utah? *Opinion:* There are no decisions in Utah on the subject. The decisions elsewhere hold that persons signing a guaranty on the back of a corporation note as president and secretary would be personally liable. It has been held that the abbreviation and letters "Treas." and "V. P." following the names respectively of two indorsers on a promissory note were mere words of description, and the obligation incurred by such indorsement was personal. (*Inquiry from Utah, Oct., 1915.*)

Payment*Provision for payment in gold coin*

2489. Can the holder of a note payable in "United States gold coin of the present standard of weight and fineness" require payment in that medium? *Opinion:* Apparently the provision for payment in gold coin is specifically enforceable. *Bronson v. Rodes*, 7 Wall. (U. S.) 229 and subsequent cases in Supreme Court of United States. (*Inquiry from Ala., April, 1917.*)

Designation of place of payment

2490. Should a place of payment be designated in demand notes received by a bank as collateral for a loan? *Opinion:* It would be preferable as a matter of convenience to have the demand notes payable at the bank to which pledged. (*Inquiry from N. Y., June, 1919, Jl.*)

Provision for payment—"With exchange"

2491. What is the effect of the term "with exchange" in a note payable in the same place in which it is drawn, where there is no provision that such exchange is on another place? *Opinion:* The words "with exchange" in the note were meaningless and no exchange charges were collectible from the payor bank. *Hill v. Todd*, 29 Ill. 101. *Clauser v. Stone*, 29 Ill. 114. *Bk. v. Goode*, 44 Mo. App. 129. *Chandler v. Calvert*, 87 Mo. App. 368. *Garrettson v.*

Bk., 47 Fed. 867. (*Inquiry from Ind., May, 1914, Jl.*)

Provision "with exchange" and "with exchange on New York"

2492. What is the effect of the words "with exchange" or "with exchange on New York" appearing in a note? *Opinion:* When a note is made payable "exchange on New York" or "with New York exchange" the holder is entitled to receive payment of the face of the note plus the amount of the exchange. Where, however, an instrument is issued and payable at the same place "with exchange" it has been held in several cases that the words "with exchange" are surplusage and have no effect. *Hill v. Todd*, 29 Ill. 101. *Clauser v. Stone*, 29 Ill. 114. *Christian County Bank v. Goode*, 44 Mo. App. 129. *Chandler v. Calvert*, 87 Mo. App. 368. *Garrettson v. Bank*, 47 Fed. 867. (*Inquiry from S. D., Feb., 1921.*)

Payment by indorser

2493. A bank owns several notes of a single maker corporation, some of which are indorsed by a certain person and others not. The corporation has failed, and will pay about 30 or 40 cents on the dollar. The indorser who is responsible wants to take up the notes on which his name appears. The idea of the bank is not to surrender those but to hold all the notes and thus get 30 or 40 % on the total amount, —whereas if the indorser took them up the bank would only get 30 or 40% on the remainder. Can the indorser insist on paying the particular notes on which he is indorser? *Opinion:* It is the general rule of law that any party to a bill or note may pay it and when an indorser tenders payment of notes which have matured and are unpaid by the maker, it would seem that the bank would be compelled to accept payment or else relieve him from liability. But it may be that the notes are not yet due. In the case of an unmatured note it is the general rule that payment can be made only by the consent of both debtor and creditor. It may be possible that the insolvency of the maker of an unmatured note would give the indorser a right to tender payment, but this is not certain. (*Inquiry from N. J., Nov., 1913.*)

Time of payment where grace abolished before maturity

2494. What effect has the abolition of days of grace by the enactment of the

Mississippi Negotiable Instruments Act on a note executed before but maturing after the law becomes operative? *Opinion:* The Negotiable Instruments Act of Mississippi, which abolished the three days of grace formerly allowed, would not affect the terms of a contract entered into before the Act took effect. A note executed before but not due until after the Act became operative would carry three days of grace in time of payment. *Barker v. Parker*, 6 Pick. (Mass.) 80. *Button v. Belding*, 48 N. Y. S. 981. (*Inquiry from Miss., Aug., 1916, Jl.*)

Agreement by holder with indorser to receive payment of protested note in installments does not discharge prior indorser

2495. A bank purchased a note made by Smith, payable to Jones's wife, indorsed both by her and Jones. At maturity it is protested for non-payment and the indorser regularly notified. Two years later Jones agrees with the holder to make weekly payments of \$10 each. The bank asks if agreement will affect the wife's liability. *Opinion:* An agreement by the holder of a protested note with the last indorser to accept payment by weekly installments does not discharge a prior indorser from liability. Had the agreement been made by the holder with the maker the wife would have been released. *Veazie v. Carr*, 3 Allen (Mass.) 14. *Dorlon v. Christie*, 39 Barb. (N. Y.) 610. *Wood v. Jefferson County Bk.*, 9 Cow. (N. Y.) 194. *Hubly v. Nichols*, 16 Johns. (N. Y.) 70. *St. Bk. v. Wilson*, 12 N. C. 484. *Union Bk. v. McClung*, 9 Humphr. (Tenn.) 98. *First Nat. Bk. v. Diehl*, (Pa.) 67 Atl. 897. *Wright v. Independence Nat. Bk.*, (Va.) 32 S. E. 459. (*Inquiry from N. Y., Dec., 1917, Jl.*)

Time of payment of note having impossible date

2496. A bank receives for collection a note reading "February 30th after date I promise to pay." The collecting bank inquires as to the liability of the maker, and whether, if collection is made and the maker later discovers the error in date and contends that it was collected illegally, the collecting bank would be liable. *Opinion:* The note is not illegal or void, but is payable on the nearest date of the same month, namely, February 28. *Daniel Neg. Inst.*, Sec. 625. (*Inquiry from Ga., May, 1909, Jl.*)

Rules for determining date of maturity

2497. What are the general rules for determining the date of maturity of notes?

Opinion: The rule of the law merchant is that the term "month" in a bill or note means a calendar and not a lunar month. A note dated January 31st, payable one month after date, matures on February 28. The common law rule is that when the date of maturity falls on a Sunday or holiday it is payable on the next succeeding business day, but if the instrument carries grace, it must be presented on the business day preceding. The due date of holiday maturing paper is now quite generally regulated by statute. *Capital Nat. Bk. v. Amer. Exch. Nat. Bk.*, 51 Neb. 707. (*Inquiry from Wis., Feb., 1909, Jl.*)

2498. What is the rule for determining the date of maturity of a note payable at a specified period after date? *Opinion:* Under the law merchant and the Negotiable Instruments Act, in computing the time an instrument has to run, the day of the date is excluded and the day of the payment is included. A note dated January 1, 1915, given for one year, is payable January 1, 1916, not December 31, 1915. *Roehner v. Knickerbocker L. Ins. Co.*, 63 N. Y. 163. *Henry v. Jones*, 8 Mass. 453. *Ammidown v. Woodman*, 31 Me. 580. *Taylor v. Jacoby*, 2 Pa. 495. *Hill v. Norvell*, 3 McLean (U. S.) 583. (*Inquiry from Neb., May, 1914, Jl.*)

Date of maturity where no corresponding day in month of maturity

2499. What is the date of maturity of a note payable a specified number of months after date when there is no day of the month of maturity corresponding with the date of the instrument? *Opinion:* A note dated December 29, 30 or 31, payable two months after date, falls due on February 28, or, in leap year, February 29. It is the rule of the law merchant that when a note payable one or more months after date is dated on a day of the month which has no corresponding day in the month of maturity, the day of maturity is not carried over to the following month but falls on the last day of the month in which it is payable. *Daniel Neg. Inst.*, Sec. 624. *N. Y. Gen'l Construction Law*, Secs. 30, 31. (*Inquiry from N. Y., April, 1918, Jl.*)

Payment to agent without authority

2500. The purchaser of a cream separator gave the company selling the same his note of \$60. The company's agent, who had authority only to sell, collected payments on the note, receipted therefor, but did not

account to his principal. The company sought to hold the purchaser on the note. *Opinion:* Authority to the agent to sell did not include implied authority to collect the note unless the company intrusted the agent with the possession of the note. Payment to the agent was at the purchaser's risk, unless he can prove that the agent had actual or ostensible authority to receive payment without having possession of the note. *Meyer v. Hehner*, 96 Ill. 400. *Doyle v. Corey*, 170 Mass. 337. *Lawson v. Carson*, 50 N. J. Eq. 370. *Cent. Tr. Co. v. Folsom*, 167 N. Y. 285. *Ward v. Smith*, 7 Wall. (U. S.) 447. *Ortmeier v. Ivory*, 208 Ill. 577. *West. Sec. Co. v. Douglass*, 14 Wash. 215. *Walton Guano Co. v. McCall*, 111 Ga. 114. *Paris v. Moe*, 60 Ga. 90. *Harrison v. Legore*, 109 Iowa 618. *Springfield Sav. Bk. v. Kjaer*, 82 Minn. 180. *Reid v. Kellogg*, 8 S. Dak. 596. *Thornton v. Lawther*, 169 Ill. 228. *Walker v. Hale*, (Neb. 1913) 139 N. W. 658. *Koen v. Miller*, (Ark. 1912) 150 S. W. 411. *Sumrall v. Kitselman*, (Miss. 1912) 58 So 594. (*Inquiry from Okla., July, 1914, Jl.*)

Payment before maturity without requiring surrender

2501. A negotiable note payable to a national bank is rediscounted with a Federal Reserve Bank and the maker, without knowledge thereof and before maturity, pays the note to the national bank, which misappropriates the money and two days later closes its doors. The maker did not obtain a surrender of the note. The Federal Reserve Bank demands payment of the note. *Opinion:* The maker is liable on the note to the Federal Reserve Bank, which is a holder in due course, but is probably entitled to preferred payment for the full amount from the assets of the failed national bank. *Oneonta Tr. & Bk. Co. v. Box*, (Ala.) 73 So. 759. *Astoria St. Bk. v. Markwood*, (S. Dak.) 161 N. W. 815. *Lucas Co. v. Jamison*, 170 Fed. 338. *Massey v. Fisher*, 62 Fed. 958. (*Inquiry from Cal., April, 1919, Jl.*)

Payment without requiring surrender of note—Liability to transferee

2502. X gives his note for \$200 to Bank A for borrowed money; Bank A indorses same and pledges it to Bank B as collateral for a note. Afterwards X pays Bank A \$100 on the note and takes cashier's receipt for same. Bank A does not advise Bank B to make proper credit on note. Bank A becomes insolvent. *Opinion:* Assuming the note

was transferred by Bank A to Bank B before maturity, the payment by the maker to Bank A was ineffective against Bank B, which can recover the full amount of the note from the maker, or so much thereof as is necessary to satisfy the lien. *Prim v. Hammel*, (Ala.) 32 So. 1006. *Farmer v. First Nat. Bk.*, (Ark.) 115 S. W. 1141. *Davis v. Miller*, 14 Gratt. (Va.) 1. (*Inquiry from La., Aug., 1915, Jl.*)

Payment by application of deposit before maturity

2503. A bank inquires concerning the effect of a note payable 90 days after date with authority to the payee to apply "at any time" any funds in the bank belonging to any of the makers or indorsers to the "payment of this debt." *Opinion:* It might possibly be construed that the word "debt" indicates that the money must be due before the right of application would arise, and some courts have held that a debt is a sum of money due by contract. But it seems this contention would not hold. See, for example, *People v. Arguello*, 37 Cal. 524, wherein the court said: "Standing alone the word 'debt' is as applicable to a sum of money which has been promised at a future day as to a sum now due and payable. If we wish to distinguish between the two we say of the former that it is a debt owing and of the latter that it is a debt due * * * Whether a claim or demand is a debt or not is in no respect determined by a reference to the time of payment." It seems that the note must be construed, therefore, as one payable ninety days after date with a provision authorizing the payee to apply a deposit in payment thereof at any time before or after maturity. If the bank made the application before maturity it would be compelled to rebate the unearned interest which it had previously received by way of discount. (*Inquiry from Ala., June, 1914.*)

Application of payment

2504. A gave his note to a bank and B signed with him. After maturity A tendered the money to the bank with the request that it be applied on such note. The bank applied the money on other notes of A. *Opinion:* B as surety has a perfect defense to a suit on the note in the plea of payment. A debtor voluntarily paying money to his creditor has the primary and paramount right to direct the application of his money to such demands as he chooses. *Lynn v. Bean*, 141 Ala. 236. *Messengale v. Pounds*, 108 Ga.

762. *Middleton v. Frame*, 21 Mo. 412. *Oliver v. Phelps*, 20 N. J. L. 180. *Seymour v. Marvin*, 11 Barb. (N. Y.) 80. *Patterson v. Van Loon*, 186 Pa. 367. *Chapman v. Conn*, 25 Gratt. (Va.) 721. *U. S. v. Kirkpatrick*, 9 Wheat. (U. S.) 720. *Buchanan v. Findlay*, 9 B. & C. 738. *Wilson v. Rykert*, 14 Ont. 188. *Rev. Codes Mont.* (1907), Tit. IV, Ch. 1, Sec. 4228. (*Inquiry from Mont.*, July, 1914, Jl.)

2505. A bank held two past due notes, one insufficiently secured by real estate, and the other over-secured by chattels. In satisfaction of the chattel mortgage note, the debtor tendered his check marked "for chattel mortgage." The bank refused to apply payment as specified and insisted upon applying payment upon the real estate note. The debtor acquiesced in the action by the bank. *Opinion*: The debtor had the primary right to have the money applied in payment of the chattel mortgage note, but where the bank applied the payment upon another debt, acquiescence by the debtor ratified such application. Same citations as in opinion 2504 supra, and also see *Milwaukee, etc., Store v. Katz*, (Wis.) 140 N. W. 1038. *Barnett v. Sipp*, (Ind. 1912) 98 N. E. 310. *Ross-Higgins Co. v. Rock*, (Wash. 1911) 118 Pac. 744. *Stone Co. v. Rich*, (N. Car.) 75 S. E. 1077. *Levystein v. Whitman*, 59 Ala. 345. *Jackson v. Bailey*, 12 Ill. 159. *Rundlett v. Small*, 25 Me. 29. *Steiner v. Jeffries*, 118 Ala. 573. *Cardnell v. O'Dowd*, 43 Cal. 586. *Bird v. Benton*, 127 Ga. 371. *Spencer Optical Mfg. Co. v. Jump*, 10 N. Y. St. Rep. 130. *Sloan v. Sloan*, 46 Ore. 36. (*Inquiry from Wyo.*, July, 1914, Jl.)

Underpayment by mistake

2506. Through an erroneous calculation a bank collected less on a note than was actually due, the same being stamped "paid" and delivered. The bank inquires whether it can recover the balance due on the note. *Opinion*: If the bank can prove by a preponderance of evidence that the full amount was not paid, it is in law entitled to recover the balance due, although it acknowledged payment and surrendered the note. The right of recovery depends upon whether or not such proof can be made. (*Inquiry from Ill.*, Jan., 1919.)

Proof of payment

2507. A credit of \$1,000 on a note as part payment was in the maker's hand-

writing. The executor of the payee doubts that such payment was ever made, and inquires how to proceed to overcome the indorsement. *Opinion*: The burden of proof is on the maker to establish the fact of part payment, unless the indorsement is in the handwriting of the creditor. *Blandy v. Clock*, 68 Mich. 201. *Bannister v. Wallace*, 14 Tex. Civ. App. 452. *Tarrentine v. Grisby*, 118 Ala. 380. *Rhodes v. Ashurst*, 176 Ill. 351. *Ferguson v. Dalton*, 158 Mo. 323. *Oil Well Supply Co.*, 127 Mo. 616. *Yarnell v. Anderson*, 14 Mo. 619. *Everrett v. Lockhart*, 8 Hun (N. Y.) 356. *Erhart v. Dietrich*, 118 Mo. 418. *Curry v. Kurtz*, 33 Miss. 24. *Pfiel v. Vanbatenberg*, 2 Camp. 439. *Spann v. Ballard*, Rice (S. C.) 440. (*Inquiry from Mo.*, Feb., 1913, Jl.)

Partial payments before maturity by consent

2508. A note is due ten years from date with a consent to partial payments after five years, not exceeding one-fifth of the principal in any one year. Can the note be paid in full after five years? Can the maker pay two-fifths of the principal in one payment? *Opinion*: The rule is elementary that the maker of a note has no right to pay the same before maturity without the consent of the holder, unless it is otherwise provided in the instrument. Under the express provisions of the note submitted, the maker may pay not exceeding one-fifth of the principal in any one year after the fifth year without the consent of the holder. (*Inquiry from Okla.*, March, 1917.)

Law of place of payment governs

2509. What law governs when a note made in one state is payable in another? *Opinion*: The note is governed by the law of the state where payable. *Brown v. Worthington*, (Mo.) 142 S. W. 1082. *Wooley v. Lyon*, 117 Ill. 248. *Guernsey v. Imperial Bk.*, 188 Fed. 300. (*Inquiry from Ill.*, Sept., 1913, Jl.)

Action on notes

Action on demand note

2510. When does a demand note become due for purpose of suit? *Opinion*: A note payable on demand is due immediately and an action can be brought against the maker at any time without any demand other than the suit until outlawed. *Sullivan v. Ellis*, 219 Fed. 694. *DeRaines v. DeRaines*, 70 N. J. L. 15. (*Inquiry from N. J.*, Nov., 1917.)

Right of action against maker and indorser

2511. The maker and indorser of a note having become liable thereon, the holder desires to know which to sue first to recover the money. *Opinion:* Under the law merchant, the holder of an indorsed instrument upon which the indorser has been duly charged, can sue both maker and indorser in separate actions at the same time or can sue either, at his election, but cannot join both in the same action in the absence of statutes authorizing such joinder, which have been passed in many states. The Negotiable Instruments Act does not alter the rules as to remedy by suit. The Code of Mississippi denies the right of separate action against indorser where the maker is a resident of the state and requires joinder of maker and indorser in the same action. *Day v. Ridgway*, 17 Pa. 303. *Curtis v. Davidson*, (N. Y.) 109 N. E. 481. *Carnegie Tr. Co. v. Kistler*, 152 N. Y. S. 420. Miss. Code, Sec. 4013. 2 *Daniel Neg. Inst.*, Sec. 1202. *Bk. of Cal. v. Union Pack. Co.*, (Wash.) 111 Pac. 573. *Howe v. St. Bk. of Smyrna*, (Fla.) 55 So. 462. Miss. Code, Sec. 4013. (*Inquiry from Miss.*, Aug., 1917, *Jl.*)

Indorser can be sued as soon as liability fixed

2512. Is it necessary for a bank holding a note to exhaust all the resources of the maker before proceeding against the indorser? *Opinion:* As soon as the indorser's liability is fixed by protest and notice, he can be sued the same as the maker, and most states have statutes allowing the maker and the indorser to be joined in one action. (*Inquiry from Md.*, June, 1915.)

Action by executor of deceased payee upon note and deed of trust

2513. In the settlement of the estate of John Doe, a note was found payable to his order. On the back thereof John Doe had indorsed a one-half interest therein to Richard Roe. Further investigation showed that the note was secured by a deed of trust on property in the name of the maker of the note, which property was not worth the face of the note, but he had no other property. Two years later this property was conveyed jointly to John Doe and Richard Roe but the note was not returned to the maker, nor the deed of trust released. John Doe died leaving a will containing no power to convey the property. The bank inquires what course should be pursued under the circumstances. *Opinion:* The deed of trust to John Doe in this case not

being released, it would take precedence, of course, over the later conveyance of the property jointly to John Doe and Richard Roe. The indorsement on the note might indicate that Richard Roe had a half interest therein, but the note was never delivered to Richard Roe, and the legal title thereto is in the estate of John Doe. It seems, therefore, the proper procedure would be for the executor to bring an action on the note and to foreclose the deed of trust, in which action Richard Roe should be made a party. (*Inquiry from W. Va.*, April, 1916.)

Suit against maker who has removed to another state

2514. A, a resident of Minnesota, loaned money to B, and a note was executed in Illinois, payable at the inquirer's bank in Minnesota. B subsequently moved to California. The note is five years overdue. The bank asks in what state suit should be brought. *Opinion:* The holder of the note in Minnesota cannot sue the maker in California because the action would be outlawed in four years and the note is five years past due. He can, however, sue the maker in Minnesota, where the statute is six years, and serve the defendant by publication which would give the court jurisdiction if the maker of the note had left the state to avoid his creditors or to avoid service; or if the maker has property in the state which can be subjected to the payment of the debt. If, however, the maker has no property in Minnesota and has not removed from the state with fraudulent intent, the holder of the note seems to have no remedy. (*Inquiry from Cal.*, Nov., 1915.)

Statute of limitations*Outlaw of demand note in California*

2515. When is a demand note outlawed in California as against the maker? *Opinion:* In California the statute of limitations begins to run against the maker from the date of a demand note, not from the date of its apparent maturity, and the note is outlawed four years from date. Cal. Civ. Code, Secs. 3135, 3131, 3125. *Jones v. Nichol*, 82 Cal. 32. *Cousins v. Partridge*, 79 Cal. 228. *Boummagin v. Tallant*, 29 Cal. 504. *Bell v. Sackett*, 38 Cal. 407. *Collins v. Driscoll*, 69 Cal. 552. *O'Neill v. Magner*, 81 Cal. 631. *Dussol v. Bruguere*, 50 Cal. 456. (*Inquiry from Cal.*, April, 1917, *Jl.*)

Outlaw of demand note in Louisiana

2516. When is a demand note outlawed

in Louisiana? *Opinion:* In Louisiana the statute of limitations begins to run from the date on a demand note and not from demand, such being the rule in most other states, and the note is outlawed unless an action is brought within five years from the date. Merriek's Rev. Civ. Code La., (1912) Art. 3540. Darby v. Darby, 120 La. 847. (*Inquiry from La., May, 1914, Jl.*)

Outlaw of demand note in New Jersey

2517. A corporation issued its demand note in 1911, there being several indorsers each waiving presentment, demand and notice of protest. No demand upon the the instrument was made until 1918. Are the indorsers liable? *Opinion:* The six year limitation provided by the New Jersey statute of limitations will bar recovery not only from the makers but also from the indorsers. The statute begins to run from the date of the instrument, whether or not it draws interest. De Raismes v. De Raismes, 70 N. J. L. 15, 71 N. J. L. 650. (*Inquiry from N. J., Sept., 1918, Jl.*)

Outlaw of demand note in New York

2518. How long is a demand note good in New York? *Opinion:* The statute of limitations begins to run upon a demand note from its date and an action is barred after six years. Mills v. Davis, 113 N. Y. 243. McMullen v. Rafferty, 89 N. Y. 456. Wheeler v. Warner, 47 N. Y. 519. Herrick v. Woolverton, 41 N. Y. 581. Shults v. Fingar, 100 N. Y. 539. N. Y. Code Civ. Proc., (1915) Sec. 382. (Van Vliet v. Katner. 124 N. Y. Supp. 63. Ledyard v. Bull, 119 N. Y. 62, 23 N. E. 444. Lawrence v. Church 128 N. Y. 324. Bishop v. Sniffin, 1 Daly N. Y. 155. Chester v. Jumel, 125 N. Y. 327. In re Williams Est., 118 N. Y. S. 562.) (*Inquiry from N. Y., June, 1919, Jl.*)

Outlaw of demand note in Pennsylvania

2519. When is a demand note outlawed in Pennsylvania? *Opinion:* It appears to be well settled in Pennsylvania that on an obligation for the payment of money on demand, the statute of limitations begins to run at once, and the suit is a sufficient demand and must be brought within six years. Swearingen v. Sewickley Dairy Co., 198 Pa. St. 68. Dominion Trust Co. v. Hildner, 243 Pa. St. 253. Messmore v. Morrison, 172 Pa. St. 300. Boustead v. Cuyler, 116 Pa. St. 551. Hall v. Toby, 110 Pa. St. 318. Byles on Bills, p. 342. (*Inquiry from Pa., Oct., 1918.*)

N. Y. statute of limitations on guaranty of payment

2520. What period of limitation is applicable in New York to a guaranty of the payment of a note? *Opinion:* Under the statute of limitations in New York the person who guarantees payment of a note and any renewal of the same is liable for six years from the time the cause of action accrues, which would be the date of maturity of the note or of the renewal as the case may be. The guaranty of payment of a demand note would run six years from the time of delivery. N. Y. Code Civ. Proc., Secs. 380, 382. Bartholomew v. Seaman, 25 Hun (N. Y.) 619. Van Vliet v. Kanter, 119 N. Y. S. 187. (*Inquiry from N. Y., July, 1911, Jl.*)

Partial payment by joint maker as affecting running of statute as to co-maker

2521. What is the effect on the period of limitations of a partial payment made by one of several joint debtors? *Opinion:* The courts are not in harmony on this question. The weight of authority supports the rule that such payment, made without the acquiescence, consent, or ratification of the other joint debtor, will not operate to suspend the running of the statute of limitations as to him. In several jurisdictions, however, a contrary view obtains, and a payment made by one before the bar is complete is regarded as the act of all and suspends the running of the statute as to all, provided the payment is made in good faith. (*Inquiry from Ariz., Aug., 1916.*)

2522. Is the running of the statute of limitations against the surety-maker of a note suspended by payment of interest or by partial payment of principal, before the expiration of such period, by the principal maker without the knowledge or consent of the surety? *Opinion:* The question does not seem to have been passed upon by the courts of New Mexico and the question depends upon which of two conflicting rules will be adopted by those courts. Authorities holding that the statute is suspended are Harris v. Stewart, 196 S. W. (Mo.) 1033. Houser v. Fayssoux, 83 S. E. (N. C.) 692. Slagle v. Box, 186 S. W. (Ark.) 299. Authorities to the contrary are Nichols v. Porter 103 N. E. (Ind.) 842. Hurley v. Gray, 173 Pac. (Kan.) 919. Dwire v. Gentry, 145 N. W. (Neb.) 350. (*Inquiry from N. M., March, 1920, Jl.*)

Acknowledgment as reviving debt

2523. Inquiry is made concerning a note held by a bank's customer made in New York which has run more than six years from maturity and to which the owner holds a letter acknowledging the debt but not making promise of payment. *Opinion:* It may be under the law of New York that the letter contains sufficient promise to revive the debt although no express promise of

payment is contained therein. Under the New York statute the acknowledgment or promise must be in writing and signed by the party to be charged thereby, and under the New York cases, although there is no express promise of payment, a promise may be implied if there is a clear, unconditional admission of the existence of the debt at the time of such admission. (*Inquiry from Tenn., Oct., 1914.*)

NOTES PAYABLE AT BANK**Section 87 of the Negotiable Instruments Act**

2524. Note: The Negotiable Instruments Act., Sec. 87, provides: "Where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon." The Negotiable Instruments Act has been passed in all the states except Georgia. As passed in Illinois, Nebraska, and South Dakota, however, the above provision is omitted; in Kansas the section, while originally enacted, was repealed by chapter 94, Laws of 1915; in North Dakota the section was likewise repealed by Act approved March 2, 1921, and in Minnesota the word "not" was interpolated. In those states, therefore, the bank is not authorized or obliged to pay its customer's note, made payable at the bank (as indicated in the opinions digested below), without express instructions from him. In all other Negotiable Instruments Law states it is so authorized and obliged. In Missouri the legislature, by amendment in 1909, added the following at the end of the section: "But where the instrument is made payable at a fixed determinable future time, the order to the bank is limited to the day of maturity."

Obligation of bank to pay

Note made payable at California bank is order to pay

2525. Notes made payable at a California bank, where the maker had sufficient funds, were forwarded to the bank for collection. The bank inquired of the maker by mail and telephone whether it should pay or refuse payment but received no response. *Opinion:* The law in California is uncertain whether the note operates as an order or authority to the bank to pay and charge to the maker's account, or whether the bank has

no right to do so in the absence of express instructions from the maker. *Indig v. Nat. Bk.*, 80 N. Y. 100. *Com. Nat. Bk. v. Henninger*, 105 Pa. 496. *Kerbaugh v. Nugent*, 48 Ind. App. 43. *Grisson v. Com. Bk.*, 87 Tenn. 350. *Wood v. Merchants Sav., etc., Co.*, 41 Ill. 267. (*Inquiry from Cal., Dec., 1914, Jl.*)

Note: In 1917 California passed the Negotiable Instruments Act, Sec. 87 of which (Civ. Code §3168) provides: "Where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon."

Connecticut bank's duty to pay (1) where presented by holder; (2) where owned by bank

2526. An opinion is asked respecting the authority and responsibility of a paying bank with reference to charging notes to customers' accounts where note is payable at the bank where customer's account is kept: first, as to collection notes coming from different banks, given for merchandise, or for anything, the bank not necessarily knowing for what debt the note was given. They come in ordinary course, either maturing on date received or some future date, the depositor's balance being sufficient. The bank asks if it is not obligatory on the paying bank to charge same against the customer's account at maturity, either with notice from the customer, or even without notifying the makers in advance that the note is held for collection. The second case presented is where a note, accepted from a customer under discount, matures at a certain date, notice of which may or may not have been given to the maker of the note, but his balance is sufficient to cover obligation on maturity date. The question asked is whether it is compulsory on the bank to charge the note against the de-

positor's account. *Opinion:* As to first question: The Negotiable Instruments Act provides: "Where the instrument is made payable at a bank, it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon." Under this it becomes the duty and obligation to pay the customer's note made payable at the bank at maturity, the same as it would his check, and the bank is bound to pay the note and charge it to its customer's account without any express instructions so to do from its customer; nor can there be seen any legal obligation to do so where the note is held in advance for collection. In the second case stated, the bank owns a note of its customer which has matured, and the account is sufficient to meet the obligation. If the note is made payable at the bank, it should be charged up. If it is not made payable at the bank, it does not seem to be compulsory upon the bank to pay the note out of the account, except that having the right to do so, if the note is not charged up, it would probably release the indorsers. *Inquiry from Conn., Jan., 1917.)*

Duty of Florida bank to pay note and dishonor later presented checks

2527. May a bank at the maturity of a note charge it to the maker's checking account without his consent and without notification and return his checks previously written which when presented overdraw the account? *Opinion:* Under the Negotiable Instruments Act "where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon." Under this provision, even where the bank is not the owner of the note, it is its duty, when the note is duly presented at maturity, if the maker's funds are sufficient, to pay the note, even without notifying the maker or obtaining his consent. Where the bank owns the note, it has the independent right to set off a matured note against the maker's account. The checks later presented which overdraw the account may be returned because of insufficient funds. *(Inquiry from Fla., Nov., 1917.)*

Note payable at Idaho bank is order to pay at maturity

2528. Inquiry is made whether a note or accepted draft, made payable at a certain bank in the state, acts the same as a check on the same bank when it matures. *Opinion:* The Idaho Revised Codes, Section

3544 (Negotiable Instruments Act), provide: "Where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon." Under this a note or accepted draft made payable at a bank is an order to the bank to pay at maturity the same as a check. The only question which might arise is whether, if the instrument is not presented until after maturity, instead of on the precise day of maturity, there is a duty of the bank to pay. This is a somewhat doubtful question, not yet decided in this country. The safer course seems to be for the bank to refuse to pay without express instruction from the depositor where the instrument is not presented until after maturity. *(Inquiry from Ida., Oct., 1917.)*

Note "payable to" and "payable at" Indiana bank

2529. (1) When a note or trade acceptance, which has been made payable direct to a bank and been discounted by it, falls due, is it the duty or the right of the bank to charge the instrument direct to the maker's or the acceptor's checking account? (2) When such an instrument has been sent for collection and falls due is it the duty or right of the bank to charge such collection direct to such account, or are additional instructions from the maker or acceptor necessary? (3) Is it material whether the instrument is payable "at" or "to" the bank? *Opinion:* (1) When a note or trade acceptance which has been made payable direct to the bank and has been discounted by the bank falls due, it is the right of the bank to charge the instrument direct to the maker's or acceptor's checking account. Were the note also made payable *at* the bank, it would be the duty of the bank to charge the account and if it did not do so, the indorsers on the note would be discharged. Some cases also hold that where the note is made payable *to* the bank but not *at* the bank, it is the duty of the bank so far as the indorsers are concerned to charge the note to the account; that where it has funds in its possession sufficient to pay, it should apply such funds on the note and if it does not they cannot be held further liable. (2) When a note or trade acceptance is made payable *at* a bank, it is the duty of the bank to charge the account of the maker or acceptor, when the paper is presented at maturity, and additional instructions from the maker or acceptor are not necessary. Neg. Inst. Act,

Sec. 87, provides: "Where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon." Under this section it is the duty of the bank to charge up the note when presented at maturity. (3) Is covered by (1) and (2). (*Inquiry from Ind., Feb., 1921.*)

Note payable at Michigan bank is order to pay

2530. A bank asks an opinion upon the following: John Jones has a commercial account with the bank; his note comes in from the S—— bank of Detroit made payable May 1, 1913, and payable at our bank. The depositor has sufficient funds to pay it, and he used same as a check, charging his account without presentation. We find that he did not intend to pay this note. Can he recover, or make us credit back his account? *Opinion:* It was the bank's right and duty to pay and charge its depositor's account with the note on the day of maturity, the same as if it were his check, and the customer cannot complain because the bank did not first receive its customer's express instruction so to do. The Negotiable Instruments Law (Sec. 89 Mich. Act) provides: "Where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon." Under this no special instruction from the bank's depositor was necessary. (*Inquiry from Mich., Sept., 1913.*)

Note payable at Mississippi bank is order to pay since Negotiable Instruments Act

2531. In states having the Negotiable Instruments Law (with a few exceptions) a note payable at the maker's bank is equivalent to an order on the bank to pay the same for his account. In Mississippi the point has not yet been decided, but the safer practice is for the bank to refuse to pay in the absence of instructions. *Grisson v. Com. Bk.*, 87 Tenn. 350. (*Inquiry from Miss., Aug., 1912, Jl.*)

Note: The Negotiable Instruments Act was passed in Mississippi in 1916; see note under heading "Notes payable at bank."

Note payable at Missouri bank is order to pay

2532. Under the rule of the Negotiable Instruments Law a man who makes his note payable at his bank thereby orders it to pay it at maturity and the bank is obliged to carry out this order, when in sufficient funds,

the same as if the order was by check. *Mo. Neg. Inst. Act, Sec. 87. (Inquiry from Mo., Nov., 1910, Jl.)*

2533. Under Negotiable Instruments Act, except where modified in certain states, it is the duty of a bank whose depositor has made his note payable at the bank to pay the same at maturity, the funds being sufficient, although there is no other express instruction from the depositor to pay. *Mo. Neg. Inst. Act, Sec. 87. Indig v. Nat. City Bk.*, 80 N. Y. 100. *Bedford Bk. v. Acoam*, 125 Ind. 584. *Grisson v. Com. B.*, 87 Tenn. 350. (*Inquiry from Mo., Jan., 1914, Jl.*)

Duty of New Jersey bank to pay note at maturity

2534. A bank received a complaint from one of its depositors because it charged his note made payable to the bank to his account on date of maturity. The note was a collection item received for another bank on date of maturity. Did the bank act within its rights in charging the note in such manner? *Opinion:* Section 87 of the Negotiable Instruments Act of New Jersey, passed in 1902, and amended in 1909, reads as follows: "Where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon. But where the instrument is made payable at a fixed or determinable future time, the order to the bank to pay is limited to the day on which the instrument is payable." The section just quoted was enacted to make the rule uniform, and to make it the duty of the bank to which a note or acceptance was made payable to pay the same *without any special order* from the customer, and, therefore, the bank acted within its rights in charging the note to the customer's account, and the depositor has no valid claim. (*Inquiry from N. J., March, 1919.*)

Ohio bank must pay at maturity

2535. A depositor gave a note to an outside party, making the same payable at the bank, and when presented by the owner of the note, the same was duly paid out of the maker's funds. The maker claims the bank had no right to pay the note. *Opinion:* The Negotiable Instruments Act of Ohio (Sec. 8192, Page & Adams Anno. Ohio Code) provides: "When the instrument is made payable at a bank, it is equivalent to an order to the bank to pay it for the account

of the principal debtor thereon." This clearly not only authorizes but requires the bank when it has the funds to pay the note of its customer made payable at the bank, when presented at maturity. See also decision in *Francis v. Bank*, 1 O. (N. P.) 281, 3 O. D. (N. P.) 383, in which it is held: A note which is made payable at a bank at which the maker is a depositor, the deposit being subject to check, is to be regarded as authority to such bank to pay such note out of such deposit. (*Inquiry from Ohio, April, 1916.*)

Duty and obligation of Oklahoma bank to pay note at maturity

2536. A holds note of B payable to order of A at C bank. B has money on deposit at C bank at maturity of note. C bank is uncertain of its right and duty to pay when presented at maturity. *Opinion:* The Negotiable Instruments Law provides: "Where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon." (*Inquiry from Okla., Oct., 1911, Jl.*)

2537. In Oklahoma, under the rule of the Negotiable Instruments Law, a depositor who issues his note payable at the bank wherein he keeps an account thereby orders the bank to pay the same at maturity. It becomes the duty of the bank, if in funds, to pay the note, and the bank incurs no liability to the depositor for so doing, even though he afterwards objects to the payment and claims he had good reason for having payment of the note refused. *Grissom v. Com. Bk.*, 87 Tenn. 350. (*Inquiry from Okla., Dec., 1910, Jl.*)

Pennsylvania bank must pay note at maturity

2538. A note is made payable at a bank. At maturity the account is good for the amount. No order has been given not to pay. The bank inquires whether a specific notice must be given the bank by the maker to entitle it to pay the note. *Opinion:* Under the Negotiable Instruments Law it is the authority and duty of a bank to pay a customer's note made payable at the bank without express instructions from the customer. (*Inquiry from Pa., Nov., 1911, Jl.*)

Purpose of statute making instrument payable at bank equivalent of order to pay

2539. The purpose of the section of the Negotiable Instruments Law making a note

payable at a bank equivalent to an order to pay for the account of the maker is to oblige as well as to authorize the bank to pay when in funds, and it was enacted to clear up a conflict in decisions. *Elliott v. Worcester Tr. Co.*, 189 Mass. 542. (*Inquiry from W. Va., Nov., 1911, Jl.*)

Duty of West Virginia bank to pay note payable at bank

2540. Where a note is made payable at a bank in West Virginia should it charge the instrument at its maturity to the account of the maker? *Opinion:* Negotiable Instruments Act, Sec. 87, provides: "Where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon." This section has been omitted in some states, but wherever it is in force, as it is in West Virginia, it is the obligation of the bank to charge the note to the customer's account at maturity the same as it would his check. (*Inquiry from W. Va., July, 1915.*)

Payment after maturity

Overdue note presented to Arkansas bank for payment

2541. A note was payable at bank and on the day it fell due there were sufficient funds on deposit to meet same. The note was not presented for payment until a day or two after it fell due, when there were still sufficient funds to meet same. The bank asks whether it was compelled to pay this note if not presented on its due date, but presented on a later date. *Opinion:* The Negotiable Instruments Act provides that, "Where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon." The safest course for the bank would be to construe this order, in case of a time note, as limited to the due date and not as a continuing order or authority to pay the note not presented on its due date but on a later date. It seems safer not to pay the note afterwards presented without express instructions from the maker, as it would be virtually paying overdue paper. There are, of course, some things to be said on the other side of the proposition. The point has, it seems, never been passed upon by any court in this country, but the English Bills of Exchange Act, which contains a similar provision, was construed by a court in Australia as

authorizing the bank to pay at a later date, although there was wide difference of opinion among members of the Australian bar. (*Inquiry from Ark., Dec., 1915.*)

Authority to pay after maturity uncertain

2542. Under the Negotiable Instruments Law it is undecided and uncertain whether the authority of a bank to pay a time instrument, payable at the bank, is limited to the day of maturity only. The point has not yet been passed upon in this country. *Wine v. Bk. of New South Wales*, 4 Australian Jurist Rep. 78. (*Inquiry from N. C., March, 1911, Jl.*)

Note: The Missouri statute (N. I. Act) expressly limits the authority of the bank to pay a time instrument payable at bank, to the day of maturity.

Clause waiving presentment does not confer authority to pay after maturity

2543. A bank has been declining to pay notes presented after maturity and asks whether such payment should be made in cases where the notes contain this clause: "The drawers and indorsers severally waive presentment for payment, protest, etc." *Opinion:* It is doubtful if the clause by which the maker of the note waives presentment would be construed as enlarging the authority of the bank to pay beyond the date of maturity. Presentment is not required to hold the maker in any event and the waiver is more especially with reference to the indorser. The point has not been decided—nor, in fact, has it ever been decided in this country that the bank has no authority to pay a note payable thereat after maturity—but it is safer in the absence of decision for the bank to assume that its authority is limited to the terms of the note, i. e., to refrain from honoring overdue notes until the question is definitely decided in the courts. (*Inquiry from N. C., Oct., 1913.*)

Charging note against deposit made after maturity

2544. A bank received for collection a note payable at the same bank and the maker's account is insufficient at maturity. The maker made a subsequent deposit, sufficient to meet the past due instrument. *Opinion:* The bank should not charge the instrument against the subsequent deposit without express instructions from the maker. Neg. Inst. A., Sec. 87 (Comsr's. dft.). (*Inquiry from Ohio, Nov., 1912, Jl.*)

Doubtful authority of bank to pay after maturity

2545. Should a bank pay a note payable at its banking institution when presented after maturity, without special instructions from the maker? *Opinion:* The safer course is for the bank not to pay without express instructions from the maker. The same question is involved as where trade acceptances payable at a bank are presented after maturity. See opinion 2551. (*Inquiry from S. C., Feb., 1919.*)

Doubtful authority of bank to pay overdue and dishonored note and accrued interest

2546. A bank inquires: (1) If a note is presented on the due date and there are not sufficient funds in bank to pay same and payment is refused for that reason, and the note is presented on a subsequent day when there are sufficient funds to meet it, should the note then be paid? (2) In case the note is not presented on date of maturity and is presented on a later date, does the bank, in the event it is then required to pay the note, have the right to pay the holder thereof past due interest thereon and charge same to maker in addition to face of note? *Opinion:* (1) When a note is presented at maturity and refused because of insufficient funds, it is dishonored and, if presented after maturity at a time when the funds are sufficient, the best course would be not to pay in the absence of express instructions from the depositor. It is very doubtful if its authority extends to a payment of paper not only overdue but dishonored. (2) The bank, if it pays an overdue note payable at the bank when presented after maturity, would not, it seems, in any event have the authority to pay interest which has accrued after maturity, without express authority from the depositor. (*Inquiry from S. C., March, 1917.*)

Joint parties and accounts

No authority to pay A's individual note out of joint savings account of A and B

2547. Where A and B have a joint account in bank payable on presentation of pass-book, and A makes her individual note payable at bank. *Opinion:* That bank, holding note for collection at maturity, has no right to charge same to joint account, but should protest unless funds to pay note are taken out of joint account by A on presentation of pass-book or are otherwise provided

by A for purpose of meeting the note. (*Inquiry from Cal., Aug., 1913, Jl.*)

Joint and several note payable at bank which carries account of only one maker

2548. A bank presents a copy of a joint and several note bearing the names of two makers, and states that payment was refused on the ground that only one maker had an account with it and this maker had not instructed the bank to pay same, it being admitted that there were sufficient funds to pay the note. The bank inquires whether the refusing bank's attitude is in accordance with law. *Opinion:* The Negotiable Instruments Act of Ohio (Section 3174 e) provides that "Where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon." Under this, where a customer has an account in bank and makes his note payable at the bank, the bank has a right and it is its duty, when it has sufficient funds, to pay the note, upon presentation at maturity, without specific instructions from the maker. In the case presented a note bears the names of two makers. There is nothing on the note to indicate that one of these makers is the principal debtor and the other is his surety. From all that appears, both may have received consideration for the note. The note is in joint and several form; that is, it is not only a joint note of both makers but also several obligation of each. The rule in such a case is not exactly clear and there appears to be no decision on the point. If the bank owned a note of two makers and kept an account with one of them, it would be very doubtful if, at maturity, the bank could set off its debt to the individual on the deposit account against the joint indebtedness of parties on the note. But in this case, the note being several as well as joint, so as to constitute the individual obligation of the maker who keeps the account, it might be held that the bank would have the right to pay it and charge it to his account without his express instructions. At the same time there is uncertainty upon this point, and, in the absence of judicial precedent, the action taken by the bank was probably the safest under the circumstances. Of course, if the note only had had a single maker, the bank's duty to pay without special instructions would be clear. (*Inquiry from Ohio, June, 1914.*)

Where bank cannot pay without express instructions

Illinois bank without authority to pay customer's note, payable at bank, unless expressly instructed

2549. In Illinois the Negotiable Instruments Law omits the provision, "Where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon," which is contained in the uniform law of other states. Under the judicial decisions of Illinois it would seem that a bank has no authority to pay its customer's note made payable at the bank, unless expressly ordered to do so by its customer, the note itself not constituting such order. *Wood v. Merchants Sav., etc., Co., 41 Ill. 267. Ridgely Bk. v. Patton, 109 Ill. 479. Contra: Home Nat. Bk. v. Newton, 8 Ill. App. 563. (Inquiry from Ill., Dec., 1920, Jl.)*

2550. A bank received a note for collection with instructions to protest, and same was duly presented to the bank where payable, and payment thereof was refused on the stated ground that: "We have not been directed by the maker to pay this note on presentment"; and further, that the bank had no right to charge the amount due thereon to the maker in the absence of specific instructions so to do. Inquiry is made whether or not it was the duty of the refusing bank to pay same and charge the maker's account. *Opinion:* The Negotiable Instruments Act contains the provision that "Where an instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon." In a few states, however, this provision has been omitted, and Illinois is one of such states. In view of this, the refusing bank is right in its contention that it was not its duty to pay and charge the note to the maker's account without specific instructions so to do. (*Inquiry from Ill., June, 1915.*)

Minnesota bank cannot pay without special order

2551. Where customer makes note payable at bank it is bank's duty, under Negotiable Instruments Act, to pay and charge same up to customer's account without special order. In a few states, however, including Minnesota, the rule of the Negotiable Instruments Act has been changed and bank should not pay without special order from customer. *Gen. St. Minn.,*

(1913) Sec. 5899. (*Inquiry from Minn., June, 1918, Jl.*)

Question of discharge of maker of note payable at bank where presentment omitted and bank fails

Extent of maker's obligation

Maker's readiness to pay stops interest

2552. A made his note payable at a bank on demand after date. The note was not presented at the bank where the maker always had sufficient funds. *Opinion:* The maker is liable in an action by the payee, but if the maker pleads and proves that he had sufficient funds in the bank at maturity and pays the money into court, he is liable only for the principal without interest after maturity or costs. Okla. Neg. Inst. Act. Sec. 70. *Armistead v. Armistead*, 10 Leigh (Va.) 525. Daniel Neg. Inst., Sec. 643. *Binghamton Pharmacy v. First Nat. Bk.*, (Tenn.) 176 S. W. 1038. (*Inquiry from Okla., Dec., 1918, Jl.*)

2553. Where maker has funds in bank at maturity, failure of bank owning note payable at bank to charge to account, or of outside holder to present for payment, will stop the running of interest. Daniel Neg. Inst., Sec., 643. (*Inquiry from Iowa, June, 1913, Jl.*)

Where bank not obliged to pay note at maturity, interest does not stop

2554. A bank writes that in the June issue of the Journal (1913) there is a "decision" stating that "where a maker has funds in bank at maturity, failure of bank owning note to charge account, * * * will stop running of interest," and asks if the bank would be legally able to collect interest if the bank failed to charge up the note at maturity supposing, of course, that the maker had sufficient funds on deposit, and did not call at the bank until the paper was 15 to 30 days past due. *Opinion:* The opinion in the June Journal that, where a note is made payable at, and is owned by, the bank and there are sufficient funds in bank at maturity, the failure of the bank to charge up the note would stop the running of interest was based on the provision of the Negotiable Instruments Act that, where a note is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon. But the Nebraska Act omits this provision. Therefore, in your state, unless the maker expressly instructed the bank to charge up the note at maturity, the interest would continue to run after maturity until paid. (*Inquiry from Neb., Aug., 1913.*)

2555. A note given to a bank has as collateral three notes of third persons payable at another bank. The holder of the notes had nothing to do with the selection of the bank of payment. On the day that the collateral notes fell due the makers left sufficient funds at the bank of payment to meet them. The notes were not presented on the day of maturity and thereafter, before they were presented, and while the money was still on deposit to pay the notes, the bank of payment failed. Are the makers of the collateral notes relieved from liability? *Opinion:* Since the holders of the notes had nothing to do with the selection of the bank of payment, it cannot be regarded as their agent, and hence the makers cannot escape liability on the theory that when the bank failed it held the proceeds of the notes as the agent of the holders. The mere naming of a bank in a note as the place of payment thereof and the depositing of funds for payment do not make the bank an agent of the holder.

The sole theory upon which the makers can escape liability is that the holders of the notes were under the same duty as the holders of a check to present promptly, failing which the holders and not the makers take the risk of continued solvency of the bank. The Negotiable Instruments Act, Sec 87, provides that "where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon." *Baldwins Bank v. Smith*, 109 N. E. (N. Y.) 138, contains a dictum supporting the theory of the duty of the note-holder to present promptly. In that case the payor bank had been constituted agent of the holders because the note had been sent to it for "collection and remittance," and the ruling was that the note was paid at maturity. Also in *New England Nat. Bank v. Dick*, 114 Pac. (Kan.) 378, a statement is found supporting the theory, but the decision, itself, seems to go on the ground that when the payor bank failed, it held the money as agent of the holder of the note. To the contrary of these statements is the well reasoned decision in *Binghamton Pharmacy v. First Nat. Bank*, 176 S. W. (Tenn.) 1038. The court quoted Sec. 70 of the Negotiable Instruments Act providing that "Presentment for payment is not necessary in order to charge the person primarily liable

on the the instrument; but if the instrument is, by its terms, payable at a special place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part. But, except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers." The reasoning of the court is to this effect: the difference between the drawer of a check and the maker of a note is that the former is secondarily liable while the latter is primarily liable. Hence presentment for payment is necessary to charge the drawer of a check but not the maker of a note. Sec 186 of the Negotiable Instruments Act, providing that "a check must be presented for payment within a reasonable time after its issue or the drawer will be discharged from liability to the extent of the loss caused by the delay," has no application to notes. Section 87 of the Negotiable Act, declaring an instrument payable at a bank the equivalent of an order on the bank, was only intended to settle the right of bank, without specific authority, to pay such instrument and charge it to the account of the principal debtor. This latter case seems supported by the better reasoning and, applying the principles to the case submitted, the makers of the collateral would continue liable notwithstanding the failure of the payor bank. (*Inquiry from Colo., Feb., 1921.*)

Maker's liability on protest of note payable at bank before close of banking hours

2556. A note payable at a bank was presented for payment before the close of banking hours on the day of maturity and payment was refused because of insufficient funds. Later and before the close of banking hours the maker of the note deposited more than sufficient funds to pay it. There was

no further presentation and the note was returned as unpaid. Was the note legally presented for payment? *Opinion:* The maker was not in default when the note was presented for payment and payment refused because of insufficient funds, and when, later in the day, during banking hours, he deposited sufficient funds to pay the note, this was equivalent to a tender of payment on his part. He was not obliged thereafter to seek the holder of the note and the collecting bank should have presented it for payment again at the close of banking hours. *German American Bank v. Milliman*, 65 N. Y. Supp. 242, which carefully reviews the authorities and also holds that where the note is protested for non-payment before the close of banking hours on the day of maturity and the money is later deposited, the protest is of no avail and the maker cannot be compelled to pay the protest fees thus incurred.

It is not entirely clear, in the case of a note payable at a bank, whether the holder has the right to cause protest to be made immediately upon presentment and refusal for lack of funds, subject to nullification of such protest if a sufficient deposit is afterwards made later in the day, or whether such protest before the close of banking hours is to be deemed premature and unjustifiable. It would seem, however, that the note cannot be regarded as dishonored so as to justify a protest which might unnecessarily damage the maker's credit where he had made full provision to take care of his paper during the day. In the case submitted, it is not stated whether notice of dishonor was given or protest made based on the refusal to pay before the close of banking hours. Whatever may be the precise facts, it would seem that the maker was not in default and that there was no sufficient presentment to justify notice of dishonor or protest. (*Inquiry from N. Y., Feb., 1921.*)

OVERDRAFTS

Classes of overdrafts and power of comptroller to require national banks to prohibit

2557. The comptroller of the currency on January 28th, 1915, issued a circular letter to national banks stating that the practice of permitting overdrafts should cease entirely, and requesting that each national bank should pass a resolution prohibiting any overdraft. Should national

banks comply with his request? *Opinion:* The circular may be regarded from two points of view: (1) as a compulsory order; (2) as a request for co-operation. 1. Apparently the comptroller has no power or authority to compel a national bank to adopt such a resolution. He is charged with the execution of all laws passed by congress relating to national banks, and in case of violation of any of the provisions of

the banking act the franchise may be forfeited by proper proceedings. Rev. St. Sec. 5239. There is no express provision of the National Bank Act which is violated by the granting of overdrafts. Under the general power of making loans a national bank may permit overdrafts and even though there should be no such power, the comptroller could not compel the directors of a national bank to pass a resolution on the subject. The only consequences that would seem to follow the ignoring of the circular would be that the comptroller might, with the co-operation of the secretary of the treasury, have it in his power to deprive a non-complying national bank of the privilege of receiving government deposits or acting as the financial agent of the government.

2. As a request for co-operation, the circular may well be given attention, for, although in particular instances it may be desirable to permit overdrafts, yet there are objectionable features to the practice generally.

Overdrafts may be divided broadly into three distinct classes: (a) fraudulent; (b) by mistake; and (c) by prearrangement. Overdrafts of the first class are expressly made criminal in some states and should be made such in all jurisdictions. (b) In cases of mistake; where the customer is responsible and his credit would be injured by dishonoring the overdraft, it would seem good banking policy to protect his credit by paying his check, and at the same time notify him that his account is overdrawn. (c) The third class is the overdraft by prearrangement, as where a buyer is permitted to draw checks for his purchases with the agreement that he is to give a note and necessary security. The last two classes of overdrafts are forms of loans apparently within the power of a national bank. (*Inquiry from N. Y., March, 1915, Jl.*)

Payment of overdrafts

Payment to bona fide holder a finality

2558. John Smith has an account at Bank A and presents the check of Jones drawn on the same bank at the paying teller's window and receives cash for the same. Jones had not sufficient deposit to protect the check and the bank asks if it can charge back the overdraft to Smith's account. *Opinion:* The great weight of authority is to the effect that a payment of a check to a bona fide holder in the ordinary course of business by the bank upon which

it is drawn, under the mistaken belief that the drawer has funds in bank subject to check, is final and irrevocable and not such payment under mistake of fact as will permit the bank to recover the money so paid. Bank A having paid Jones' overdraft to Smith in cash, the latter is not liable to refund the money and the bank cannot charge the same to his account. (*Inquiry from Wis., March, 1914, Jl.*)

Mistaken charge of overdraft received by mail to depositor's account

2559. Bank A receives an overdraft through the mail from bank B. After the check has been entered on the bank's books and charged to the drawer's account it is discovered that the account is overdrawn. Can the check be returned to bank B? *Opinion:* In this case the charging of the account was by mistake, and some courts might hold that this was an inadvertence which might be corrected. At the same time the rule is quite well settled that when an overdraft is paid, it is a finality and cannot be recovered. If the cash is paid over the counter to a holder, even before charge to the account, it is too late to recall the payment, but in the case of a check coming by mail or through the clearing house, it would seem that the point of time when the check is paid is when it is charged to the account of the drawer, as such charging evidences an intention to pay the check, and the subsequent remittance of the money is an act done as agent of the holder. In the present case while it would appear reasonable that the bank might undo its bookkeeping where it had not actually remitted the money, it would seem from the authorities, which, however, are not very satisfactory on this point, that, when the overdraft was charged against the drawer's account, it was paid, and that it would be too late to return the check to bank B. (*Inquiry from N. M., May, 1920.*)

Drawee not obliged to apply insufficient balance to overdraft

2560. A presents to B bank C's check for \$125, the latter's balance at the time being only \$45. Would the bank be obligated to apply this \$45 as a part payment of the check, and if not, would the bank be permitted to pay subsequent checks within the amount of the balance, or would A have a right to deposit sufficient to the credit of C to make the check good? *Opinion:* A bank is not obliged to make part payment of a check and is not obliged to receive from

the holder sufficient to make the check good. The presentment of an overdraft and refusal to pay same do not create any lien on the balance in favor of the holder. The bank may rightfully pay any subsequently presented checks within the balance. (*Inquiry from Kan., Nov., 1916.*)

Payment by credit to depositor

Credit of overdraft to account of another depositor

2561. John Smith deposits with the receiving teller of his bank a check drawn on the same bank and receives credit for the same. Later it appears that the maker of the check had not sufficient funds to protect the check. The bank asks if it can rightfully charge back the overdraft to Smith's account. *Opinion:* Where an overdraft of one depositor is offered for deposit by another and credited to the latter's account, the legal effect, according to a number of authorities, is the same as if the money was first paid out and redeposited; in other words, the payment by credit to account is final and irrevocable. But in California the courts hold that a bank which receives a deposit of a check drawn on the same bank takes the same for collection from itself and can cancel the credit upon discovering on the same day that it is an overdraft. And (according to a Pennsylvania case) where a depositor knows that the drawer has no funds, he is guilty of fraud which will justify charging the check back. Furthermore, as was held in a New York case, it is competent for the bank to credit the depositor's account conditionally, that is, upon condition that if upon examination the check is found not good it will be charged back. And a recent decision in the Court of Appeals of Missouri is to the effect that where the bank can prove a custom to charge back, this will entitle the bank to cancel the credit. In the light of the foregoing, Bank A cannot charge back to the account of Smith the check of another depositor which has been placed to his credit upon later discovering such check is an overdraft unless (1) Smith knew that the check was not good at the time he deposited it, or (2) Bank A had an agreement with Smith that the deposit should be conditional upon examination as to the state of the drawer's account, or (3) Bank A can prove an established custom among the banks of the city known to Smith of charging back later in the day if the deposit is found to be an overdraft. The latter is on the authority of the Missouri case and may not be universally followed.

To protect the bank in such cases it would seem advisable to print a notice in the pass-books or on the deposits slip of customers to the effect that such deposits will be credited conditionally and, if not found good at the close of business, will be charged back and depositors notified. (*Inquiry from Wis., March, 1914, Jl.*)

Deposit of overdraft on same bank

2562. A check of another depositor on the same bank was offered for deposit and credited in the depositing customer's pass-book. May the credit be revoked upon discovering the check to be an overdraft? *Opinion:* The rule adopted by the majority of courts is that the check is paid equally as if the money had been first paid out and redeposited, and the bank cannot afterwards revoke the credit upon discovering the check to be an overdraft. *Oddie v. National City Bank*, 45 N. Y. 735. *First National Bank v. Burkhardt*, 100 U. S. 686. In California, however, it has been held that when a check on the same bank is presented by a depositor for credit and entered in his pass-book, there is no presumption that the check was received as cash or otherwise than for collection and the bank has until the close of banking hours on the day of deposit in which to ascertain whether the check is drawn against sufficient funds. *National Gold Bank v. MacDonald*, 51 Cal. 64. *Corn Bank v. Rogers*, Cal. 92 Pac. 879. Authorities in Alabama, Illinois, New Jersey and Pennsylvania hold the New York rule first stated. (*Inquiry from Ky., April, 1920.*)

Suggested clause in pass-book giving bank the right to charge back wrongly credited overdraft on itself

2563. In *Oddie v. National City Bank*, 45 N. Y., 735, the court held that where the check of one depositor is deposited by another, and the teller gives him credit therefor, such credit cannot be revoked upon finding the check was not good. A New York bank complains that this decision seems unfair and is contrary to the decisions of other states. It asks if this decision is still law in New York, and if it would be possible for a bank to protect itself by some sort of contract or agreement printed in its pass-books or on its deposit slips, or both, to the effect that all checks received on deposit are subject to final payment. *Opinion:* The rule established in *Oddie v. National City Bank*

that a credit in a depositor's pass-book of an overdraft of another depositor is final and irrevocable has not been overturned in New York. Decisions in other states conflict. The same rule has been held in Alabama and Pennsylvania. On the other hand, in California it has been held that "when a check on the same bank is presented by a depositor with his pass-book to the receiving teller, and he merely receives the check and notes it in the pass-book, nothing more being said or done, this does not of itself raise the presumption that the check was received as cash or otherwise than for collection." This rule is the more equitable one, but it cannot be said to be the law of New York; therefore it would be advisable to print on the deposit slip and probably also in the pass-book a properly worded clause giving the bank the right to charge back a wrongly credited overdraft on itself at any time before the close of business on the same day. *Oddie v. Nat. City Bk.*, 45 N. Y. 735. *City Nat. Bk. v. Burns*, 68 Ala. 267. *Bryan v. Bk.*, 205 Pa. 7. *Nat. Gold Bk. v. McDonald*, 51 Cal. 64. *Ocean Park Bk. v. Rogers*, (Cal.) 92 Pac. 879. *James River Nat. Bk. v. Weber*, (N. Dak.) 124 N. W. 952. *Pollack v. Nat. Bk. of Com.*, (Mo.) 151 S. W. 774. (*Inquiry from N. Y.*, March, 1913, *Jl.*)

Drawee as collection agent of holder

Drawee paying subsequent smaller check while overdraft held for collection

2564. A draws a check for \$250 in favor of B on bank C where he has a balance of only \$200. On presentation by B, payment being refused, he left the check with the bank and subsequently, while check was still in the bank's possession, another check, drawn by A in favor of D, for \$200 was presented and paid. Can B hold bank C responsible for the \$200? *Opinion:* Bank C would be acting in a dual relation, namely, as B's agent for collection and as agent of A to pay his "good" checks. As the bank would be under no duty to make part payment of the \$250 check and as the \$200 check would be the first one presented which would raise the duty of making payment, it being within the balance, bank C's duty would be to pay this check, and the fact that the bank held the \$250 check as agent for collection would give it no lien on the customer's balance which would operate to prevent its paying the \$200 check. There would be no neglect of duty to B, and no responsibility to him because of bank C's subsequent payment of the \$200 check, that

being the only check within the balance. (*Inquiry from Va.*, April, 1911.)

Drawee mailing overdraft for collection must pay later specific deposit as directed

2565. Where a bank holds for collection checks upon itself without a deposit against the same and receives a specific deposit from its customer to be paid upon a later described check, its duty is to obey the instructions and in so doing it incurs no liability to the owners of the checks which it holds for collection. Where several checks are received any one of which would be an overdraft, the bank if it chooses can pay an overdraft and apply a future deposit thereto. *Drovers Nat. Bk. v. O'Hare*, 119 Ill. 646. *Parker v. Hartley*, 91 Pa. 465. *Bk. of British N. A. v. Cooper*, 137 U. S. 473. (*Inquiry from Ala.*, April, 1916, *Jl.*)

Non-liability of drawee to holder of overdraft

2566. A gave B a check on bank C where his account was overdrawn and sold the goods for which the check was given and deposited the proceeds with the bank. B gave the check to D who, believing it not good, returned it to B who kept it six months and then presented it to bank C for payment. The bank in the meanwhile had closed A's account. As A had been in the habit of overdrawing his account for some time, although there was no special agreement of the bank to pay this check, it is asked if the bank is under obligation to pay it or would have been if it had been presented promptly. *Opinion:* Under the Negotiable Instruments Act a bank is not liable to the holder of a check unless and until it accepts the same, which acceptance must be in writing and the bank's only obligation to pay a check when in funds runs to the drawer. In the present case the check was an overdraft and the bank had not agreed with the drawer to honor same. Therefore, there was, or is, no obligation on the part of bank C to pay the check to B whose only recourse, if the bank refuses, is against A, the drawer. (*Inquiry from Kan.*, Sept., 1914.)

Deposit of overdraft on another bank

2567. John Smith deposits in Bank A a check of Jones drawn on a New York bank and receives credit for the same. Payment of the check is refused by the New York bank. Bank A asks if it can charge back the item to Smith's account. It also asks if Smith had received cash could his ac-

count still be charged. *Opinion:* The bank of deposit has the right to charge the amount back to Smith's account, but care must be taken to preserve Smith's liability as indorser, assuming he has transferred title to the bank and not merely deposited it for collection. Smith, being duly charged as indorser, would be indebted on the check to the bank and, even though cash had been paid to him, the bank would have the right to set off such indebtedness to his account. *Spokane, etc., Tr. Co. v. Huff*, (Wash.) 115 Pac. 80. *Oddie v. City Nat. Bk.*, 45 N. Y. 735. *Cons. Nat. Bk. v. First Nat. Bk.*, 129 N. Y. App. Div. 538. *City Nat. Bk. v. Burns*, 68 Ala. 267. *Amer. Exch. Nat. Bk. v. Gregg*, 138 Ill. 596. *Titus v. Mechanics Nat. Bk.*, 35 N. J. L. 588. *Nat. Gold Bk. v. McDonald*, 51 Cal. 64. *Peterson v. Union Nat. Bk.*, 52 Pa. 206. *Lamsdon v. Gilman*, 81 Hun. (N. Y.) 526. *Pollack v. Nat. Bk. of Com. (Mo.)* 151 S. W. 774. (*Inquiry from Wis., March, 1914, Jl.*)

Recovery by drawee

Recovery of money paid on overdraft because of erroneous credit

2568. A deposit of \$105 made by one depositor was erroneously credited to another depositor, who checked out the amount. *Opinion:* The bank has a right of action against the customer to recover the amount of the overdraft with interest from the time overdrawn. *James River Nat. Bk. v. Weber*, (N. Dak.) 124 N. W. 952. *Citizens Tr. Co. v. Levine*, 147 N. Y. S. 737. (*Inquiry from Pa., Jan., 1915, Jl.*)

Charge of overdraft to customer's account after transfer of credit from another customer

2569. A person who has an overdraft at a bank asks another person to lend him money for a few days and the latter telephones the cashier of the bank, asking it to charge the lender's account with the amount and give the borrower credit for it, and to require a receipt from the borrower. The instructions of the lender are followed. The bank then applies the money on the overdraft. Is it liable to the lender? *Opinion:* There is no liability. The instructions of the lender were followed. The bank was not responsible for any misrepresentation made by the borrower to the lender as to the use to which the money was to be put, nor was it a trustee of the money of the lender to see that it was properly applied after the credit to the other account. After the credit was trans-

ferred, the bank had a right to deal with it as the money of the borrower by applying it to the overdraft. (*Inquiry from Tex., Jan., 1921.*)

Collection of overdrafts

2570. Inquiry is made as to the collectibility of overdrafts. *Opinion:* The courts have held that an overdraft is in legal effect an irregular loan by the bank to the overdrawing customer. It constitutes an indebtedness which may be sued for the same as an indebtedness on a note, or the bank may apply subsequent general deposits upon the overdraft. (*Inquiry from Ia., Dec., 1915.*)

Recovery on overdraft

2571. Can a bank recover on overdraft of depositor where his pass-book was balanced and cancelled vouchers returned and the pass-book did not show the overdraft but showed a credit to the depositor? *Opinion:* An overdraft is held by the courts to be in the nature of an irregular loan for which the depositor is liable to the bank and even though the balancing and return of the pass-book might constitute an account stated, it is the rule of law that an account stated is not conclusive but may be corrected upon proof of mistake; so that in any event the bank would have a right of action to recover an overdraft granted a depositor upon proof that he had overdrawn his account. (*Inquiry from N. Y., Feb., 1916.*)

Action on overdraft against maker and indorser

2572. Through error a bank paid a check for \$200, given by W. H. B. to P. B., his brother, after the former had closed his account. W. H. B. was notified of the overdrafts and he declared the check a forgery, and stated his intention not to pay same. When P. B. was notified of his brother's statement, the former declared the check regular and stated he would not return the funds and that the bank should collect from the maker. *Opinion:* The best procedure would be to bring a suit against W. H. B., as maker, and P. B., as indorser, of this check. If the maker's name is forged, which the indorser denies, that fact can be proved at the trial and the bank can recover judgment against the indorser and he will probably go to jail. If, on the other hand, the maker's signature is genuine, then both parties would be liable for the amount. (*Inquiry from N. Y., May, 1916.*)

PASS-BOOKS

Pass-books

Nature of pass-book

2573. Bank A cashed several checks for a party drawn on a bank at Sulphur Springs, Colorado, upon the strength of a pass-book, given him by that institution, showing a credit of \$300. The Sulphur Springs bank refused payment of the checks, stating that credit was given the drawer by mistake and the entry in the pass-book was invalid. *Opinion:* The pass-book was not a letter of credit, but merely prima facie evidence of a deposit and the bank may show that credit was given by mistake or for an invalid item. A check not being an assignment under the Negotiable Instruments Law, Bank A has no right of action thereon against the drawee. *Talcott v. First Nat. Bk.*, 53 Kan. 480. *Bk. v. Clark*, 134 N. Y. 368. *Lucks v. Northwest Sav. Bk.*, (Mo.) 128 S. W. 19. (*Inquiry from Colo., Feb., 1912, Jl.*)

Mistaken entry of deposit in pass-book— Burden of proof

2574. After entering a check in a pass-book for \$57, the teller discovered that it called for only \$51, and accordingly charged the depositor's account \$6. The depositor, who asserts that he is unable to produce the check, claims that it calls for \$57. Is the entry in the pass-book, a receipt by the bank for the amount stated or a mere memorandum, subject to correction? On whom is the burden of proof? *Opinion:* The entry in the pass-book is in the nature of a receipt and is prima facie evidence that the amount stated has been received. Although the entry is subject to change upon proof of error, the burden of proof is upon the party alleging the error. (*Inquiry from N. Y., Dec., 1917.*)

Signature or initials of receiving officer to entry of deposit

2575. Does the entry of deposit in a pass-book have to be signed or initialed by receiving officer to have evidential effect of a receipt? *Opinion:* The courts generally hold that the entry of a deposit in a pass-book to the credit of the depositor is in the nature of a receipt and is prima facie evidence that the bank has received the amount from the depositor. *Quattorchi v. Farmers & Merchants Bank*, 89 Mo. App. 500.

Talcott v. First National Bank, 53 Kan. 480. The presumption of correctness arising from the entry may be rebutted by other evidence. In view of the nature of the entry, it is very doubtful whether it needs to be initialed to give it the evidential effect of a receipt. In some banks the practice exists. Apparently the question has not come before the courts. It is not necessary to consider the abstract question whether or not a signature is necessary to the validity of a receipt, since the printed name of the bank on the pass-book in which the entry is made would be sufficient. (*Inquiry from Kan., March, 1915.*)

Right of depositor to pass-book and paid checks

2576. Where a balanced pass-book shows an overdraft, which the depositor refuses to pay, has the bank the right to retain it and the cancelled checks, until payment is made? *Opinion:* The bank should return the pass-book but retain the checks. The balanced pass-book constitutes a statement of the account and the depositor is probably entitled to it. While the depositor has the ultimate right of property in the paid checks, they are the bank's vouchers and it has a temporary right of possession until the account is settled. Such checks are the bank's evidence of its payments on behalf of the depositor, and it would not be wise, in the case of an overdraft, for the bank to part with such evidence of its payment until the account had been adjusted. In a suit to recover the amount of the overdraft the check would be the best evidence. (*Inquiry from Ill., July, 1915.*)

Duty of depositor to examine pass-book

2577. An item of \$50 credited in a pass-book in December, 1911, was not entered on the bank's ledger to the credit of the depositor and was omitted in the balancing of the account in January, 1912, and in subsequent balancing. No claim was made that the bank had made an error until more than six years later, and then by the administrator of the depositor. In the meantime the deposit tickets of December, 1911, were destroyed and the administrator could not produce the checks which entered into the balance of January, 1912. Is the bank liable for the amount? *Opinion:* In this case it would undoubtedly be held

that the failure on the part of the depositor to examine his pass-book and returned vouchers without unreasonable delay, and to report errors to the bank will free the bank from liability. It is the duty of a depositor to examine his pass-book and report errors within a reasonable time after balancing and his failure so to do will, according to some cases, estop him from thereafter questioning its correctness, if the bank would be thereby prejudiced, while other cases hold he is not thereby estopped, but that the burden of showing error is placed on the depositor. *Leather Mfg. Bk. v. Morgan*, 117 U. S. 96. *Rettig v. South. Ill. Nat. Bk.*, 147 Ill. App. 193. *Critten v. Chemical Nat. Bk.*, 60 N. Y. App. Div. 241. (*Inquiry from W. Va., Aug., 1918, Jl.*)

Validity as contract of pass-book notice that checks credited conditionally

2578. What is the legal effect of printing in a depositor's pass-book the following notice, "Checks on this bank will be credited conditionally. If not found good at close of business they will be charged back to depositors, and the latter notified of the fact. Checks on other city banks will be carried over for presentation through the clearing house on the following day. This bank, in receiving checks or drafts on deposit or for collection, acts only as your agent, and beyond carefulness in selecting agents at other points, and in forwarding to them, assumes no responsibility"? *Opinion:* The notice printed in the pass-book is binding as a contract between bank and depositor. *Minneapolis Sash & Door Co. v. Metropolitan Bank*, 76 Minn. 136, 78 N. W. 980, to the effect that a notice in a pass-book that the bank in forwarding items to other points would select responsible agents but would assume no risk or responsibility on account of their omissions, negligence or failure, had the effect of limiting the liability of the bank as provided, but would not protect the bank where it negligently mailed an item direct to the drawee for collection. This decision stands generally for the proposition that a notice in a pass-book is binding on the depositor, where the contents of the notice are not against public policy. (*Inquiry from Minn., Nov., 1916.*)

Note: Some cases, however, hold that the printing in a bank pass-book of an agreement limiting the liability of the bank does not bind the depositor unless it appears "affirmatively that he consented and agreed to it either by being required to sign it or by

having his attention particularly called to it. It is not sufficient merely that it appear in the front of the pass-book." *Los Angeles Inv. Co. v. Home Sav. Bank*, 182 Pac. (Cal.) 293.

Comparative effectiveness of clause on pass-book and on deposit slip

2579. Is there any advantage in placing a clause limiting the liability of a bank on deposit slips as well as in the pass-book? *Opinion:* While the courts generally hold that a pass-book clause is a contract binding on the depositor, there are cases where the depositor has contended that he has never read the clause and that, therefore, it was not binding on him as a contract because there had been no assent or meeting of minds. (See *Elder v. Franklin Nat. Bank*, 55 N. Y. Supp. 576.) Where such a clause is also printed on the deposit slip which the depositor fills out every time he makes a deposit, it is quite clear such a claim would be held untenable and the placing of such clause on the deposit slip might be of value as an additional protection. (*Inquiry from N. Y., Nov., 1920.*)

Note: See also *Los Angeles Ins. Co. v. Home Sav. Bank*, 182 Pac. (Cal.) 293 holding that a depositor is not bound by a pass-book rule unless it is affirmatively shown that he signed it or had his attention called to it.

Savings pass-books

Nature of savings pass-books and rights of assignee

2580. A Massachusetts banker desires legislation to make it possible for the owner of a lost pass-book to withdraw his money without the four months delay required by Massachusetts statutes, and, in order to ascertain the present status of the law, inquires—(1) Is the form of pass-book ordinarily used by mutual and stock savings banks, anything more than a memorandum of transaction, even though the by-laws require the pass-book to be presented whenever a deposit or payment is made? (2) Does an assignment or transfer of the pass-book transfer anything except the amount the owner of the book actually has on deposit, regardless of the balance shown by the pass-book (3) Has the holder of the pass-book and order for payment on account of the same from a depositor any more right to action against the bank than the holder of a check would have against a

commercial bank? *Opinion*: (1) The pass-book is simply evidence of the deposit and is not a negotiable instrument. *Mills v. Albany Exchange Savings Bank*, 28 Misc. (N. Y.) 251, and cases cited. This is true although the by-laws require presentation of the pass-book for entering of a deposit or withdrawal. If the pass-book is lost, some courts uphold by-laws of a bank which require indemnity as a prerequisite to payment. Other courts deny the bank's right to indemnity and the only real necessity for indemnity would seem to be in a case where the depositors were so numerous that the bank could not be sure that the person alleging himself to be the depositor who had lost his book was in reality the depositor. (2) Assignment of the pass-book transfers to the assignee simply the amount on deposit, regardless of the balance shown in the book. The theory has been denied that, as the bank's contract is to pay only on the production of the book and enter all deposits and withdrawals therein, the assignee has the right to rely on the conditions stated therein and that the bank is estopped as against the assignee to show that it has paid the original depositor without production of the book. As the pass-book is not negotiable, the assignee takes simply the rights of his assignor therein and unless he notifies the bank of the assignment, it would be protected in paying the assignor on claim of loss without production of the book.

There seems to be some merit in the present Massachusetts statute requiring four months' notice before payment of an account, where the book is said to be lost, from the standpoint of protecting a bona fide assignee of the book. (3) There is a difference as to the rights of the holder of a check on a commercial bank and the holder of an assigned savings pass-book. The former has no right of action, but the latter, after notice of the assignment, has a right of action against the bank for the deposit. (*Inquiry from Mass., Jan., 1912.*)

Savings pass-book not negotiable

2581. Is a savings pass-book a negotiable instrument in Massachusetts? *Opinion*: A savings pass-book is clearly not within the definition of a negotiable instrument, contained in the Negotiable Instruments Act. The rule that it is not such an instrument applies in Massachusetts as elsewhere. (*Inquiry from Mass., May, 1917.*)

Binding effect of pass-book rules without signature of savings depositor

2582. It has been the custom with a national bank having a savings department to require the signature of the depositor in the pass-book at the bottom of the page following the rules. It asks whether the mere statement: "In account with ———, who makes all deposits subject to the Rules and Regulations of the Bank which will be found in this book," fully binds the depositor to those rules. *Opinion*: The printing of the rules in the pass-book seems to make them binding as a contract between the depositor and the bank. The courts have so held in various cases. However, the custom of requiring the signature of the depositor is to be commended. (*Inquiry from Wis., Dec., 1916.*)

Note: See, however, *Los Angeles Inv. Co. v. Home Sav. Bank*, 182 Pac. (Cal.) 293, in which it is held the pass-book rule does not bind the depositor unless it appears "affirmatively that he consented and agreed to it either by being required to sign it or by having his attention particularly called to it. It is not sufficient merely that it appear in the front of the pass-book."

Rule of national bank that savings pass-book must accompany check

2583. May a national bank provide in its by-laws that a check on a savings account shall be accompanied by the savings pass-book when withdrawals are made? *Opinion*: A by-law of a national bank printed in the pass-book is a contract with the depositor and it may enforce the rule requiring the pass-book to accompany checks on savings accounts. Such a by-law is not contrary to the National Bank laws. The Federal Reserve Act recognizes that national banks may carry savings accounts as well as time deposits. See Section 19 F. R. Act regulating reserve, and circulars of the Federal Reserve Board (Circular No. 6, Series of 1915, and Regulation E, Series of 1915). (*Inquiry from Ohio, Oct., 1915.*)

Assignment of savings pass-book

Assignee of savings pass-book takes only depositor's rights

2584. A bank has been in the custom of returning savings pass-books, upon which there is no credit balance, with the stamped statement, "Account Closed." What is the liability of the bank when the depositor makes fictitious entries and transfers the

book to an innocent holder for value? *Opinion:* A savings pass-book is not a negotiable instrument, and no transferee thereof can take greater rights against the bank than the original depositor. In the case submitted there is no liability because of fictitious entries. (*Inquiry from Ohio, Feb., 1918.*)

2585. A savings bank or savings department pass-book is not a negotiable instrument, and an assignee of the book and account from the depositor takes no greater rights than the latter against the bank. *Mills v. Albany Exch. Bk.*, 59 N. Y. S. 149. (*Inquiry from S. D., July, 1910, Jl.*)

*Rights of assignee of savings pass-book
against receiver*

2586. Bank A loaned an individual \$1,000 upon the collateral security of a written order and a pass-book connected with a savings account in Bank B. Bank B received and accepted notice of the assignment and later failed. The depositor was also a stockholder in Bank B, liable to assessment. The receiver of Bank B refused to obey the written order given by its depositor and proposed to hold the account to secure the depositor's liability as stockholder. *Opinion:* Bank A is entitled to the deposit and such right is superior to any claim of lien by the receiver for B. In this case the assignment would have been valid, even without the notice to or acceptance by Bank B. *Taft v. Bowker*, 132 Mass. 277. *Gammond v. Bowery Sav. Bk.*, 15 Daly (N. Y.) 483. *Kingman v. Perkins*, 105 Mass. 111. *Jackson v. Hamm*, 14 Colo. 58. *Allyn v. Allyn*, 154 Mass. 570. *Marsh v. Garney*, 69 N. H. 236. *Pollard v. Pollard*, 68 N. H. 356. *Forist v. Bellows*, 59 N. H. 229. *Jones v. Lowery Bk. Co.*, 104 Ala. 252. *Savage v. Gregg*, 150 Ill. 161. *Smith v. Clarke*, 9 Iowa 241. *Thayer v. Daniels*, 113 Mass. 129. *Ricker v. Cross*, 5 N. H. 570. *Lassiter v. Jackman*, 88 Ind. 118. *Krapp v. Eldridge*, 33 Kan. 106. *Rogers Ins. Co. v. Carrington*, 43 Mich. 252. *Brown v. Mansur*, 64 N. H. 39. *Garland v. Harrington*, 51 N. H. 409. *Conway v. Cutting*, 51 N. H. 407. (*Inquiry from N. H., Dec., 1915, Jl.*)

Bank cashing draft on faith of savings pass-book, after account closed, is the loser

2587. A bank closes out a savings account without requiring a return of the pass-book, and the holder of the book fraudulently draws a draft on the bank, attaching the savings book and negotiates

the draft to a bank, which cashes the same on faith of the book. What is the responsibility of the drawee bank to the cashing bank? *Opinion:* There is no responsibility. A savings pass-book is not a negotiable instrument, but is a mere evidence of the receipt of the deposits therein entered subject to explanation. The drawee bank is not estopped by its leaving the pass-book outstanding. The cashing bank has no greater rights than the original holder. It is incumbent upon any bank before advancing cash upon a savings bank book to make inquiry of the issuing bank as to the correctness of the account therein stated. (*Inquiry from Mich., Apr. 1, 1918.*)

*Assignee cannot hold bank for unentered
withdrawals*

2588. A savings bank or savings department pass-book contains a rule requiring its presentment when money is withdrawn in order that payment may be duly entered therein. A check was cashed without such presentment and no entry of the withdrawal was made in the pass-book. An innocent assignee or pledgee of the book advanced value thereon upon faith of the entries shown. *Opinion:* A savings pass-book is not negotiable and the assignee cannot hold the bank liable where the withdrawals have not been entered as provided by the rules printed in the book. The savings bank is not estopped to show the true state of the account. (*Inquiry from N. C., Nov., 1914, Jl.*)

2589. A depositor of a savings bank withdrew from his account of \$500 the sum of \$100, but, contrary to the rules printed in his pass-book, the withdrawal was not entered therein. He then assigned the book, showing a balance of \$500, to Bank A, which cashed his check for \$500. The savings bank admitted liability only to the extent of \$400. *Opinion:* Bank A is the loser of \$100 unless it can recover that amount from the depositor. The savings bank is not liable, because the pass-book is not a negotiable instrument and Bank A took no greater rights than the depositor. (*Inquiry from S. D. July, 1910, Jl.*)

Payment with and without presentation of pass-book

*Certification of depositor's check without
presentation of savings pass-book*

2590. A depositor having a savings account issued his check to the order of B in

negotiable form. The check was delivered to B without the pass-book, which provided that the bank will not honor any checks on the account unless accompanied by the pass-book. B indorsed to the order of C, who had the check certified by the bank. After the bank charged the amount to the drawer's account, it learned that B obtained the check through fraud. *Opinion*: Payment of such a check without production of the pass-book would probably be valid, the condition of production being waived by both drawer and drawee; and, payment being valid, certification of the check in the hands of a bona fide holder would be equally chargeable to the depositor. *Cosgrove v. Provident Sav. Inst.*, 64 N. J. L. 653. *Times Square Auto Co. v. Rutherford Nat. Bk.*, (N. J.) 73 Atl. 479. (*Inquiry from Pa.*, Feb., 1913, *Jl.*)

National bank may, under its rules, refuse check unaccompanied by savings pass-book

2591. A check drawn on the D national bank was cashed by a bank and presented to the drawee, which refused payment, stating that the drawer had a savings account which was good for the amount but the rules required that a check on the savings department must be accompanied by the customer's bank-book. The holder questions the right of the drawee to refuse payment under such rules. *Opinion*: The rules constitute a contract between bank and depositor under which the bank would have a right to refuse to pay a check unless accompanied by the book. The remedy of the holder of the check is against the drawer and prior parties, unless the book can be procured from the depositor to accompany the check. (*Inquiry from Pa.*, April, 1910, *Jl.*)

Payment of savings deposits to wrong person on presentation of pass-book

2592. What is the liability of a bank if a savings pass-book falls into the hands of a person not the owner, who presents it and is paid an order thereon? *Opinion*: It is usual for savings banks to pay only on presentation of the book, accompanied by the written order of the depositor, and after asking a number of test questions in

order to assure themselves as to the identity of the depositor. If a person not the true owner presented the book, he would have to forge the depositor's signature, and generally would have to answer the test questions correctly, as to age, parentage, etc. If, notwithstanding these precautions, the bank pays, then it is a question for the courts, whether the bank has used reasonable care. If it has, it is protected by its rules although it pays on a forgery; otherwise, it would be liable. (*Inquiry from Mo.*, June, 1916.)

Note: For an important recent decision covering the duty of care required of savings bank, see *Bulakowski v. Philadelphia Saving Fund Society*, 113 Atl. (Pa.) 653, which holds that a savings bank is not responsible for the same degree of care required of commercial banks and the mere fact of forgery of a receipt for a deposit does not render the savings bank liable to its depositor.

Pass-book rules providing non-liability for payment to wrong person do not protect bank in absence of reasonable care

2593. The by-laws contained in a savings bank pass-book provide: "If any person shall present a book and falsely allege himself or herself to be the depositor named therein, and thereby obtain the amount deposited, or any part thereof, this institution will not be liable to make good any loss the actual depositor may sustain thereby, unless previous notice of his or her book having been lost or taken shall have been given at the office of the bank." A book of a depositor was stolen, presented to the bank and payment was made on a forged signature. The bank received no notice of the loss of the book until the day after the forgery was perpetrated. Under the above rule what are the bank's rights? *Opinion*: A rule printed in the pass-book of a depositor, that the bank will not be liable for payment to a person presenting the book who falsely alleges himself to be the depositor, will not relieve the bank making payment to such person upon forged order unless it uses reasonable care. *Zuplkoff v. Charleston Nat. B.*, (W. Va.) 88 S. E. 116. *McKenna v. Bowery Sav. Bk.*, 157 N. Y. S. 16. (*Inquiry from W. Va.*, July, 1917, *Jl.*)

PLEDGE AND COLLATERAL

What constitutes valid pledge

2594. A form of pledge of personal property as security for a loan is legally sufficient in Tennessee where it contains a provision constituting the pledgor the agent of the pledgee to retain possession and care for the property as such agent. To constitute a valid pledge there must be delivery of the property to the pledgee and in some states (Georgia and Kentucky, for example) a pledge wherein the pledgor retained possession as agent would be invalid as against a bona fide purchaser of the property without notice of the pledge. But in Tennessee it has been held the pledgor can hold the property as agent of the pledgee. For form of pledge see 5 A. B. A. Jl. 108. *Memphis City Bk. v. Smith*, 110 Tenn. 337. *Macon First Nat. Bk. v. Nelson*, 38 Ga. 391. *Bell v. Ky. Glass Works Co.*, 106 Ky. 7. *Fourth St. Bk. v. Millbourne Mills*, 172 Fed. 177. *McCready v. Haslock*, 3 Tenn. Ch. 13. *Johnson v. Smith*, 11 Humph. (Tenn.) 400 (*Inquiry from Tenn., Aug., 1912, Jl.*)

Trustee cannot borrow on security of trust funds for personal uses

2595. May a trustee for a minor, who maintains a savings account in his name as trustee for such child, pledge the deposit book, accompanied by a withdrawal order, as security for a loan to himself individually? *Opinion:* It is elementary law that a trustee has no right to use trust funds for his personal advantage. See Cal. Civil Code, Sec. 2229. The pledge in question is clearly unauthorized. *Jones' Estate*, 10 N. Y. St. 176, holds that a trustee cannot lawfully borrow trust funds. (*Inquiry from Cal., Nov., 1914.*)

Right of holder of depository bond to look to surety before resorting to collateral security

2596. A public official holds as surety for a deposit of public funds both surety bonds and collateral municipal bonds and the bank asks whether, in case of default of the depository, the depositor could require payment in full from the surety without first attempting to realize on the collateral. *Opinion:* The general rule is that the creditor or pledgee is not compelled to resort first to the collateral, but can look to the surety for the full amount of the loss

to the extent of his bond and the surety is entitled to be subrogated to the rights of the creditor in the collateral. See, for example, *Jones on Collateral Securities*, Sec. 686, in which the rule is stated that a surety cannot require the creditor to proceed upon the collateral security before bringing suit against the surety. Citing *Brick v. Freehold Nat. Banking Co.*, 37 N. J. L. 307. The bank further asks, if the depositor could have recourse on either or both forms of security at his option. It seems the depositor has this right, there being no special provision in the surety bond which would otherwise regulate the subject. (*Inquiry from Wash., Oct., 1914.*)

Collateral notes

Sufficiency of single signature to collateral note

2597. A bank encloses form of collateral note and inquires whether there is any necessity for more than one signature for the note, collateral agreement and judgment clause. *Opinion:* The usual practice in a form of collateral note, such as the one submitted, is to have one signature at the bottom, and there seems to be no particular reason why the contract should be split up and the makers sign in two or three places. If a man should give a simple form of promissory note and should attach thereto a mortgage as security, he would, of course, sign twice, once to the note and again to the mortgage. But where the note and pledge are incorporated in the same instrument, it has been customary for the borrower to sign in one place only. (*Inquiry from Ill., Dec., 1918.*)

Power of attorney to sell collateral

2598. A promissory note was given with collateral security coupled with a power of attorney to the holder to sell the collateral. Before the sale the maker died. *Opinion:* The power of sale, being an authority coupled with an interest, is not revoked by the maker's death. *Mansfield v. Mansfield*, 6 Conn. 559. *Bell v. Mills*, 123 Fed. 24. *Warrior Coal, etc., Co. v. Nat. Bk.*, (Ala.) 53 So. 997. (*Inquiry from Pa., Sept., 1914, Jl.*)

Power of sale in collateral note

2599. A bank has been using a form of collateral note containing a provision giving

it power to sell the same or any part thereof, or substitutes therefor or additions thereto, at any broker's board, or at public or private sale upon non-performance of any of the promises or demand. The bank asks whether it is proper to sell, under the power so conferred, without publication or recovering judgment. *Opinion:* It appears that the bank has a right to sell without going to court or publishing under the rule that it may sell the collateral securities under any power of sale the debtor may have given. *Brooklyn Bk. v. Barnaby*, 197 N. Y. 210. *Ocean Nat. Bk. v. Fant*, 50 N. Y. 474. *Willoughby v. Comstock*, 3 Hill (N. Y.) 389. *Wallace v. Berdell*, 24 Hun. (N. Y.) 379. (*Inquiry from N. Y., Aug., 1919.*)

2600. A bank submits a form of collateral note providing that the bank has power and authority, upon the non-performance of the promise given in the note, to sell the collateral either at private sale or public auction without advertisement or notice. The bank asks whether the collateral may be sold without going to court for an order. *Opinion:* This procedure might be necessary where there was no power of sale given in the collateral note, but where, as in the present case, the note expressly provides a power or authority to the bank, upon non-performance of the promise given in the note, there seems to be no question that the bank has a right to sell the collateral without procuring a court order empowering it so to do. (*Inquiry from Neb., Sept., 1919.*)

*Collateral note pledging security for
"other indebtedness"*

2601. A bank submits form of collateral note containing stipulation that the collateral is pledged for the payment "of this and any other liability or liabilities of the undersigned to the ——— Bank, primary or secondary, absolute or conditional, due or to become due, or which may hereafter be contracted." The bank asks whether it can hold the collateral pledged with this note for an indebtedness upon another note unless the other note so specifies. *Opinion:* Collateral notes with similar clauses are in very common use, and it is quite certain that the bank could apply any surplus collateral upon another note of the pledgor without the necessity of such other note containing a duplication of this language. (*Inquiry from Tenn., Nov., 1914.*)

*Right to apply collateral upon other
indebtedness*

2602. A bank presents a form of note containing a clause not only for the payment of this particular note but "also for the payment of any other liability or liabilities of the undersigned to the said bank due or to become due, whether now existing, or hereafter arising." *Opinion:* Under the foregoing quoted provision of the note, the bank will be entitled, after payment of the note in full, to hold the collaterals and apply upon the maker's liability on the other notes owned by the bank. (*Inquiry from N. J., March, 1918.*)

Contents of advertisement for sale of collateral

2603. A bank asks whether it is necessary, where a collateral note authorizes a bank to make public sale upon default, that the published notice or advertisement in the newspaper (1) give the amount and other terms of the collateral note, and also (2) the name of the pledgee bank, or, as to this latter, whether "for the account of whom it may concern" is sufficient. *Opinion:* Ordinarily it would not be necessary in the published advertisement to describe the amount and other terms of the collateral note and to give the name of the pledgee bank as the one offering the collateral for sale. In *Earle v. Grant*, 14 R. I. 228 supra, the court said: "The complainant also seeks to avoid the sale because the advertisement, in advertising the shares for sale, did not name either the pledgor or pledgee. It does not appear that it is customary to give names in such advertisements. No case is cited which holds that it is necessary to give them." The *Laclede* case (156 Mo. 270), holding otherwise, is exceptional upon this point. The underlying principle is that the sale must be made fairly and in good faith to protect the pledgor or it will be set aside; but there are very few cases which define with particularity just what the published advertisement shall or shall not contain, and this, it seems, will depend upon what is the custom in the locality as well as the nature of the collateral for sale. (*Inquiry from Ohio, Aug., 1916.*)

Purchase of collateral by pledgee at own sale

2604. A bank asks whether, notwithstanding a collateral note gives the bank power to sell the collateral at public or private sale, without demand, advertisement or notice, with the further right to the bank

of becoming the purchaser, the law of Pennsylvania would require as a prerequisite to such sale an advertisement in a local paper and impose as a condition that the sale be at auction. *Opinion:* There seems to be no statute in Pennsylvania or decisions in that state so holding. The courts generally recognize the validity of a contract dispensing with notice of sale and giving the pledgee right to purchase at the sale. For example, in *Fidelity, etc., Co. v. Roanoke Iron Co.*, 81 Fed. 439, the holder of collateral was given by the terms of the pledge full power upon default to sell the collateral at public or private sale without advertisement or notice. It was held where the sale was conducted in good faith, and the pledgee purchased the collateral, that he acquired good title. (*Inquiry from Pa., June, 1914.*)

Liability of maker of collateral note for deficiency

2605. A bank asks whether the maker of a note, with collateral security, would be held responsible for the balance due in case the collateral depreciates below the face amount of the note. *Opinion:* When securities are sold and they do not equal the amount of the note for which they are pledged as collateral, the holder has a good cause of action against the maker for the balance due on the note. (*Inquiry from Pa., March, 1919.*)

Collateral to note of foreign corporation executed in state

2606. A note is executed by a Pennsylvania corporation to a bank for a loan, the note being executed, delivered and made payable in New Jersey, and a further note, pledging collateral for the payment of the first note, is executed by a third person, with the usual power of sale, etc., this second note also being a New Jersey contract. The question is whether, when the bank comes to realize on the collateral under the power of sale, it can safely do so under the New Jersey law, or would the fact that the maker of the first note was a Pennsylvania corporation make it necessary to observe any provision of the Pennsylvania law. *Opinion:* The Pennsylvania law would not affect this transaction, that is to say, the contract pledging the collateral, being a New Jersey contract, would be governed solely by the New Jersey law as to the enforcement of the collateral; this, if course, upon the assumption that the Pennsylvania

corporation was empowered under its charter to borrow money. (*Inquiry from N. J., Oct., 1918.*)

Collateral loans at any rate of interest

2607. A trust company inquires whether the debtor's acquiescence, after receiving notice that he will be charged an increased rate of interest on a collateral loan, will operate as an assent on his part and constitute a binding agreement. *Opinion:* The bank has the right to demand immediate payment and sell the collateral on default, and its notice that the rate will be increased is virtually a communication to the debtor that it will not collect the loan or foreclose the collateral if the debtor will agree to pay an increased rate of interest. It seems that the debtor's acquiescence in such a notice is an agreement upon his part to the increased rate; for if he should decline to agree to the increased rate, the bank would immediately sell the collateral. The custom of banks of sending such notices and the acquiescence of borrowers in paying the increased rate would have a governing effect on the courts so that the notice and acquiescence would be held binding agreements. In New York, call loans of \$5,000 and upwards secured by collateral can be made at any rate of interest. (*Inquiry from N. Y., April, 1917.*)

Liability of pledgee to pledgor for excess of collateral misappropriated by second pledgee

2608. (1) A executes a negotiable note to B, pledging securities exceeding in value the amount of note. B sells the note to C, who disposes of the collateral without authority, keeps the proceeds and destroys the note. Is B liable to A for the difference between value of securities and amount of note? (2) Assuming that B is liable to A, and that B is engaged in the loan brokerage business, taking paper to himself, but intending to dispose of it to a client, of which fact A had knowledge, would the situation be changed? (3) Again assuming B's liability, would the following provision in the note affect the matter: In case of a sale of this debt and the collateral to same, the payee of this note shall not be liable for an amount in excess of the proceeds of such sale? *Opinion:* (1) B would be liable to A for the difference. (2) Knowledge by A of the fact that B is engaged in the loan brokerage business, taking paper payable to himself with a view of selling it, would not change the liability of B. (3) The provision in the

note would probably relieve B in case C sold the collaterals for an amount greater than the debt and misappropriated the entire proceeds. The pledgee's obligation to care for the pledge may be modified by the express contract of the parties. Jones, Collateral Securities, Section 406. (*Inquiry from Ala., July, 1915.*)

Remedy of bank on b/l collateral held for unpaid draft

2609. As collateral security for an unpaid draft a bank holds a bill of lading covering automobiles with the following indorsement: "For value received we hereby sell, transfer, assign and set over all our right, title and interest in the within b/l and cars shipped thereunder to the B bank." When the drawer becomes insolvent and the purchaser refuses to take the automobiles bought, may the bank dispose of them without advertising and offering at public sale? *Opinion:* The common law rule that a pledgee of collateral upon default of the pledgor in payment had no right to sell the collateral without legal authorization would seem to apply to a debt secured by a bill of lading. In the absence of statute giving a right of sale of pledged goods upon default—the lien law of Indiana does not seem broad enough to give the right—it seems necessary to take the usual proceedings to obtain court authorization to dispose of the automobiles, in the absence, of course, of a special agreement.

If the indorsement, above quoted, is construed as a contract of sale, the bank thereby became the owner of the cars and it could, of course, dispose of its own property. But, looking at the entire transaction which is one of discount of a draft to which is attached a bill of lading, the transfer of the bill of lading might be construed as one of pledge rather than of sale; for this is the usual transaction where banks purchase drafts secured by bills of lading, the real buyer of the goods being the drawee of the draft and the bank being merely the holder of the bill as collateral until the draft is paid. (*Inquiry from Ind., Dec., 1918.*)

Application of surplus collateral

Application of surplus security pledged for specific debt

2610. It is a well established rule at common law that, in the absence of an agreement to the contrary, securities pledged to a bank to secure a specified demand can-

not be held for other demands though against the same debtor. It is owing to such rule that clauses are inserted in collateral notes making the provision that such collateral is not only pledged for a particular debt but for any other liability of the pledgor. Trueber v. Dane, (Mass.) 89 N. E. 227. (*Inquiry from Ala., July, 1910, Jl.*)

Surplus cannot be applied on other indebtedness without agreement

2611. Bank A borrowed \$5,000 from Bank B, executing its note therefor, and pledging \$10,000 as collateral in goods receivable. The note did not provide that the collateral was to secure "this or any other indebtedness that may be incurred." Bank A overdrew its account by \$5,000 and became bankrupt. Bank B desires to apply all the proceeds of the \$10,000 collateral in payment of the overdraft as well as the note. *Opinion:* The collateral being pledged for a specific debt, Bank B cannot in the absence of an agreement apply the surplus to another indebtedness. Bank B cannot claim the surplus under the doctrine of banker's lien, because the collateral was not received in the ordinary course of business but for a specific purpose. *Reynes v. Dumont*, 130 U. S. 354. *Bock v. Gorrisen*, 2 De Gex F. & J. 434, 443. *In re Medewe*, 26 Beav. 588. *Vanderzee v. Willis*, 3 Brown Ch. 21. *Bk. v. Ins. Co.*, 104 U. S. 54, 71. *Russell v. Haddock*, 3 Gilman (Ill.) 233, 238. *Duncan v. Brennan*, 83 N. Y. 487. *Bk. v. Leland*, 5 Metc. (Mass.) 259. *Wyckoff v. Anthony*, 90 N. Y. 442. *Lloyd v. Lynchburg Nat. Bk.*, 86 Va. 690. *Bacon v. Bacon*, 94 Va. 686. (*Inquiry from Tenn., Sept., 1915, Jl.*)

Surplus collateral on firm note cannot be applied on partner's note in absence of agreement

2612. A bank held a firm note which was secured by collateral and also held a past due note of a third person which bore the indorsement of one of the firm members. The firm became bankrupt and the bank, after selling the collateral in satisfaction of the firm debt, attempted to apply the surplus on the indorsed note. *Opinion:* The bank cannot appropriate the surplus of the collateral upon the independent debt of the individual member of the firm, in the absence of an agreement. *McIntire v. Blakeley*, (Pa.) 12 Atl. 325. (*Inquiry from Pa., Dec., 1908, Jl.*)

Provision in collateral note as to application of surplus collateral

2613. The following clause inserted in a note is legal and can be enforced: "and it is hereby agreed that such surplus, or any excess of collateral upon this note, shall be applicable to any other note or claim against held by said bank." This form would be improved by adding a provision that the collateral might be held and applied upon any other note or claim against the individual maker or against any firm of which he is a member. *Hollowell v. Blackstone Nat. Bk.*, 154 Mass. 359. *Bk. v. Blocker*, 77 Tex. 73. (*Inquiry from Pa., Sept., 1912, Jl.*)

Accounts receivable as collateral

Essentials of valid assignment

2614. To constitute a valid pledge of an account receivable there must be an assignment in writing, mere delivery of a copy of the account being insufficient. In case of such assignment of accounts, the bank is safe if the debtor is notified before payment to the assignor; or where the borrower acts as the lender's agent to collect the accounts, a bond or security for the fidelity of the agent should be required. Where the assignment is for the purpose of securing credit and not for a prior debt, the bank, in the event of the borrower's bankruptcy, would have a prior claim upon such accounts for the amount of its advances; but where the assignment is made within four months of the borrower's bankruptcy for the purpose of securing an existing debt, such assignment would probably be void as a preference. *Exch. Nat. Bk. v. Fed. Nat. Bk.*, (Pa.) 75 Atl. 683. *In re Cotton Mfg. Sales Co.*, 209 Fed. 629. (*Inquiry from Pa., Jan., 1916, Jl.*)

Accounts receivable of manufacturing concern

2615. A bank asks what recourse it has against a manufacturing concern for whom a receiver has been appointed and whose accounts receivable were assigned to the bank as security for their note with the understanding that they would collect the accounts and remit monthly. *Opinion:* If there was a valid assignment of these accounts to the bank and the proceeds have gone into the receiver's hands, the bank would be entitled to such proceeds as its property. If, on the other hand, there was no valid pledge of the accounts to the bank, or if there was a valid pledge, but the pro-

ceeds were used by the concern and did not go into the hands of the receiver, then the bank would be limited to proving claims for the amount of the indebtedness against the manufacturing concern and would receive only such dividends as their assets might pay. It has not been made clear just how these accounts were assigned to the bank; simply that it purchased demand paper secured by accounts receivable. In view of a recent decision of the Supreme Court of Pennsylvania, the form of the transaction is important. In *American Exchange National Bank v. Federal Nat. Bank*, 75 Atl. (Pa.) 683, a manufacturing concern gave a collateral note to a bank which recited that there was deposited as collateral certain accounts receivable. Copies of the accounts were delivered to the bank. The manufacturing concern was to collect the accounts but the bank never got the proceeds. The court held that mere delivery with the collateral note did not constitute a valid pledge or give the bank a lien on the account. (*Inquiry from Pa., Dec., 1915.*)

Assignment of accounts for past indebtedness

2616. A bank wishes to be advised as to its position where a customer comes to the bank and assigns to it a list of accounts and guarantees their genuineness, said accounts to be applied on his indebtedness, and it subsequently develops that some of the accounts assigned had already been collected by him, and later he collects some of them and refuses to turn over the proceeds to the bank. *Opinion:* Assuming the accounts assigned to the bank were security for an existing indebtedness, there would be no criminal liability of the customer because some of the accounts were not genuine but had been collected before the assignment. As to these, he would not be obtaining any money or property from the bank under false pretenses. But as to the other accounts he would be criminally liable. (*Inquiry from Okla., Sept., 1918.*)

Negotiable notes as collateral

Enforcement of negotiable collateral notes

2617. Bank loaning \$250, and taking as collateral an unmatured negotiable note of third person for \$500, is a holder for value to the extent of the amount advanced with interest and can enforce the collateral note for that amount, free from defenses available to the maker against the payee. If the collateral note is not subject to defense, the

full amount is recoverable, the bank being accountable for the surplus to the pledgor. *Swift v. Tyson*, 16 Pet. (U. S.) 1. *Sears v. Lantz*, 47 Iowa 658. *Des Moines Nat. Bk. v. Chisholm*, 71 Iowa 675. 31 Cyc. 888. *Vos v. Chamberlain*, (Iowa) 117 N. W. 268. *Elk Valley Coal Co. v. Third Nat. Bk.*, (Ky.) 163 S. W. 766. (*Inquiry from Iowa, Nov., 1916, Jl.*)

Rights of pledgee of negotiable note

2618. A makes his note payable to the bank for value and as collateral indorses over to the bank the note of B payable to A. The bank asks if the maker B is estopped from setting up defenses against A. *Opinion:* It is a general rule that one taking negotiable paper before maturity as collateral security is, for all practical purposes, the owner of it and a bona fide holder for value and may collect it, at least to the extent of the debt for which it was pledged, without regard to the equities between the original parties, whether arising out of the original transaction or from subsequent dealings. It follows that B could not set up a defense against A in an action by the bank on the collateral note. (*Inquiry from Wash., July, 1915.*)

Right of pledgee to collect negotiable note but not to apply until debt matures

2619. Where a bank makes a loan and accepts as collateral security the note of a third party, does it become the duty of the bank to make collection of any principal or interest payment, on the note so pledged, which mature before the note accepted by the bank from the borrower? *Opinion:* The following extracts from *Jones on Collateral Securities*, supported by citation of authority, seem to answer the question: "The pledgee may enforce payment of collateral paper upon its maturity, although the principal debt has not then matured. Yet, while he is entitled to collect a collateral note upon its maturity, he has no right to apply the proceeds to the payment of his loan until after default in the payment of that. The money when received is a substitute for the note, and is to be held upon the same terms, and subject to the same rights and duties as the note. If the debt secured is payable at a definite time, no application of the proceeds of a collateral note can be made until that time arrives. If the debt secured is payable upon demand, a demand upon the debtor must be made before applying the proceeds of a collateral note." "If the

collateral note be pledged with the understanding that it is not to be resorted to unless the maker of the principal note fails to pay that at maturity, then a suit upon the collateral note cannot be maintained until both notes are due." "But a pledgee is not bound to collect the collateral security upon its maturity before the maturity of the principal debt, except upon the request of the pledgor, or in pursuance of an express contract to do so." (*Inquiry from Fla., Oct., 1915.*)

Enforcement by suit and by public or private sale

2620. A bank asks whether, when notes are pledged as collateral security, it has a right to bring suit on the notes even though the collateral notes also give the power to sell the security at public or private sale; and also asks what is the procedure at public or private sale. *Opinion:* 1. Where notes are pledged as collateral security the bank has a right to bring suits thereon even though the collateral note gives the power to sell the security at public or private sale. In fact, except for the special power of sale, the bank could not sell the notes but could only sue to enforce them. In case the bank offered the notes for sale, and no purchaser could be found, the bank could bring suit. 2. As to the procedure at public or private sale. In case of public sale, unless notice is waived, reasonable notice must be given the pledgor of the time and place of sale and the same must be advertised a reasonable time before the date fixed. Just what the published notice should contain is somewhat of local custom and also depends on the nature of the collateral. In case of private sale, a purchaser is usually obtained by negotiation. (*Inquiry from Minn., Aug., 1916.*)

Sale before maturity of note pledged as collateral security

2621. A note for \$300, payable in a year, was pledged by the payees as collateral for their note for \$80, payable in four months. Collateral note contained the usual power of sale. Information is desired as to whether, upon the dishonor of the \$80 note, the pledgees of the \$300 note can sell same before its maturity at less than its face value; and if so, could they sell to the maker of the note or his representative, and would they have to account to the pledgors for the difference between the face value of the note at maturity and the amount realized

by them upon its sale? *Opinion:* Where a note for \$300 is pledged for a loan of \$80 accompanying a collateral note giving the pledgee the power to sell at public or private sale without notice, upon default, and there is default in payment of the \$80 note, the pledgee has the right under the power to sell the \$300 note although the same is not due; but in the exercise of such right, due regard must be given to the interests of the pledgor; the sale must be bona fide, and the collateral must not be sacrificed; otherwise such sale might be held invalid, and the pledgee liable to the pledgor for conversion. (In re Litchfield Bank, 28 Conn. 575. Joilet, etc., Steel Co. v. Scioto, etc., Co., 82 Ill. 548. Gay v. Moss, 34 Cal. 125. Halleck, etc., Co. v. Gray, 19 Colo. 149. Hunter v. Hamilton, 52 Kan. 195. Cleghorn v. Minn., etc., Trust Co., 57 Minn. 341. Flicher v. Dickinson, 7 Allen [Mass.] 23 Minn. Boswell v. Thigpen, 75 Miss. 308. Morris, etc., Bank Co. v. Lewis, 12 N. J. Eq. 323. Garlick v. James, 12 Johns. [N. Y.] 146. Handy v. Sibley, 46 Ohio St. 9. Dwight v. Singer, 27 Pa. Super., 119. Brightman v. Reeves, 21 Tex. 70. Whittiker v. Charleston Gas. Co., 16 W. Va. 717. Mowry v. First Nat. Bank, 54 Wis. 38.) The sale or surrender of the \$300 note to the makers thereof for less than the face value would probably not be authorized under the terms of the power of sale. (Union Trust Co. v. Rigdon, 93 Ill. 458. Sparhawk v. Drexell, 12 Bank. Reg. 450.) (*Inquiry from Wis., Feb., 1920, Jl.*)

Enforceability of negotiable machinery notes pledged as collateral

2622. A wholesale house delivered machinery to a retail firm, title to which was to remain in the former until paid for by virtue of a contract which was put on record. The firm received several notes from various purchasers of the machinery, which notes it pledged as collateral security for a loan from the firm's bank. The notes contained statements to the effect that they were in payment for a plow or other specified articles. The borrowing firm became insolvent. The bank seeks to enforce the notes, and the wholesale house, as owner of the machinery, makes a demand on the bank for a portion of the notes. *Opinion:* The recital in the notes that they were given in payment for certain articles of machinery does not affect their negotiability. The notes are enforceable by the bank free from any equities and the bank is entitled to the pro-

ceeds as against the claim of the owner of the machinery. The fact that the wholesale house held the machinery under contract, which was recorded whereby title thereto should remain in the house until the machinery was paid for, would not affect the rights of the bank as holder in due course of the collateral notes. Chicago Ry. Equip. Co. v. Merchants Nat. Bk., 136 U. S. 268. Mott v. Havana Nat. Bk., 22 Hun (N. Y.) 354. Third Nat. Bk. v. Bowman, 50 N. Y. App. Div. 56. Pope v. Lumber Co., 162 N. C. 206, 78 S. E. 65. (*Inquiry from Minn., Jan., 1917, Jl.*)

Part payment after note assigned as collateral

2623. X issued his negotiable note of \$200 payable to A, which was indorsed to B as collateral. X paid A \$100 on the note, taking A's receipt, but A failed to advise B to make the proper credit on the note. A failed and B seeks to collect the full amount from X. *Opinion:* Payment by X to A was ineffective against B, who can recover the full amount of the note or so much thereof as will satisfy his lien. Prim v. Hammel, (Ala.) 32 So. 1006. Farmer v. First Nat. Bk., (Ark.) 115 S. W. 1141. Davis v. Miller, 14 Gratt. (Va.) 1. (*Inquiry from La., Aug., 1915, Jl.*)

Government securities as collateral

Liberty bond as collateral security

2624. A bank loaned its depositor \$100, taking his note therefor, payable October 23, 1918, and holding his \$100 Liberty bond which he purchased with the money borrowed as security for the note. In view of the fact that his bond is a little below par, the bank seeks to hold \$10 of his deposit balance as additional security, while the depositor seeks to withdraw the entire balance. *Opinion:* A bank which holds the unmatured note of depositor secured by a Liberty bond, purchased with proceeds of note, cannot retain a portion of depositor's balance, before maturity of note, as additional security for its payment, in the absence of express contract. (*Inquiry from S. D., April, 1918, Jl.*)

Unindorsed government bond as collateral

2625. Some time ago a borrower deposited in a bank a registered U. S. bond as collateral for any indebtedness he may have, at which time no assignment thereof was procured. The bank asks whether it can apply the bond to present indebtedness

Opinion: The bank has title to the bond and is a holder to the extent of its lien. It has a right to have the indorsement of the bond by the borrower, Secs. 49 and 47 of Negotiable Instruments Act. In view thereof, the bank would have the right to sell the bond, upon default, at public auction, upon giving the pledgor reasonable time to redeem; or, if the bank has a special form of collateral note under which this bond has been pledged authorizing public or private sale without notice, it can pursue its remedy under this. (*Inquiry from W. Va., June, 1919.*)

Pledge by bank of deposited Liberty bonds for which interest-bearing certificate issued

2626. Bank A issued a certificate of deposit, certifying that B had deposited five hundred dollars par value in U. S. Second Liberty Loan bonds returnable to him or his order on surrender of certificate properly indorsed, the interest thereon being payable in lieu of the interest on such bonds. Would the bank have the right to pledge these bonds as security for deposits, etc.? *Opinion:* If the bonds deposited under this certificate were to be regarded as a special deposit, of which the bank was bailee and the depositor remained owner, the bank would have no right to pledge the bonds as security for deposits, etc. But under the terms of the certificate, the specific bonds are not to be returned and interest is payable thereon in lieu of the interest on such bonds. It would seem that, thereunder, the bank could treat the bonds as its own property, being indebted for a like amount of bonds, and if so, could pledge them as security for deposits made with it. It might be better if a clause, giving the specific right to pledge, was inserted in the certificate. (*Inquiry from N. M., March, 1919.*)

War Savings certificates as collateral security

2627. Several customers of a bank desire to pledge their War Savings stamps as security for payment of notes given for the balance of the purchase money of such stamps. *Opinion:* War Savings certificates cannot be lawfully pledged to a bank by the owner whose name appears therein as collateral security for a loan, in view of the condition therein that the certificate is "not transferable." U. S. Rev. St., Ch. 56, Sec. 6. *Sands v. Curfman*, (Tex.) 177 S. W. 161. U. S. Rev. St., Sec. 3477. *Price v. Forrest*, 173 U. S. 410. *Ball v. Halsell*, 161 U. S. 72. *Hagar v. Swayne*, 149 U. S. 242. U. S. v.

Gillis, 95 U. S. 407. *Erwin v. U. S.* 97 U. S. 392. (*Inquiry from Miss., Sept., 1918, Jl.*)

2628. A bank asks whether War Savings certificates can be lawfully pledged to a bank as collateral security for a loan by the owner whose name does not appear thereon, but on which the space for owner's name is left blank. *Opinion:* There is nothing to prevent the certificate passing from hand to hand, the same as money would, and the holder, whoever he may be, could have his name inserted as owner. Nevertheless, it is the intention of the law that such certificates shall not be transferred but held by the original investor and it is expressly provided as a condition that they are not transferable. Now, if the holder of a blank certificate pledges same to a bank, there is evidence from the mere fact of pledge that the original owner has transferred the same and some complication might possibly arise as to the validity of the pledge where the bank sought to realize on the collateral. At the same time, a blank certificate of itself carries no more evidence of prior ownership than a postage stamp and probably the bank might safely hold such blank certificate as collateral for a loan. It seems impossible to answer more definitely. (*Inquiry from Miss., Oct., 1918.*)

Corporate stock as collateral

Sale under power in note

2629. A bank holds certain shares of stock as security for a collateral note, which contains this provision: "Having deposited with said bank, as collateral security, fifty shares American Telephone & Telegraph Company stock, with authority to sell the same on non-performance of this promise, in such manner as they in their discretion may deem proper, without notice, either at the New York Stock Exchange or at public or private sale, and to apply the proceeds thereon." Bank asks whether it would be justified in notifying the maker that unless the note is taken care of by a certain date it would sell the collateral on the Stock Exchange and apply the proceeds on the note. Bank's attorney advises it that, in his opinion, this procedure would not be upheld by the court, but the provisions of the statute covering foreclosure of a lien must be followed. *Opinion:* The rule is well settled that a waiver of the requirement of notice of the pledgee's intention to sell, and of the time and place of sale, may be made by agreement of parties. (*Williams v. Hahn*, 113 Cal. 475. *Loomis v. Stave*, 72 Ill. 623.

McDowell v. Chicago Steel Works, 124 Ill. 491. Bryson v. Rayner, 25 Md. 424. Mowry v. Wood, 12 Wis. 413.) And where securities are pledged with a bank under a collateral note which authorizes sale, in case of non-payment, without notice, either at the New York Stock Exchange or at public or private sale, the bank is entitled to sell the collateral on the Stock Exchange, without notice, in event of non-payment, and apply the proceeds on the note. A notice given the maker that unless the note is taken care of by a certain date the collateral will be sold on the Stock Exchange, while not legally necessary, is a proper procedure. Robinson v. Hurley, 11 Iowa 410. Hamilton v. State Bank, 22 Iowa 306. Williams v. U. S. Trust Co., 133 N. Y. 660. Baker v. Drake, 66 N. Y. 518. Genet v. Howland, 45 Barb. (N. Y.) 560. Milliken v. Dehon, 27 N. Y. 364. And see Toplit v. Bauer, 161 N. Y. 325, 55 N. E. 1059. Barber v. Hathaway, 169 N. Y. 575. Ogden v. Lathrop, 65 N. Y. 158. Nelson v. Edwards, 40 Barb. (N. Y.) 279. Boyen v. Baldwin, 52 N. Y. 232. Wheeler v. Newbould, 16 N. Y. 392. (*Inquiry from N. Y., Dec., 1919, Jl.*)

Sale of stock collateral on outlawed note

2630. A bank held a note for \$300 secured by a stock certificate with power of sale. The note became outlawed by the statute of limitations. The bank wishes to sell the collateral and apply the proceeds towards payment of the note in order to revive the indebtedness. *Opinion:* The bank has the right to sell the stock, but the note once outlawed could not be revived by crediting the proceeds on the note. Conway v. Caswell, 121 Ga. 254. Shaw v. Silloway, 145 Mass. 503. Drake v. Wetmore, 67 Hun (N. Y.) 77. Sproul v. Standard Plate Glass Co., 201 Pa. St. 103. Lyon v. St. Bk., 12 Ala. 508. Hartranft's Est., 153 Pa. 530. (*Inquiry from N. C., Sept., 1913, Jl.*)

Certificate of stock indorsed "for collateral purposes"

2631. A bank is offered, as collateral for a note, a stock certificate indorsed "for collateral purposes, John Smith," and the bank asks whether, if it should be forced to take the stock in payment of the note, it could have the stock transferred to its name. *Opinion:* It seems the indorsement of a certificate of stock, as above quoted, is a valid indorsement, so that, if the bank were forced to take the stock in payment of the

note, it would have the right to have it transferred to its name. The mere indorsement "John Smith" would be sufficient to assign the certificate and the coupling that it is for collateral purposes would not affect the validity of the bank's title as pledgee. (*Inquiry from Cal., Oct., 1916.*)

Transfer of unindorsed stock collateral under power contained in collateral note

2632. A collateral note contains the following provision: "Upon default in the payment of any 'obligations' to the holder hereof, such holder shall have full power and authority to sell and assign all or any part of the 'collateral' at any Brokers' Board, or at public or private sale, etc." Does this provision authorize, in case of default in payment of the collateral note, the transfer of a stock certificate attached to the note as collateral, where the certificate is not signed for transfer by the borrower? In other words, does this provision constitute a power of attorney? *Opinion:* The Uniform Stock Transfer Act, which is in force in Maryland provides that a stock certificate can be transferred "(b) By delivery of the certificate and a separate document containing . . . a power of attorney to sell, assign or transfer the same or the shares represented thereby. Such . . . power of attorney may be either in blank or to a specified person." It would seem that the power contained in the collateral note would be sufficient without the signature of the borrower to the power of attorney on the stock certificate itself. At the same time, the latter is the better procedure. See Uniform Stock Transfer Act, Sec. 4, under which the rights of a transferee under a separate power of attorney may be subordinated to those of a person taking the certificate in good faith for value without notice of the prior transfer. (*Inquiry from Md., March, 1921.*)

Right of unrecorded pledgee to dividends as against attaching creditor

2633. A bank held as collateral certain stocks of a company indebted to the bank, upon which a dividend was declared. After the dividend was due and before received by the bank, the funds of the pledgor with the company were attached by one of its creditors. *Opinion:* The bank had the right as unrecorded pledgee of the stock to the dividends declared thereon, as against an attaching creditor of the pledgor. Donally v. Hearndon, 41 W. Va. 519.

Lipsecomb's Admr. v. Condon, 56 W. Va. 516. Jones on Collateral Securities. (*Inquiry from W. Va., Feb., 1913, Jl.*)

Necessity of book transfer to protect pledgee against attaching creditor of corporate stock in Connecticut

2634. A bank asks the meaning of the opinion of the Attorney General of Connecticut to the Bank Commissioner as to the effect of the amendment made by Chapter 149 of the Public Acts of 1915 to Section 20 of Chapter 194 of the Public Acts of 1903 concerning the pledge of stock of corporations. *Opinion:* The Attorney General refers to decisions of the Supreme Court of Connecticut construing statutes requiring transfers of stock to be registered on the corporate books, so as to give attachment or execution precedence over a prior unregistered sale or pledge of the certificate of stock. It would appear that the legislature by its amendment of 1915 attempted to change the law so that book transfers would not be required to protect the pledgee against a subsequent attaching creditor. The purport of the opinion of the Attorney General in that the legislature has not so effectively changed the law as to make it clear beyond doubt that a pledge of corporate stock as collateral, without book transfer, would take precedence over an attaching creditor. He says in substance that, until the Connecticut courts distinctly and specifically hold under the amended statute that the unrecorded pledge takes superior rights to the attaching creditor, it would not be entirely safe for a pledgee bank to rely on mere delivery of the shares without transfer upon the books of the corporation. (*Inquiry from Conn., Aug., 1915.*)

Note: The Uniform Stock Transfer Act was passed in Connecticut in 1918, by Section 13 of which no attachment upon the shares is valid until the certificate is actually seized, or surrendered to the issuing corporation, or transfer by the holder is enjoined.

Lien of corporation on stock after notice of pledge

2635. A bank asks whether, where stock of a corporation is pledged to the bank as collateral and notice of the pledge served on the corporation which afterwards failed, the bank's claim is subordinate to a lien of the corporation for an indebtedness of the stockholder created after notice of the pledge. *Opinion:* It has been held in

quite a number of cases that where the corporation's claim against the stockholder arises after notice to it of the pledge or assignment, its lien is subordinate thereto. Ardmore State Bank v. Mason, (Okla. 1911) 120 Pac. 1080. Hotchkiss U. Co. v. Union Nat. Bank, 68 Fed. 76. Curtice v. Crawford Co. Bk., 118 Fed. 390. Bank of Amer. v. McNeil, 10 Bush (Ky.) 54. Conant v. Reed, 1 Ohio St. 298. White River Sav. Bank v. Capitop Sav. Bk., 77 Vt. 123. Miles v. New Zealand Alford Est. Co., 54 L. J. Ch. (N. S.) 1035. (*Inquiry from Minn., Jan., 1915.*)

Right of pledgee of Georgia bank stock where new certificate issued to pledgor

2636. A, the owner of a certificate of stock in a Georgia bank, pledged the same as security for a loan from B, who held his note for the amount. Afterwards the pledgor obtained a new certificate of stock from the bank without returning the original certificate. A defaults on his note and B tenders the original certificate to the bank, requesting the issue of a new certificate of stock. The bank refused on the ground that another certificate had been issued to the original stockholder. *Opinion:* In issuing new certificate without surrender of the original, the bank took the risk of the original certificate being outstanding in the hands of a bona fide holder. The pledgee is entitled to damages against the bank for such refusal, being the amount of his loan and interest unless he has bought the stock in, in which case the measure of damages is the value of the stock at the time of refusal to transfer. Smith v. Slaughter House Co., 30 La. Ann., 1378, 1383. First Nat. Bk. v. Lanier, 11 Wall. (U. S.) 369. Ga. Code, Sec. 2219. Bk. of Culloden v. Bk. of Forsyth, 48 S. E. (Ga.) 226. Hilton v. Sylvania & G. R. Co., 68 S. E. (Ga.) 746. (*Inquiry from Ga., Jan., 1919, Jl.*)

Common stock pledged as collateral depreciated by issue of preferred stock

2637. A bank holds fifty shares of common stock of an industrial corporation as collateral. Some time later, without knowledge on the part of the bank, the corporation issues preferred stock to the original holder, which depreciates the value of the collateral. The bank seeks to protect its rights as pledgee. *Opinion:* Where common stock of an industrial corporation is pledged with a bank as collateral, the bank to protect its collateral and right to dividends

should either have the stock transferred or notify the corporation of the pledge; for otherwise, if the corporation, without notice of the pledge, issues preferred stock to the original holder which depreciates the value of the collateral and the latter negotiates the stock, the transferee or pledgee thereof would have a superior right thereto than the original pledgee. *Hunsaker v. Sturgis*, 29 Cal. 142. *McCrae v. Yule*, 68 N. J. L. 465. *Boyd v. Conshohocken Mills Co.*, 149 Pa. 363, 24 Atl. 287. *Guarantee Co. v. East Rome Town Co.*, 96 Ga. 511, 23 S. E. 503. *Fairbanks v. Merchants Nat. Bk.*, 30 Ill. App. 28. *Herrman v. Maxwell*, 15 J. & S. (N. Y.) 347. *Skiff v. Stoddard*, 63 Conn. 198. *Fitchburg Sav. Bk. v. Torrey*, 134 Mass. 239. *Donnell v. Wyckoff*, 49 N. J. L. 48. *State v. Smith*, 15 Ore. 98. *Brady v. Irby*, (Ark. 1912) 142 S. W. 1124. *Central, etc., Bk. v. Wilder*, 32 Neb. 454. *Brisbane v. Delaware, etc., R. Co.*, 94 N. Y. 204. *Cleveland, etc., R. Co. v. Robbins*, 35 Ohio St. 483. *Robinson v. Newberne Nat. Bk.*, 95 N. Y. 637. *Timberlake v. Shippers Compress Co.*, 72 Miss. 273. *Steel v. City Island, etc., Co.*, 47 Ore. 293. *Rose v. Barclay*, 191 Pa. 594. (*Inquiry from N. Y., May, 1919, Jl.*)

Surrender of collateral to person paying note, where bank had notice of rights of third person

2638. A bank gave a receipt as follows: "June 27, 1917. Received of John Doe, Trustee for the Jenkins Company, the following orders for stock used as collateral on notes signed by the following parties to be delivered to him as soon as said notes are paid—John Doe 50 shares, John Brown 75 shares, Jack Clark 30 shares ——— Bank ——— Cashier." One of the signers, Jack Clark, came into the bank and requested that the stock be turned over to a third party, and the request was granted, the bank officer forgetting that the bank held an order for the delivery of the stock. The bank asks to what extent it is bound by the order and whether John Doe can recover the stock. *Opinion:* The stock in question was received by the bank, not from Clark, but from John Doe, trustee, under an agreement to deliver the stock to Doe, trustee, as soon as the Clark note was paid, and this was coupled with an order by Clark that on payment either by Doe, trustee, or by Clark, of the note, the bank should deliver the stock to Doe, trustee, or to his successor or appointee. Without knowledge of the

facts behind these documents, they would indicate a possible equity in the stock in Doe, trustee, upon its redemption, of which the bank had notice and which it had agreed to recognize. Therefore, if Doe, trustee, has any rights in the stock, after payment of the note, it seems the bank would be liable to Doe, trustee, where it turned over the stock to Clark, or to a third person by order of Clark, upon receiving payment of the note. (*Inquiry from Ky., April, 1917.*)

Husband pledging wife's certificates in District of Columbia

2639. A married woman owns certain stock certificates and executes as a detached instrument an irrevocable power of attorney to transfer the stock signed in blank. Her husband pledges the stock certificates with these blank powers of attorney to bank as security for a loan to him. The bank asks: (1) Whether or not the bank granting the loan is put on notice of having granted a loan to a married man, accepting as collateral, securities which appear to belong to the wife; and (2) Whether a married woman has the power to contract as surety-maker or indorser for her husband or for any one even though it be other than her husband. *Opinion:* (1) The courts hold that where a wife pledges her property for a consideration which moves to her husband, she will be regarded as a surety. *Keller v. Orr*, 106 Ind. 406. The fact that the husband pledged this stock for his own debt would, it seems, put the bank on notice that the stock belonged to the wife and was being pledged to secure her husband's debt. (2) Married women in the District of Columbia are prohibited from making a contract as surety, etc., for anyone even though it be other than her husband. (*Inquiry from D. C., June, 1920.*)

Pledgee's right to dividends on pledged stock

2640. A loaned B \$1,000 on 50 shares of the capital stock of X Company, due notice of the pledge having been given to the company. Dividends have accrued on the stock and are due and payable. *Opinion:* Dividends accruing on the pledged stock belong to the pledgee, and the company after notice is liable to the pledgee therefor. If the company went into liquidation, A would be entitled to liquidation dividends. *Ga. Code* (1911), Sec. 2219. *Southwestern Ry. Co. v. Thomson*, 40 Ga. 408, +11. *McCrea v. Yale*, 68 N. J. L. 465. *Guarantee Co. v.*

East Rome Town Co., 96 Ga. 511. Gemmel v. Davis, 75 Mo. 546. Central Neb. Nat. Bk. v. Wilder, 32 Neb. 454. (*Inquiry from Ga., April, 1913, Jl.*)

Right of pledgee to dividends on unpaid balance from assets of bankrupt borrower

2641. A corporation pledged \$10,000 worth of bonds with a bank to secure a loan from the bank of \$7,000 as well "as any other indebtedness." Later the bank loaned the corporation an additional \$3,000 to be paid out of the sale of its product in preparation. Before the sale the corporation became bankrupt, and the bank realized \$7,000 from the bonds. The bank claims the unpaid balance against the estate. *Opinion:* The bank is entitled to dividends on the unpaid balance, over and above the amount realized upon the security. National Bankruptcy Law, 1898, Sec. 57 h, 56 b, 57 e. Loveland on Bankruptcy (3d Ed.), p. 611. (*Inquiry from Tenn., Jan., 1909, Jl.*)

Insurance policies as collateral

Life insurance policy assigned as collateral security

2642. The insured and the beneficiary assigned a life insurance policy to a bank as collateral. The policy contained a provision that all parties must join in any settlement of the policy. *Opinion:* The bank holds the policy subject to the right of the insurance company to require all parties to join in the settlement of the policy. Where there exists a disability on the part of the beneficiary, the rule varies as to the right of the insured or the beneficiary to make a valid assignment in such a case. McQuillan v. Mut. Reserve Fund Life Ass'n, 112 Wis. 665. Moise v. Mut. Reserve Fund Life Ass'n, 45 La. Ann. 736. Stevens v. Warren, 101 Mass. 564. Newman v. John Hancock, etc., Ins. Co., 90 N. Y. S. 471. Conn. Mut. L. Ins. Co. v. Westervelt, 52 Conn. 586. Barry v. U. S. Equit. L. Assur. Soc. 59 N. Y. 587. Newcomb v. Mut. L. Ins. Co., 18 Fed. Cas. No. 10147. Lee v. Abdy, 17 Q. B. D. 309. Succ. of Miller, 110 La. 652, 34 So. 723. Milhous v. Johnson, 51 Hun (N. Y.) 639. Mut. L. Ins. Co. v. Terry, 62 How. Pr. (N. Y.) 325. Bunnell v. Shilling, 28 Ontario 336. Mut. L. Benev. Ins. Co. v. Wayne County Sav. Bk., 68 Mich. 116. Ellison v. Straw, 116 Wis. 207. (*Inquiry from Mich., March, 1913, Jl.*)

Wife's insurance policy as collateral to husband's note

2643. Where an insurance policy paya-

ble to wife is transferred to a bank to secure note of husband and wife, and on the husband's death the bank collects the amount of the note out of the proceeds of the policy going to the wife, is the wife subrogated to the rights of the bank so as to be a claimant against her husband's estate? *Opinion:* Assuming the wife was a surety on the notes of her husband and wife held by the bank, which were paid out of the proceeds of the pledged insurance policy, it seems clear that she would have the right to be subrogated to the rights of the bank and entitled to prove her claim against the estate of her deceased husband. (*Inquiry from Ill., Oct., 1917.*)

Oral pledge of life insurance policy as collateral

2644. A bank inquires whether delivery of a life insurance policy to Brown without written assignment was sufficient to vest title as pledgee in him. *Opinion:* A policy of life insurance is a chose in action, and the insured, if the insurance is payable to him, or, in the event of his death, to his personal representatives, may assign the same, unless the assignment is prohibited by statute. According to the authorities, the assignment to Brown was valid, and he would be entitled to the proceeds. (*Inquiry from Ark., May, 1920.*)

Fire insurance policy as collateral

2645. A bank states that practically all the fire insurance policies assigned to it contain this clause: "Loss, if any, payable to ——— Bank, as its interest may appear," and is assented to by the agent of the company. The bank asks whether this form fully protects it "even in case of bankruptcy of the insured." *Opinion:* It seems that the above quoted clause, assented to by the agent of the company, the policy being assigned to the bank by the insured as security for his indebtedness, would fully protect the bank, even in case of bankruptcy of the insured. In the latter case, however, the assignment of the policy should be for a present consideration moving from the bank to insured, for if it was assigned for a past indebtedness within four months of bankruptcy, and then a fire should occur, the assignment might be upset as preferential. The bank, however, would take subject to all the conditions of the policy such, for instance, as the provision for cancellation on notice, etc. (*Inquiry from Wash., July, 1916.*)

Cancellation of fire insurance policy held as collateral

2646. A bank held A's note which was secured by A's mortgage covering city lots. Shortly before maturity of the note, and as a condition of renewal thereof for 12 months, A procured a policy of fire insurance covering a building standing on said lots wherein the loss, if any, was made payable to the bank "as its interest may appear." About 20 days after the procurement of the policy and the renewal of note, A notified the bank that the insurance company had given notice that the policy had been cancelled, and demanded a surrender of the policy. The bank asks whether it can retain the policy and recover its claim in case the building is destroyed by fire. *Opinion:* Assuming the company had the right to cancel, then the condition upon which the bank made the loan for a year has failed, and this would give it the right to rescind the contract of extension and proceed to collect the loan. If the company had no right to cancel for non-payment of premium or for other reason, it seems the bank could hold the company to the extent of its claim in case of loss by fire during the year. (*Inquiry from Fla., Feb., 1915.*)

Real estate collateral

Pledge of title deeds to land

2647. Upon a loan to Akin and wife, instead of taking as security a mortgage on the town property and placing the mortgage on record, the bank received a deposit of the title deeds with power of sale of collateral upon default. The bank asks whether it has power to sell the property, or if the court will declare the same a mortgage and compel a foreclosure thereof. *Opinion:* In England the deposit of title deeds to land as security for debt has been held, in equity, to be good as an equitable mortgage on the land. *Russell v. Russell*, 1 Bro. Ch. 269. This doctrine has been adopted in some of the states though in others the courts have held such a doctrine to be forbidden by the statute of frauds and that it is inconsistent with the registry laws enacted in those states. It seems that Idaho has not passed upon this question one way or the other. Where such title deeds are an equitable mortgage the holder would have to bring proceedings for a foreclosure of the lien, if a purchaser could be procured, and a judgment would order the execution of a deed giving legal title to the land. It seems clear that title to the land itself cannot be con-

veyed merely by a assignment of the title deeds even if such assignment creates an equitable mortgage. (*Inquiry from Ida., Feb., 1915.*)

Remedy of pledgee on building and loan collateral

2648. A bank has a customer whose past due note is secured by building and loan stock assigned in absolute form in blank. The bank asks whether it can demand payment of the association or will the stock have to be advertised and sold publicly. *Opinion:* The law requires enforcement of collateral by foreclosure or by sale pursuant to contract, but it makes an exception in the case of negotiable paper and similar choses in action which the law requires the pledgee to collect rather than to sell. The reason for this exception to the general rule in relation to the sale of property pledged is that such paper has no established market value, and it cannot be presumed it was the intention of the parties to so deal with it. Under this rule it has been held that a savings bank book pledged as collateral must be collected and not sold. In the case of building and loan stock, there seem to be no decisions, but if the stock held as collateral by the bank was matured so as to be payable by the association, it seems the same reasoning and rule would apply and that the bank could realize on this collateral by demanding payment of the association. (*Inquiry from Ill., July, 1915.*)

Bond for title given as security

2649. A purchased a farm from B, giving him cash and notes therefor, and receiving from B a bond for title. A transferred the bond to a bank as security for a loan. After the bond and transfer had been duly recorded, the bank temporarily surrendered the bond to A but A wrongfully disposed of it. B was notified of the transfer and the recording clerk was also notified not to cancel the entry. *Opinion:* The bank has not lost its security and is protected in such bond as against a subsequent innocent purchaser or assignee of the bond. Ga. Code, Secs. 6633, 6634, 6635. *Kendrick v. Colyar*, 143 Ala. 592. *Meesick v. Sunderland*, 6 Cal. 297. *Churchill v. Little*, 23 Ohio St. 301. *Stevens v. Chaffee*, 98 Wis. 42. *Carbine v. Pringle*, 90 Ill. 302. *Case v. Bumstead*, 24 Ind. 429. *Lehman v. Rice*, 118 La. 975. *South Baltimore, etc., Co. v. Smith*, 85 Md. 537. *De Camp v. Wallace*, 45 Misc. (N. Y.) 436. *Rhines v. Baird*, 41 Pa. 256.

Trodden v. Williams, 144 N. C. 192.
Walker v. Maddox, 105 Ga. 253, 31 S. E. 165.
Hackett v. Watts, 138 Mo. 502, 40 S. W. 113.
Casteel v. Baugh, (Ky.) 66 S. W. 996.
Merriam v. Polk, 5 Heisk.

Tenn.) 717. Middlestadt v. Gannon, 1 Neb. (Unoff) 286, 95 N. W. 479.
Rosenberger v. Jones, 118 Mo. 559, 24 S. W. 203.
Garr v. Hill, 9 N. J. Eq. 210. (*Inquiry from Ga., Aug., 1912, Jl.*)

PRESENTMENT, PROTEST AND NOTICE

Presentment and demand for payment

Demand and notice necessary to hold indorser of note

2650. What steps are necessary to hold the indorser of a promissory note? *Opinion:* Due demand and notice of dishonor without protest are all that is necessary to hold the indorser, although protest is, of course, permissible. (*Inquiry from Va., Dec., 1909, Jl.*)

Sufficiency of demand and notice to hold indorser

2651. A note, with three accommodation indorsers, discounted by a bank was renewed from time to time. Finally, on the date of the maturity of a renewal note, one of the indorsers refused to indorse a further renewal note because the names of the other two indorsers had been left off the prior renewal without his knowledge or consent. Three days after the maturity of the last renewal which had been signed by the indorser it was protested, he having been informed of its non-payment on the day of maturity. Can he be held liable on that renewal? *Opinion:* The protest was ineffectual since it was not made on the day of dishonor but the indorser would be liable without protest if it could be shown that there was due demand and notice of dishonor. Upon the question whether there was legal demand and notice, if the note was payable at the bank, possession of the note by the bank would satisfy the requirement as to demand. Even if not so payable, if payment was in any way demanded of the maker on the day of maturity, this would suffice. Unless facts can be shown as above, the indorser would be discharged by failure to demand payment at maturity. Concerning notice of dishonor, assuming there was a sufficient demand, the indorser was informed on the day of maturity that the note was not paid; this information and the request to sign a renewal might be held sufficient as a notice of dishonor; for notice of dishonor need not be given in writing and all that is necessary is information to the indorser that the note has not been paid and that he is looked to

for payment. (*Inquiry from Del., March, 1914.*)

Diligence in presentment

2652. A check was drawn on an insolvent bank, and inquiry is made whether the drawer is liable to the holder thereof. *Opinion:* Assuming that a check is presented with due diligence, the risk of the failure of the bank remains with the drawer. And, if the bank fails, the drawer remains liable to the holder. If, however, there is delay in presenting the check beyond the reasonable time period fixed by law, and the bank fails before the check is presented, the drawer is discharged. The above case must not be confused with one where the check has been received by the bank upon which drawn and charged to the drawer's account before its failure. In such case the check is paid and this, according to the weight of authority, discharges the drawer. But if the check has not been paid by charge to account at the time of failure of the bank, the drawer remains liable provided there has been diligence in presentment. (*Inquiry from N. Y., July, 1919.*)

General duty of collecting bank

2653. What is the usual duty of a collecting bank as regards presentment, protest and notice of dishonor? *Opinion:* It is the duty of a collecting bank to exercise reasonable diligence and care in obtaining payment of the paper and if refused payment, to secure the rights of the owner against any drawer or indorser who may be secondarily liable thereon, by making due presentment, and giving notice of dishonor, and causing protest to be made, where protest is required by law; also to follow instructions of its principal and to exercise good faith. For any loss resulting to the principal from failure to perform such duty, the collecting bank is liable. (*Inquiry from Okla., June, 1914.*)

Stopping payment does not excuse demand and notice as against indorser

2654. Does the stopping of payment of a check excuse presentment, protest, and

notice of dishonor? *Opinion*: Such countermand does not excuse presentment and notice to the indorser nor protest in case the check is a foreign bill of exchange. *N. Y. Neg. Inst. Act, Secs. 139, 185, 267. (Inquiry from Md., May, 1909, Jl.)*

Demand and notice to hold accommodation indorser

2655. Three accommodation notes intended for discount were drawn as follows: No. 1, payable to and indorsed by accommodation party and discounted for the maker; No. 2, payable to bank, indorsed by the accommodation party and discounted for the maker; No. 3, made by accommodation party and discounted for the payee. *Opinion*: The bank is equally protected by notes 1, 2 or 3, except that in case of notes Nos. 1 and 2, demand and notice are required to preserve the liability of the indorser, unless the notes contain a waiver. As to note No. 3, no demand and notice are necessary to hold the accommodation party who is liable as maker. *Oppenheim v. Simon Reigel Cigar Co., 90 N. Y. S. 355. (Inquiry from D. C. Oct., 1914, Jl.)*

Presentment not necessary to hold accommodated indorser

2656. A made his note payable to the order of B which was indorsed by C before delivery, presumably for accommodation. C negotiated the note to Y bank. The note was not presented on the day of maturity. *Opinion*: Presentment on the day of maturity and notice of dishonor are required to hold B and C, the indorsers, but if the instrument was made for the accommodation of either B or C, and such indorser had no reason to expect it would be paid if presented, neither presentment nor notice is required to hold such indorser liable. *Webster v. Mitchell, 22 Fed. 781. Amer. Nat. Bk. v. Junk Bros., (Tenn.) 30 S. W. 753. Brown v. Crofton, (Ky.) 76 S. W. 372. N. C. Neg. Inst. Act, Sec. 2229. (Inquiry from N. C., Oct., 1915, Jl.)*

Presentment and notice not necessary to hold surety-maker

2657. A corporation note is also signed as maker by three sureties. It no longer maintains an office at A, where note is dated and payable, the parties to the note are now widely scattered, and it is practically impossible for presentment to be made in person. What procedure is necessary to hold the sureties? *Opinion*: No present-

ment or notice of dishonor is necessary to charge a surety with liability. His liability to pay the note is absolute, the same as that of the principal maker. The procedure to obtain payment is to bring suit against the sureties. *(Inquiry from Ind., April, 1915.)*

Indorser on forged check liable without demand, protest or notice

2658. What steps must be taken to preserve the liability of an indorser on a forged check? *Opinion*: A forged check is not properly protestable nor is demand and notice of dishonor necessary to hold an indorser who is liable to an indorsee as warrantor of genuineness. An agent holding such paper is duly diligent by giving notice of the forgery within reasonable time. *Rossi v. Nat. Bk. of Commerce, 71 Mo. App. 150. (Inquiry from Wis., May, 1913, Jl.)*

Presentment in case of lost instrument

2659. A note forwarded in ample time was lost in the mails. Are the indorsers discharged? *Opinion*: The Negotiable Instruments Act, Sec. 5327, provides: "Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, presentment must be made with reasonable diligence," and Sec. 5359—"Notice of dishonor must be given with reasonable diligence." Under these sections, it would be permissible to make presentment with due diligence upon a copy of the lost note or written particulars thereof and to give notice of dishonor in case of refusal to pay and the indorsers would then be held. *(Inquiry from Kan., March, 1919.)*

Presentment by indorsee of "non-negotiable counter check"

2660. A check payable to "John Smith or bearer" was stamped across its face "non-negotiable counter check." The check was presented through the Clearing House by an indorsee of the payee and the drawee bank refused payment. *Opinion*: The bank's refusal to pay was justified and the check was not properly protestable. *(Inquiry from Wis., Nov., 1913, Jl.)*

Place of payment

Presentment at bank other than drawee

2661. A check upon A bank is presented to and cashed by B bank and immediately

charged to the former's account prior to forwarding it to A bank, pursuant to an agreement between both banks. A bank became insolvent after its account was charged but before it received the item. *Opinion:* Bank B will not be permitted to maintain the charge to the account of Bank A, against the receiver of the latter. *Armstrong v. Second Nat. Bk.*, 38 Fed. 883. (*Inquiry from Kan., May, 1915, Jl.*)

Presentment where makers have moved from place of payment

2662. A note is made payable at the office of the makers at a particular street address, and before maturity the makers have closed their office and moved to another street. *Opinion:* To hold an indorser, presentment at the place specified in the note would be sufficient; but where notary knows the makers are at a new address, it would be safer to make a supplemental presentment at that place. *Schlesinger v. Schultz*, 110 N. Y. App. Div. 356. *Ryan v. State*, (Fla.) 53 So. 448. (*Inquiry from N. H., Jan., 1912, Jl.*)

Mailing notice to maker in lieu of presentment

2663. Where a note does not name any place of payment, a bank inquires whether it has discharged its duty when it mails the maker a notice stating where his note will be due, and the date and amount, or must the note be presented at his place of business? Very often the maker lives in the country, and has no place of business. *Opinion:* Where a promissory note does not name any place of payment, it is payable at the place of business or residence of the maker and must be presented at such place at maturity, and due notice of dishonor given, to preserve the liability of an indorser, if not waived. The mere mailing of notice to the maker will not suffice. But so far as the maker is concerned, presentment is not necessary, and he must seek the holder to make payment. *Christopherson v. Common Council*, (Mich.) 75 N. W. 445. *Oxnard v. Varnum*, 111 Pa. St. 193. (*Inquiry from S. C. Sept., 1919, Jl.*)

Time of presentment

Reasonable time for presentment of demand drafts

2664. Bank A sent a demand draft, with instructions attached that notice of dishonor be wired it immediately in case of non-payment, to bank B, which sent it to bank

C which in turn sent it to bank D located in same city as drawee. Bank D held draft for fifteen days, and returned it, bank B charging it back to bank A's account. Is bank A liable on its indorsement? *Opinion:* The law requires that presentment of a demand draft be made within a reasonable time, and what is a reasonable time depends upon the facts and circumstances of each particular case—presumptively a bank which held a draft for ten or fifteen days before making presentment and giving notice of dishonor did not comply with the requirements of making presentment within a reasonable time and the indorsers would be discharged, especially as the draft was accompanied by instructions to wire notice of dishonor immediately, which would imply that immediate presentment was desired. (*Inquiry from Tex., Dec., 1916.*)

Reasonable time for presentment of demand notes

2665. Have the courts accurately determined what is a "reasonable time" within which an indorser on demand paper can be held without presentment? *Opinion:* The courts have not fixed any particular time as being reasonable within which to present paper payable on demand or at sight, but the same depends on all the circumstances of each particular case. In respect to notes, it has been held, in particular cases, that a delay in presentation was not unreasonable where there was a delay of nineteen months. *Vreeland v. Hyde*, 2 N. Y. Super. 429; two years, *Tomlinson Carriage Co. v. Kim-sella*, 31 Conn. 268. *Bacon v. Bacon*, 94 Va. 686; and even thirty-two months, *Commercial Bk. v. Allen*, 10 Minn. 330. Whereas, on the other hand, the delay, in case of a note, was held to be unreasonable where there was a delay of over two years—see *Gerke Brew. Co. v. Busse*, 11 Ky. L. Rep. 322. *Home Sav. Bank v. Hosie*, 119 Mich. 116. *Eisenlord v. Dillenbach*, 79 N. Y. 617. *Harrisburg Nat. Bk. v. Reilly*, 24 Pa. Co. Ct. 113; six months, *Martin v. Winslow*, 16 Fed. Cas. No. 9172; five months, *Anderson v. First Nat. Bk.*, 144 Iowa 251; sixty days, *Merritt v. Jackson*, 181 Mass. 69; and even as short a time as twenty-five days, *Levy v. Drew*, 14 Ark. 334. (*Inquiry from N. Y., March, 1919.*)

One year's delay in presentment of demand note

2666. A gave B a note payable one year from date, bearing interest at 10 per cent. payable annually. After the expiration of

a year B indorsed the note over to C for value, and one year later the note is presented to A for payment and refused. *Opinion*: B's indorsement of a past due note was valid, making it a demand instrument. The delay of one year in demanding payment, under the circumstances, was unreasonable, and the indorser was discharged. *Com. Nat. Bk. v. Zimmerman*, 185 N. Y. 210. *Schlesinger v. Schultz*, 110 N. Y. App. Div. 356. *Yates v. Goodwin*, 96 Me. 90. *Anderson v. First Nat. Bk.*, (Iowa) 122 N. W. 918. (*Inquiry from Ida.*, Sept., 1911, *Jl.*)

Not safe to hold indorsed demand note over two or three months unless it contains waiver of presentment

2667. A bank has a note payable on demand, indorsed and discounted for the benefit of the maker, interest being collected every six months. How long is the indorser bound thereon? *Opinion*: The Negotiable Instruments Law provides that where the instrument is payable on demand, presentment must be made within a reasonable time after its issue. Exactly what is a reasonable time for presentment in order to charge an indorser is not clearly defined by the authorities which vary greatly. Each case must be governed by its own particular facts. It would not be safe, however, to hold an indorsed demand note more than two or three months before presenting same for payment, unless the indorser waived presentment. (*Inquiry from N. J.*, Nov., 1917.) (*Similar inquiry from Pa.*, Sept., 1911, *Jl.*)

Time limit for presentment of check

2668. When should a check be presented in order to hold the drawer? *Opinion*: Where a check is issued and delivered in the place where the drawee is located, the well established rule adopted by the courts is that under the Negotiable Instruments Act the reasonable time for presentment to hold the drawer ends with the next business day after delivery of the check. *Kershaw v. Ladd*, 34 Ore. 375. This rule applies to a bank in which the payee deposits a check for collection drawn upon another bank in the same place. See *Rickford v. Ridge*, 2 Campb. 537. There is no rule which would require the collecting bank to make presentment the same day of deposit, in the absence of some specific instruction from its depositor so to do. Where there exists a custom of presentment through a clearing

house in any city or town, according to the rule in some courts, such method is within the requirements of diligence, and, as illustrated in a Pennsylvania case, the drawer will remain liable, although the check was not presented until the third business day following delivery. *Loax v. Fox* 178 Pa. 68. But a Nebraska case refused to follow this decision and required presentment by the payee the following day. *Edmisten v. Herpolsheimer*, (Neb.) 92 N. W. 138. A Texas case held that the drawer was discharged where there was presentment through a clearing house on the third day because he had not impliedly consented and was entitled to have his check presented directly to the drawee not later than the day following its delivery. *Merchants Nat. Bk. v. Dorchester*, (Tex. 1911) 136 S. W. 551. The payee, however, who deposited the check was bound by the custom by reason of his implied consent. *Rickford v. Ridge*, 2 Camp. 537. (*Inquiry from Ore.*, March, 1917, *Jl.*)

Check must be presented within reasonable time

2669. When must a check be presented? *Opinion*: A check must be presented within a reasonable time, but the exact period of time after which a check becomes stale or discredited and puts a purchaser or a bank of payment upon inquiry is not definitely fixed by the authorities. A check becomes outlawed according to the statute of limitations of each state. But there is some divergence of opinion of different courts as to whether the statute begins to run from the date of a check or from a reasonable time after date or from a time after date beginning with the end of the statutory period. *Lancaster Bk. v. Woodward*, 18 Pa. 357. *Merchants, etc., Bk. v. Clifton Mfg. Co.*, (S. C.) 33 S. E. 750. *Skillman v. Titus*, 32 N. J. L. 96. *First Nat. Bk. v. Needham*, 29 Iowa 249. *Farmers Bk. v. Dreyfus*, 82 Mo. App. 399. *First Nat. Bk. v. Harris*, 108 Mass. 514. *Rothschild v. Corney*, 9 B. & C. 388. *London, etc., Bk. v. Groome*, 8 Q. B. D. 288. *Ames v. Meriam*, 98 Mass. 294. *Bull v. Bk. of Kasson*, 123 U. S. 105. (*Inquiry from Kan.*, April, 1916, *Jl.*)

Collecting bank not required to present check on day received unless circumstances exceptional

2670. A bank received for collection a check from another place on Thursday, and presented it for payment on Saturday

forenoon, Friday being a legal holiday. The check was dishonored, although it could have been paid if presented on Thursday. *Opinion:* The collecting bank was not liable for not presenting the check on the day it was received, unless it had information that the drawee was approaching insolvency or that the case required extraordinary diligence on the part of the bank in protecting its principal. First Nat. Bk. v. Fourth Nat. Bk., 77 N. Y. 320. Pinkney v. Kanawha Valley Bk., (W. Va.) 69 S. E. 1012. (*Inquiry from Mont., April, 1915, Jl.*)

Drawee withholding presentment of check received by mail for twenty days, because of insufficient funds

2671. The drawee bank to which a check is sent directly by mail holds it for twenty days because of insufficient funds in the drawer's account and then returns it without notice of protest. What is the result of such action? *Opinion:* The indorsers are discharged because of the delay in presentment and in the giving of notice of dishonor. The drawee bank is probably liable to the forwarding bank for the delay. The drawee bank occupied the dual relation of agent of the drawer to pay the check and agent of the forwarding bank to make due presentment and give notice of dishonor. The twenty days' delay would seem to be negligence, rendering the drawee liable to the forwarding bank. (*Inquiry from Iowa, Sept., 1917.*)

Ten days delay in presentment of draft because of drawee's change of address

2672. At the request of shippers a customer of bank A paid a bill of lading draft for goods that were shipped to wrong place and drew back with bill of lading attached upon shippers for the amount, the draft being made payable on demand and marked "protest." A forwarded it direct to bank B in city where shipping concern carried on business, for collection, with instructions not to protest and that bank, after presenting at the former place of business of shippers, who had removed to another part of the city, held the draft for ten days, when upon presentment the drawee refused to pay the draft and take up the bill of lading, claiming that by reason of delay the value of the goods had deteriorated. Where does the responsibility lie? *Opinion:* The ten days' delay in presentment was negligence which would make bank B responsible for any resulting damage,

assuming the new address of the drawees was known and their removal from one part of the city to another without notice did not contribute to this delay. Although A sent the item with instruction "no protest," this would not justify B in delaying to make presentment for ten days. Where the drawee removes to another locality in the same city, the party whose duty it is to make demand must exercise reasonable diligence to ascertain the whereabouts of the party sought. It is not certain, however, that the ten days' delay would relieve the shippers. A drew on them at their request, and they virtually promised to pay the draft and take up the bill of lading. They would have to show that the non-presentment to them of the draft and bill of lading was the cause of the loss, and that they were unable to control the shipment in the interim and save its value; and there is the further question of the ultimate liability of the railroad company for improper routing. See Linville v. Welch, 29 Mo. 203. Woodruff v. Daggett, 20 N. J. L. 526. Cupler v. Nellis, 4 Wend. (N. Y.) 398. Smith v. Fisher, 24 Pa. St. 222. Sequin v. Milling Elec. Co., (Tex. Civ. App.), 137 S. W. 456. (*Inquiry from Tex., Jan., 1918.*)

Delay in presentment of check on foreign bank

2673. What is the responsibility of national bank in connection with checks drawn by it on European points which may be held up for an indefinite period (say, several months) and for any reason may not be paid when presented. *Opinion:* Where a check is drawn in New York upon a bank in a foreign country and is presented an unreasonable time after its issue and dishonored and protested, the liability of the drawer is governed by the law of New York, and he is not absolutely discharged by the delay in presentment, but only to the extent of the loss, if any, caused by such delay. Amsinck v. Rogers, 189 N. Y. 252. (*Inquiry from N. Y., Dec., 1919, Jl.*)

Effect of non-presentment of check for ten years

2674. A bank's customer has in his possession a check dated January 26, 1905, which he has never presented. Is the check still valid ten years after its date if the maker has never stopped payment? *Opinion:* In Campbell v. Whoriskey, 170 Mass. 63, it was held that, where a demand must be made before bringing an action, in a strict sense the cause of action does not accrue until after the demand. It seems,

however, to be well settled in Massachusetts that, where a demand is necessary to fix the legal rights of a party and give complete cause of action, the demand ordinarily must be made within the time limit for bringing an action at law. (*Whitney v. Cheshire R. R.*, [Nov. 1911] 210 Mass. 263. *West. Union Tel. Co. v. Caldwell*, 141 Mass. 489. *Codman v. Rogers*, 10 Pick. 112.) In Massachusetts, in actions upon bills, notes and other evidences of indebtedness issued by a bank, the period of limitations is twenty years (Mass. R. L. C. 202, Sec. 1, Cl. 2), and in actions on contract other than those upon judgments, and those described in Sec. 1, *supra*, the period is six years. It would seem that the case now submitted would be controlled by R. L. C. 202, Sec. 2, and, as no demand was made within six years, action on the check would be barred. (*Inquiry from Mass.*, Feb., 1915.)

By whom made

Draft "payable through bank A" presented to drawee by Bank B

2675. An accepted draft with the words "payable through bank A," and bearing the indorsement of several banks, was sent direct to bank B, and by that bank presented to the drawee for payment at maturity. Is the instrument protestable by bank B? *Opinion*: Where an instrument is made payable through a specified bank, such restriction of the channel of collection is lawful, and presentment by another bank is not a due presentment and it is not protestable. *Commercial Nat. Bank v. First Nat. Bank*, 118 N. C. 783, 24 S. E. 524, 32 L. R. A. 712, 54 Am. St. 753. *Farmers Bank of Nashville v. Johnson*, 134 Ga. 486, 68 S. E. 85, 137 Am. St. 242. (*Inquiry from N. C.*, March, 1919.)

To whom made

Presentment, by custom, of draft on county treasurer to county depository

2676. A draft drawn on the county treasurer was presented to the treasurer's depository in another town where it is customary to present all drafts drawn on the treasurer. Payment was refused because of "no funds in general deposit" and the draft was duly protested. *Opinion*: The presentment was sufficient and the protest for non-payment was legal and valid. *Brent v. Bk. of Metropolis*, 1 Pet. (U. S.) 89. *Cox v. Nat. Bk.*, 100 U. S. 704. (*Inquiry from Miss.*, Oct., 1911, *Jl.*)

Presentment of draft addressed to drawee in care of bank

2677. Is it sufficient to present a draft to the bank in whose care it is made payable? *Opinion*: This is sufficient and authorizes protest in the event of non-payment without necessity of further presentment to the drawee. (*Inquiries from Okla.*, April, 1911, *Jl.*, S. C., Dec., 1910, *Jl.*)

Presentment of indorsed note payable at bank to maker personally

2678. Although an indorsed note was made payable at a bank, presentment was made to the maker in person, and then protested. May the indorser recover the protest fees from the payee? *Opinion*: Where an indorsed note is made payable at a bank, presentment for payment must be made at the specified place in order to hold an indorser, and where the note is not presented at the bank, but to the maker personally, and then protested, the instrument is not duly presented and the protest is unauthorized. There is no right to recover the protest fees. *Farmers Nat. Bk. v. Venner*, (Mass.) 78 N. E. 540. *Myers Co. v. Battle*, (N. C.) 86 S. E. 1034. *Merchants Nat. Bk. v. Bentel*, (Cal.) 113 Pac. 708. (*Inquiry from Kan.*, July, 1917, *Jl.*)

Presentment at main office of note payable at designated branch

2679. A note for \$500 was made payable at a designated branch office of a bank. The notary presented the note at the main office and the item was protested for non-payment. The indorser claims non-liability. *Opinion*: Presentment for payment at the main office of the bank was not sufficient to hold the indorser. *Ironclad Mfg. Co. v. Sackin*, 114 N. Y. S. 42. (*Inquiry from Mich.*, Nov., 1911, *Jl.*)

Presentment by parent bank cashing check drawn on branch

2680. Is a parent bank which cashed a check drawn on its branch a holder in due course with duty to present for payment at the branch and with recourse upon the drawer and prior indorsers if payment is stopped or the check is refused for other reasons? *Opinion*: The parent bank occupies the same status with respect to the check as an independent purchaser. *Woodland v. Fear*, 7 El. & B. (Eng.) 519. It must present the check in due course for payment and may enforce the instrument

against the drawer and prior parties, in the event of non-payment, if it could have done so had it no relation to the bank on which drawn. (*Inquiry from Ala., May, 1917, Jl.*)

2681. In the city of C there is the "Bank of C" and also a branch located in a different part of the city, known as the "Bank of C Home Savings Branch." A check drawn on the branch was presented for payment at the parent bank. *Opinion:* The presentment of the check was not sufficient and therefore would be no basis for a protest. In case of a check drawn on the parent bank and presented at that bank where payment was refused although the drawer had all his funds in the branch, the bank would not be responsible for damages. While the branches of a bank are agencies and not distinct banks, the courts recognize that for certain purposes, including the presentment and payment of checks, the different branches are to be regarded as distinct. (*Inquiry from Ga., March, 1912, Jl.*)

Manner of presentment

Demand of payment over telephone insufficient

2682. Is a demand of payment of a negotiable instrument over the telephone by a notary sufficient to justify a protest? *Opinion:* The presentment is insufficient, the law requiring personal attendance with the note at the place of demand, in readiness to exhibit it, if required, and to receive payment and surrender it if the debtor is willing to pay. *Gilpin v. Savage*, (N. Y.) 94 N. E. 656. (*Inquiry from W. Va., Aug., 1911, Jl.*)

Check not sufficiently presented to hold indorser where drawee refuses payment over telephone

2683. Is a telephone message from a bank that a check is not good a sufficient presentation? *Opinion:* It has been held that a demand over the telephone is not a legal presentation; the instrument itself must be presented. The fact that the bank replies over the telephone that the check is not good would not dispense with the necessity of due presentment to hold an indorser. To constitute dishonor, the instrument must be duly presented, or presentment must be legally excused. In this case there is no due presentment and no excuse of presentment, so far as an indorser is concerned; hence if protest or notice of dishonor was based or given on the telephone refusal of a bank to pay a check, it would not be legally sufficient and the

indorser would be discharged. (*Inquiry from Fla., June, 1916.*)

Presentment of sight draft over telephone

2684. A bank receiving a sight draft on a person living three miles away telephoned him at his home, there being no bank in his town. He was reported to be absent quite a distance and, not being able to locate him, the bank had the item protested for non-payment. *Opinion:* Presentment and demand of payment of a sight draft over the telephone is not legally sufficient and protest for non-payment in such a case is unauthorized. It has been held that as presentment must be made by actual exhibition of the paper, or, at least, by some clear indication that the paper is at hand ready to be delivered, a demand over the telephone at the place specified in the instrument is insufficient. *Neg. Inst. Law* (Commsr's. dft.), Secs. 72, 73, 74. *Gilpin v. Savage*, 201 N. Y. 167. (*Inquiry from Ark., March, 1918, Jl.*)

Priority where checks presented through mail and over counter

2685. When the check of A is presented through the mail at twelve o'clock, and has not been paid by charging to the account of the drawer before two p. m., when another check is presented over the counter for the entire balance, what should the bank do? *Opinion:* If A's check had been paid by charge to account, although remittance was to be made later, no question could arise. But although not paid, it seems the rule would apply that checks should be paid in the order of their presentment, and that the check of A, having been first presented should be first disposed of. (*Inquiry from N. Y., Sept., 1920.*)

Protest

Abolition of protest

2686. Has the protest of negotiable instruments been abolished in any state? *Opinion:* It has not. (*Inquiry from Pa., Sept., 1912, Jl.*)

Instruments as to which protest required

2687. What instruments require formal protest? *Opinion:* Formal protest as distinguished from demand and notice of dishonor is required only in case of foreign bills of exchange. However, protest of notes and inland bills is permitted and it is customary for a collecting bank to protest all paper unless otherwise instructed. (*In-*

quiries from N. J., Nov., 1913, Jl., Wis., April, 1912, Jl., Iowa, May, 1914.)

Omission of presenting bank to have check protested

2688. A stock buyer gave his check in payment of cattle, on a local bank, which the payee took to his own town in same county, having been assured by the assistant cashier of drawee bank that it would be paid on presentment. The payee deposited the check for credit in his home bank and withdrew the proceeds. The check was forwarded through a city correspondent, but payment was refused on presentment because of insufficient funds. The home bank was advised of non-payment by 'phone, and it instructed that the check be returned without protest through the city correspondent. This was done, and when the check reached the home bank the payee was advised of non-payment, and gave his note for the amount, but subsequently threatened to sue the home bank for non-protest. What is the liability of the home bank, and also the liability of the drawee upon its promise to pay the check? *Opinion:* (1) The drawee is not liable as acceptor because its promise was not in writing. (2) The home bank is not liable, as the check did not require protest, and the liability of the payee as indorser was preserved by due demand and notice. (Plover Sav. Bank v. Moodie, [Iowa] 110 N. W. 29, 113 N. W. 476. Weil v. Corn Exch. Bank, 116 N. Y. Suppl. 665. Neg. Inst. Law, Secs. 118, 152.) (*Inquiry from S. D., Feb., 1921, Jl.*)

Accommodation indorser of note can be held by demand and notice without protest

2689. Under the Negotiable Instruments Act is it necessary to protest a note in order to hold an accommodation joint maker or indorser? *Opinion:* Protest is not necessary to hold a joint maker, even though he sign for accommodation; he is primarily liable and can be held without protest or notice of dishonor. However, it is necessary to make due demand and give notice of dishonor to hold an accommodation indorser. Strict notarial protest, while also permitted, is required only in the case of a foreign bill of exchange. (*Inquiry from S. C., Feb., 1918.*)

Protest of instrument providing that when receipted it becomes a check

2690. Bank A receives an item, sent from a clearing house, subject to protest.

On its face was a statement that it would have to be receipted before it became a check on bank B and space was provided for that purpose on face. It was indorsed but not receipted, and bank A protested it for non-payment. Is bank A liable for damages? *Opinion:* It would be questionable whether an order stating on its face that it would have to be receipted before it became a check would be subject to protest for non-payment where not so receipted. Such an instrument might be held not negotiable, because of the condition of receipt as a prerequisite, in which event it would not be subject to protest; and even if negotiable, there would be a further question whether a refusal to pay where the condition that it would be receipted before it became a check had not been complied with would constitute a dishonor so as to justify protest. It would seem in this case that the instrument should not have been protested. Banks are sometimes held liable in damage for making wrongful protest where injury to credit is caused thereby. Whether there would be any such liability in this case is somewhat uncertain. (*Inquiry from Ga., March, 1913.*)

Protest of check on branch, held by parent bank

2691. May a branch bank treat checks in the hands of the parent bank like checks in the hands of other banks when items come to it in the regular course of mail? *Opinion:* Checks on a branch bank coming from the main office should be treated just like checks coming from independent banks when they are received by the branch bank in the regular course of mail, and where the drawer of a check has not sufficient funds in the branch bank to meet such check, it may be protested at the close of the business day on which it is received and returned. The general rule is that each branch bank is regarded as separate and distinct; the deposit in one branch of a check drawn on another is the same as if the check so deposited had been drawn on an outside bank. If it is dishonored by the branch upon which it is drawn, the branch of deposit has the right to charge back the amount to its own depositor and return him the check. See Woodland v. Fear, 7 El. & B., 519 (Eng.); Ironclad Mfg. Co. v. Sackin, 129 N. Y. App. Div. 555. (*Inquiry from Mich., Aug., 1913.*)

Protest of check retained by payor without payment

2692. Is there the right to protest a protestable item after it has been obtained

by the payor under means other than the actual bona fide payment thereof? *Opinion:* Protest in the case seems to be authorized by Sec. 160 of the Negotiable Instruments Act, which provides, "When a bill is lost or destroyed or is wrongfully detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof." (*Inquiry from Neb., March, 1919.*)

Protest of checks under \$10

2693. Should a collecting bank protest a check for less than \$10? *Opinion:* In case of a small check under \$10 payable in the same state, in the absence of instructions it might be proper to omit protest and merely give due notice of dishonor. (*Inquiry from Okla., Sept., 1911, Jl.*)

Protest of decedent's check

2694. Is it necessary to protest a check presented for payment subsequent to the death of the drawer? What if indorsers are located in different state? *Opinion:* Where a check is presented for payment subsequent to the death of the drawer, it may be protested and notice of dishonor must be given to indorsers, and if the check is drawn in one state and payable in another, it must be protested. If the check bears no indorsement and is presented by the payee or his agent, there would seem no real necessity for protest or notice of dishonor to the representatives of the drawer's estate, except that a certificate of protest would establish the fact of non-payment by the bank and might be convenient when proving check as a claim against the drawer's estate. (*Inquiry from Ill., Aug., 1913.*)

Protest not necessary against deceased maker

2695. A note is signed by John Smith, payable to John Doe, who waives protest. Smith dies before the note becomes due. Is it necessary to protest the note in order to hold Smith's estate? *Opinion:* It is not necessary to protest a note in order to hold a maker or his estate. (*Inquiry from N. J., April, 1914.*)

Protest of check on failed drawee

2696. Should a check presented after the failure of the drawee bank be protested? *Opinion:* A check does not require protest at all; due demand and notice of dishonor are sufficient. But the bankruptcy or insolvency of the drawee does not excuse

these steps and it is usual and customary to protest a check as the certificate of protest affords a convenient means of proving dishonor. If the check is protested, the protest should be made on the day of presentment, but notice of dishonor can be given without any formal protest at all. See *Shaw v. McNeill*, 95 N. C. 535. (*Inquiry from N. Y., Sept., 1919.*)

Liability of collecting bank omitting protest and delaying return of draft

2697. A bank received for collection, with instructions to protest if not paid, a draft with shares of stock attached. The draft was returned without protest, forty-five days later, and, as a result of the delay, the owner of the item was prejudiced by a depreciation in the value of the stock attached to the draft which he might have disposed of at a better figure had the draft been promptly returned unpaid. What is the liability of the collecting bank? *Opinion:* The delay would seem to be unreasonable, and it was the duty of the collecting bank to present the draft with due diligence, and if it delayed the collection for an unreasonable period of time, it could be held liable for any resulting loss. (See *A. B. A. Journal*, April, 1919.) (*Inquiry from Ark., March, 1919.*)

Protest of inland check

2698. Can a check that has not been out of the state be legally protested? *Opinion:* The Negotiable Instruments Act provides in Sec. 118: "Where any negotiable instrument has been dishonored it may be protested for non-acceptance or non-payment, as the case may be; but protest is not required, except in the case of foreign bills of exchange." It is quite customary to protest inland checks, and it is authorized by the above section. (*Inquiry from Fla., Sept., 1919.*)

Object of protesting inland bill of exchange

2699. What is the object of permitting protest of inland bills of exchange? *Opinion:* The object of permitting protest of inland bills is to enable the holder to obtain a convenient means of proving dishonor in case he is compelled to bring suit on the paper, as the notary's certificate of protest is admitted as prima facie evidence to prove dishonor and obviates the necessity of calling witnesses and proving that fact by other evidence. (*Inquiry from Wash., Sept., 1911, Jl.*)

Collecting bank omitting protest of inland check

2700. Is a check drawn and payable within a single state and not bearing the indorsement of anyone outside the state protestable? Is the collecting bank responsible when the same is not protested? *Opinion:* Although a collecting bank is responsible if by its negligence it fails to take the necessary steps upon dishonor to hold prior indorsers, if it makes due demand and gives due notice of dishonor the prior parties are held without protest. While it is customary for collecting banks to protest inland checks, no substantial damage to the holder results from omission to protest, where the liability of indorsers is preserved by demand and notice. (*Inquiry from Miss., May, 1917.*)

Protest when notice of non-payment wired

2701. Should the drawee bank in order to hold the indorsers have a check protested upon non-payment, in addition to wiring non-payment, when instructions are to wire? *Opinion:* The statute permits the protest, and, although it is not absolutely required, it is desirable, because a certificate of protest provides a convenient means of proving dishonor, as it is prima facie evidence of it, and in a suit against the indorsers, if there is no certificate of protest, the fact of due demand and dishonor must be proved by the testimony of witnesses. (*Inquiry from Iowa, Oct., 1918.*)

Protest of draft refused because bill of lading not attached

2702. A draft which called for a bill of lading was sent to a bank for collection. Where payment is refused because the bill of lading is not attached to the draft, it having been lost on the way, is protest proper? *Opinion:* A negotiable draft is subject to protest. A non-negotiable one is not. If it is a plain negotiable form of draft drawn for the price of merchandise, it is protestable, although the bill of lading for same was not attached. If, on the other hand, the draft contains language making it payable only on condition that the bill of lading is surrendered, it is not negotiable and not protestable. (*Inquiry from Miss., Jan., 1918.*)

Protest of check where drawer had no account

2703. A check drawn on an Oregon bank was received by an Oklahoma bank from its customer. It was forwarded with instructions to protest but was returned unpro-

tested. Does the fact that the drawer had no account in Oregon bank excuse the collecting bank from following instructions? *Opinion:* If the check showed on its face that it was drawn in Oklahoma upon an Oregon bank, protest would be required to hold parties secondarily liable; but if it appeared to be both drawn and payable in Oregon, demand and notice of dishonor without formal protest would be sufficient. As the drawer had no account in bank, this fact would excuse demand, notice and protest so far as he was concerned, but any indorser for value would be released if the proper steps upon dishonor were not taken. If the collecting bank made due demand and gave notice of dishonor through its immediate principal and the notice came back to the Oklahoma bank in due season, so that it was enabled to notify its customer of the dishonor and hold him liable as indorser, there would probably be no loss for which the collecting bank could be held. It nevertheless should have followed instructions. (*Inquiry from Okla., Apr., 1914.*)

Protest of check on non-existent drawee bank

2704. Is a check drawn on a non-existent bank subject to protest? *Opinion:* Such a check is negotiable and is subject to protest under the Negotiable Instruments Act. Neg. Inst. Law (Commsr's. dft.), Secs. 82, 114, 117. (*Inquiry from Ill., Feb., 1918, Jl., N. D., Oct., 1918.*)

Protest of indorsed note payable at and held by bank

2705. Should a bank protest an indorsed promissory note payable to its order at the bank? *Opinion:* The note being payable to the order of the bank at the bank, the holding of the note at maturity constitutes a sufficient demand, and all that is necessary is to mail notices of dishonor to the indorsers whose names are on the back. Formal notarial protest is not necessary, but it is permissible under the law, and customary, as the certificate of protest affords a convenient means of proving dishonor. See Neg. Inst. Act, Sec. 118. (*Inquiry from N. H., Jan., 1920.*)

Protest of check "payable to order of self"

2706. Is a check "pay to the order of self," indorsed by the maker and negotiated, protestable? *Opinion:* The check is negotiable and consequently protestable. (*Inquiry from Iowa, Sept., 1917.*)

Surety-makers not discharged by failure to protest

2707. Are surety-makers of a note discharged by the failure to have the note protested? *Opinion:* Under the Negotiable Instruments Act the surety-makers are primarily liable and not entitled to protest. (*Inquiry from Tenn., Aug., 1916, Jl.*)

Protest unnecessary to hold guarantor of payment

2708. Is it necessary to protest a note to hold the indorser who guarantees payment? *Opinion:* The guaranty of payment obviates the necessity of protest. *Zahn v. First Nat. Bank*, 103 Pa. 576. (*Inquiry from Pa., July, 1915.*)

Drawee's duty as to protest when check presented over counter

2709. Where payment of a check has been stopped or there is lack of funds, is it necessary for a bank to protest it for a holder when it is presented over the counter? *Opinion:* In such a transaction a bank is not the agent of the holder and is not obliged to protest the check for him. He has the right to have it protested if he chooses, paying the fee for it himself. There would be no particular advantage to the holder in having such a check protested, unless there was a prior indorser whom he desired to sue; so far as the drawer is concerned he is liable in any event. (*Inquiry from Mont., May, 1920.*)

Duty as to protest between drawee and local presenting bank

2710. Should a bank protest items drawn on it when sent to it by another bank in the same town, or should it refuse payment and let the other bank do the protesting? *Opinion:* When the check is presented by another bank in the same town, it would seem that the only function of the drawee is to pay, or to refuse to pay, and the presenting bank is in such case the agent of the holder to have the check protested. (*Inquiries from Colo., March, 1919, N. C., July, 1919, Va., Jan., 1918, Del., June, 1915.*)

Presenting bank in same city and not drawee should protest check

2711. A bank received for deposit from the payee a check on another bank in the same city. The drawee bank returned the check because of insufficient funds, without protest. Was this proper? *Opinion:* Protest is permissible but not required unless

the check is drawn in one state and payable in another. See *Morrison v. Bailey*, 5 Ohio St. 13. In the case submitted, it was incumbent on the presenting bank and not the drawee to take the necessary steps to preserve the liability of the indorser; this could have been done by simply notifying him of the dishonor of the check, but, of course, the bank would have the right to hand the check over to a notary for purpose of protest. (*Inquiry from Ohio, Nov., 1919.*)

Drawee's duty as to protest of check received through mail

2712. Should a drawee bank protest an overdraft received by mail? *Opinion:* It is customary for banks when they receive through the mail checks drawn on themselves, which are dishonored, to cause protest to be made before returning the items. In so doing, they are acting as agents for the holders who, it is assumed, desire certificates of protest as a convenient means of proving dishonor. (*Inquiry from Mass., June, 1919.*)

Liability of drawee failing to protest check received through mail

2713. If a drawee bank returns a check with notation, "Payment stopped subject to adjustment," and does not protest the check, is it liable? *Opinion:* A bank which refuses payment of a check because the drawer has stopped payment is not liable to the holder for refusal to pay, because a check of itself does not operate as an assignment of any part of the funds to the credit of the drawer and the bank is not liable to the holder unless and until it accepts or certifies the check. But where a check is mailed to the drawee bank, it might be held that the payor bank assumed the dual relation (1) as agent of the depositor to pay or refuse payment and (2) as agent for the holder to present to itself and to protest if not paid,—in the latter relation it would be its duty to protest when so instructed; but the bank might take the ground that it did not act as agent for the holder, but only as agent of the drawer. A check, however, does not require protest, mere notice of dishonor is sufficient, so there would be no loss of liability of prior parties from which damages would result. (*Inquiry from Okla., April, 1919.*)

Protest of check by drawee acting as agent of payee

2714. A check for \$160 was drawn, payable by A to B, who deposited it for col-

lection. The check was forwarded directly to the drawee bank, where payment was stopped by A. The drawee questions the advisability of protesting the check for non-payment. *Opinion:* The drawee would not be responsible in omitting protest, as protest is not necessary in this case, there being no contingent parties to be held liable. (*Inquiry from Wis., March, 1916, Jl.*)

Drawee not liable to payee for omission to protest

2715. The payee of a check deposits it in his bank for collection and before the item is presented goes to the town of the drawee and asks the latter if it will pay the same when it comes through the regular channels. The drawee promises to hold the check awaiting a deposit by the drawer, there being insufficient funds at the time. When the check was presented, the drawee returned it unpaid, because of insufficient funds, without protesting it. The payee wants to hold the drawee for not protesting. *Opinion:* Drawee bank not liable to payee of check for omission to protest before returning unpaid because of insufficient funds. In this case the check was owned by the payee, and there was no discharge of parties contingently liable and no loss resulted to the payee from the bank's omission to protest. Bank's promise to hold check awaiting deposit by drawer is not binding on bank, not being an acceptance nor supported by a consideration. (*Inquiry from La., Aug., 1917, Jl.*)

Protest of undated check

2716. An undated check negotiable in form was presented for payment at a savings bank. The presenting bank protested the item for non-payment after refusal of payment because of non-production of the pass-book. *Opinion:* The check was properly protestable and its negotiable character was not affected by the fact that it was undated or that it was payable only on presentation of the pass-book, since the holder is not chargeable with knowledge of any condition of payment not existing on the face of the check itself. N. Y. Neg. Inst. Act, Sec. 25. (*Inquiry from N. Y., Aug., 1913, Jl.*)

Protest where signature placed under drawer's signature

2717. A check was presented to the drawee bank with another signature under that of the drawer which was in the proper

place. The drawee bank returned the check with the notation "Signature unauthorized." The bank presenting the check then protested the check. Was this necessary? *Opinion:* Although in the case submitted there was a signature under the drawer's signature, the check was genuine and not a forgery and under the circumstances protest was justified. The signature placed under the drawer's signature may have been that of an indorser. While an indorsement is usually placed on the back, it has been held valid where placed on the face of the instrument and even under the drawer's name. (*Inquiry from Iowa, Feb., 1920.*)

Protest of check signed by unwitnessed mark

2718. A drawer of checks unable to write signs by mark with witnesses. A check coming through another bank unwitnessed, to drawee, was returned by that bank with the notation on back, "This party signs name by mark and mark requires witness." The presenting bank protested and its procedure is questioned. *Opinion:* A signature by mark would be incomplete without a witness and it would seem such check would not be properly protestable any more than would a check bearing no signature. (*Inquiry from Okla., Sept., 1912.*)

Protest of check bearing mutilated signature

2719. Is a drawee bank liable for failure to obey instructions to protest checks for non-payment where the signature is so mutilated that the drawee bank cannot be positive as to the identity of the drawer? *Opinion:* Where the mutilation is such that the drawee bank cannot know positively who the drawer is, it is proper to return the check without protest for further information. This is not such a dishonor as justifies protest. (*Inquiry from Ky., Jan., 1921.*)

Missing signatures

Protest where maker's stamp indicates lack of necessary signature

2720. A check which bears the rubber stamp of a corporation as maker indicates that at least two officers must add their names. The signature of only one is suffixed, and he only indorses. Is the holding bank justified in causing protest to be made? *Opinion:* The check on its face showed that it was incomplete as to signature so that there would be no presentment of a completed check. Probably it would be held that there was no dishonor by refusal to pay

which justified a protest. (*Inquiry from Colo., Aug., 1919.*)

Protest where one of two necessary signatures of officers of corporation missing

2721. The contract between a bank and a corporation requires that the checks of the latter have the signatures of two officers of the corporation. Was the drawee bank justified in protesting a check signed by only one of such officers. *Opinion:* There is no judicial precedent, but the test as to whether protest was proper would seem to be whether the issuance of the paper by the one officer was within his authority as between him and the corporation. If it was, the check was valid and protestable; if it was not, the drawer corporation would not be bound by the check and any indorser would be liable on his implied warranty, as expressed by the Negotiable Instruments Act, that the instrument is genuine and in all respects what it purports to be, for such warranty includes the authority of an agent to sign for his principal. Notice of protest or dishonor is not necessary to hold an indorser on his breach of warranty; in fact, if the officer's act was beyond his power, there was no dishonor because there was and could be no due presentment, and without dishonor there can be no protest. (*Inquiry from N. J., April, 1921, Ill.*)

2722. By agreement between a bank and its depositor, a corporation, a check requires two signatures to authorize payment. The bank refuses to pay because one of such signatures is missing and inquires as to the legality and propriety of protesting the check. *Opinion:* To authorize or justify a protest the instrument must be "dishonored" and one of the essentials to constitute dishonor is that the instrument must be "duly presented." If the instrument, though not in accordance with the contract with the bank, was drawn in this way by authority of the board of directors, it would probably be held to be a genuine negotiable instrument duly presented and protest would be justifiable and valid. But if issued without authority and without the second signature, it was not a valid order, the check would probably not be protestable, but the indorser would be liable upon breach of warranty of genuineness. Ill. Neg. Inst. Act, Secs. 117, 151, 83. (*Inquiry from Ill., Dec., 1916, Ill.*)

Protest where signature lacking

2723. Bank F sends bank A an unsigned check on bank B which refuses payment.

Bank A returns check to bank F without protesting, although instructed by bank F to protest all items. May the F bank charge the A bank with the amount of the check? *Opinion:* An unsigned check does not, of course, constitute an order by the customer on the bank to pay; it cannot, therefore, be dishonored and there can be no protest. The return of the check by A without protest, although F has instructed it to protest all items, does not entitle F to charge A with the amount. (*Inquiry from Neb., Aug., 1914.*)

Missing indorsements

Protest where payment refused because indorsement lacking

2724. Is protest justifiable when a check is refused payment because of lack of indorsement or because of improper or insufficient indorsement? *Opinion:* Refusal of payment because of lack of indorsement or because of improper indorsement is not a dishonor which authorizes or justifies a protest. The Negotiable Instruments Act authorizes protest "Where any negotiable instrument has been dishonored," and provides that "The instrument is dishonored by non-payment, when it is duly presented for payment and payment is refused." The holder of an instrument acquired through insufficient or improper indorsement is not in position to make due presentment and therefore there is no dishonor which authorizes a protest. *Goshen v. Bingham*, 118 N. Y. 349, 23 N. E. 180, 16 Am. St. Rep. 765. *Harden v. Birmingham Trust & Sav. Co.*, 55 So. (Ala.) 943. (*Inquiry from Colo., April, 1916.*)

Protest of check refused because indorsement missing

2725. Under the laws of the state of New Jersey or of Utah is it allowable to protest a check because of a missing indorsement? *Opinion:* To constitute dishonor and authorize protest, a check must be duly presented, and where a check is presented lacking indorsement, there can be no due presentment and protest is not justified. The Negotiable Instruments Act in Utah is not different from the New Jersey Act with reference to the requirements of presentment, notice of dishonor, protest, etc. (*Inquiry from N. J., May, 1920.*)

Protest where third person presents check lacking payee's indorsement

2726. Is protest justified where a check to the order of the payee is presented by a

third person without the indorsement of the payee and payment is refused for that reason? *Opinion:* The refusal is not a dishonor which justifies protest. To constitute dishonor it is essential that there be due presentment of the check and it cannot be said that a check without indorsement of the payee, presented by a third person, is duly presented, because the payee's indorsement, which is the order and authority to the bank to pay the holder, is lacking. *Harden v. Birmingham, etc., Bank (Ala.) 55 So. 943. (Inquiries from Ill., Dec., 1917, Okla., May, 1912, Jl., Ga., Sept., 1910, Jl. Ga., Dec., 1916, Jl.)*

Protest where payment refused because payee's indorsement lacking although indorsed by depository bank

2727. When a check bearing the indorsement, "Credit to the account of payee, John Doe, cashier" is refused payment because not properly indorsed, should it be protested? *Opinion:* Section 118 of the Negotiable Instruments Act authorizes protest "when the instrument has been dishonored," and Section 83 provides that "the instrument is dishonored by non-payment when it is duly presented for payment and payment is refused or cannot be obtained." There must be due and regular indorsement to entitle the holder to demand payment, and the payee did not indorse, but the bank of deposit indorsed a memorandum that the check should be credited to his account. It is questionable whether it could be held that there was a due presentment which would constitute the refusal to pay a dishonor which would authorize protest. (*Inquiry from Ill., Feb., 1919.*)

Protest where payee's indorsement lacking and prior indorsements guaranteed

2728. Where a check bearing a number of bank indorsements "Prior indorsements guaranteed," lacks the payee's indorsement, should the presenting bank protest the item? *Opinion:* Where a check is presented by a third person without the indorsement of the payee and payment is refused for that reason, such refusal is not a dishonor which justifies a protest. To constitute dishonor, it is essential that there be due presentment of the check. It cannot be said that a check without the indorsement of the payee presented by a third person is duly presented, because the payee's indorsement, which is the order and authority to the bank to pay

the holder, is lacking. (*Inquiry from Colo., Aug., 1919.*)

Protest of draft refused payment because accompanying b/l not indorsed

2729. A grain dealer in Oklahoma drew a draft on a firm in Kansas. He attached thereto an "order" bill of lading which provided that "the surrender of this original order bill of lading properly indorsed shall be required before delivery of the property" and deposited it in his bank for credit. On presentment through the Kansas City Clearing House, payment was refused because the grain dealer failed to indorse the bill of lading. Should the draft have been protested? *Opinion:* In the absence of instructions not to protest, the draft should have been protested upon dishonor. (*Inquiry from Kan., Nov., 1913, Jl.*)

Incorrect indorsements

Protest where payment refused because indorsement incorrect

2730. Does presentment by a holder under an "incorrect indorsement" authorize protest? *Opinion:* To authorize the protest of a check, it must be "duly" presented for payment. The holder under an "incorrect indorsement" is not entitled to demand payment; hence there can be no due presentment of such a check and no dishonor by non-payment which would authorize a protest. (*Inquiry from Pa., Nov., 1911, Jl.*)

Protest where payment refused because indorsement of certificate of deposit incorrect

2731. Bank A issued a certificate of deposit to B, payable to his order on demand. B negotiated it in another state and it was sent to bank C in the same town as bank A for collection. It bore three indorsements. Bank A refused payment, and returned to bank C, with notation, "Signature incorrect." Should bank C protest it before returning it to its correspondent? *Opinion:* In such case there was no dishonor of the instrument and no justification for protest. (*Inquiry from Ida., Oct., 1915.*)

Protest where payment refused because check payable to guardian is indorsed individually

2732. A check payable to "Will Jones, guardian of Elsie Smith," was indorsed by Will Jones only. On presentment of the check payment was refused because of the incomplete indorsement. The collecting

bank then protested the check. *Opinion:* The question is an uncertain one whether the indorsement of "Will Jones" without adding his representative capacity is a proper indorsement. Where a check is presented bearing an improper or defective indorsement of the payee and payment is refused for that reason, there is no due presentment and no dishonor which justified protest. *Harden v. Birmingham, etc., Bk., (Ala.) 55 So. 943. Thornton v. Rankin, 19 Mo. 193. Daniel Neg. Inst., Secs. 271, 301, 795a. (Inquiry from Wash., March, 1914, J'l.)*

Protest where payment refused because of incorrect indorsement and certification also refused

2733. When a check is refused payment because of improper indorsement and certification is then asked, and refused because of lack of funds, can it be protested for non-payment? *Opinion:* The Negotiable Instruments Act provides that "Where any instrument has been dishonored, it may be protested for non-acceptance or non-payment, as the case may be; but protest is not required except in case of foreign bills of exchange." Mere non-payment is not sufficient to authorize protest; there must be a dishonor of the instrument, and where the instrument is refused payment because of incorrect indorsement, there is not a due presentment or a dishonor within the meaning of the Act; or one that calls for protest. The fact that a drawee refuses to certify because of insufficient funds would not authorize protest. A bank is not obliged to certify a check in any event, and where it refuses there can be no protest no matter what the reason for refusing is. (*Inquiry from Ind., Dec., 1919.*)

Forged instruments

Protest of forged check unauthorized

2734. Is a forged check or one bearing an unauthorized signature protestable? *Opinion:* Protest is neither necessary nor proper; the instrument is void and the indorser of a check warrants that it is genuine to all holders in due course and is liable without demand, protest or notice. *Hamer v. Brainerd, 7 Utah 245. Turnbull v. Bowyer, 40 N. Y. 456. Perkins v. White, 36 Ohio St. 530. Susquehanna Bk. v. Loomis, 85 N. Y. 207. Rossi v. Nat. Bk. 71 Mo. App. 150. Daniel Neg. Inst., Secs. 669b, 733a, 1113b. (Inquiries from Ind., Nov., 1916, J'l., Tenn., Feb., 1916, Fla., Feb., 1910, J'l.)*

Instructions to protest do not apply to forged check

2735. Is a drawee bank liable for failure to obey instructions to protest checks for non-payment when the check is a forgery? *Opinion:* A forged check is not protestable and the bank is not liable. (*Inquiry from Ky., Jan., 1921.*)

Non-negotiable instruments

Draft "payable on arrival of goods" not protestable

2736. Bank A sends B a draft drawn on its face "payable on arrival of goods." The accompanying letter gives no instructions to hold for arrival of goods, but printed instructions are, "Protest all items of \$10 and over." B protested the item without ascertaining whether or not goods had arrived, and the question is as to its liability. *Opinion:* The draft was a non-negotiable instrument because "payable on arrival of goods." The order was, therefore, conditional, not absolute. Under the law merchant, protest is only required in the case of bills negotiable by the custom of merchants, and no protest is necessary in case of non-negotiable instruments, nor is it, unless by statute, evidence of any fact therein stated. The Negotiable Instruments Act contains no provision for protest of non-negotiable instruments, and the draft being non-negotiable was not protestable. B's proper procedure was to hold for arrival, although it received no instructions to that effect, because the draft was expressly made payable only on arrival of goods. If not paid then, B should have notified principal. It would seem that B failed in its duty, and if there was any resulting damage it probably would be held liable. *Kampman v. Williams, 70 Tex. 568, 8 S. W. 310. Ford v. Mitchell, 15 Wis. 304. Bank of Mobile v. Brown, 42 Ala. 108. (Inquiry from Tenn., March, 1920.)*

Protest of county warrant

2737. Is a county warrant providing for payment of money out of a particular fund subject to protest? *Opinion:* The warrant is not negotiable under the Negotiable Instruments Law and is not subject to protest. (*Inquiry from Ala., Nov., 1914, J'l.*)

Protest of draft payable "at sight on arrival of car"

2738. A bank received for collection a draft payable "at sight on arrival of car,"

together with instructions to protest upon non-payment. The draft was presented and refused. The bank wired non-payment but did not protest. *Opinion*: A draft payable "at sight on arrival of car" is non-negotiable, and is not properly subject to protest. The bank exercised due diligence. *Westberg v. Chicago Lumber Co.*, 117 Wis. 589. *Daniel Neg. Inst.*, Sec. 927. *Bk. v. Brown*, 42 Ala. 108. *Ford v. Mitchell*, 15 Wis. 304. (*Inquiry from Ohio, Nov., 1911, Jl.*)

Protest of draft "payable in Kansas City exchange"

2739. By agreement with its customer a bank stamped its checks "Payable in Kansas City exchange." The holder of such checks demanded cash, but only Kansas City exchange was tendered. Can the holder refuse the tender of exchange and protest the check if not paid in money? *Opinion*: The checks are not payable in cash but in drafts on Kansas City, and the holder cannot have the checks protested. All doubt as to whether the checks would be payable in money would be removed if the stamp read: "Payable by the drawee's draft on Kansas City." *Security Tr. Co. v. Des Moines County*, 198 Fed. 331. (*Inquiry from Kan., Aug., 1913, Jl.*)

Protest of check against savings account

2740. Can a check drawn against a savings account without pass-book accompanying be legally protested? *Opinion*: If the check is in negotiable form it would be protestable, but if the check had on its face "on presentation of my pass-book," then it would be non-negotiable and not subject to protest. (See *A. B. A. Journals* for Aug. and Sept., 1913) (*Inquiry from N. Y., Nov., 1915.*)

Protest of check payable "on presentation of pass-book"

2741. A check on a savings bank payable on its face "on presentation of the pass-book" was presented for payment unaccompanied by the book. The bank refused payment on the ground that the presentation was incomplete and did not think it necessary to protest the check. *Opinion*: The check was not negotiable and therefore not subject to protest. Besides this the presentation was incomplete. *N. Y. Neg. Inst. Act*, Secs. 20, 189. (*Inquiry from N. Y. Sept., 1913, Jl.*)

Instruments drawn and payable in same state but negotiated elsewhere

Checks payable in one state and negotiated in another

2742. Does a check drawn and payable in one state become a foreign bill because indorsed in another state? *Opinion*: Such check does not become a foreign bill and protest is not required but optional. (*Inquiry from Utah, April, 1911, Jl.*)

Check dated and payable in Wyoming, indorsed outside state

2743. A check dated at Sheridan, Wyoming, and drawn on a bank of that place, bears the indorsement of a bank outside of the state. It is questioned whether by reason of the indorsement it becomes a foreign bill of exchange so as to require protest. *Opinion*: Notwithstanding such indorsement the check is an inland bill of exchange and does not require protest. *Brown v. Wilson*, 45 S. C. 519. *Piner v. Clary*, 17 B. Monroe (Ky.) 645. *Smith v. Little*, 10 N. H. 526. *Williams v. Putnam*, 14 N. H. 540. *Ticonic Bk. v. Stackpole*, 41 Me. 302. *Kirtland v. Wanzer*, 2 Duer, 278. *Corbin v. Planters Nat. Bk.*, 87 Va. 661. *Neg. Inst. A.*, Sec. 129, 152, *Comsr's. dft.* *Libel v. Tucker*, L. R. 3 Q. B. 77. (*Inquiry from Wyo., Dec., 1909, Jl.*)

Check dated and payable in Nebraska though written and cashed in Iowa

2744. Is a check dated "Jackson, Nebraska," drawn on the bank at Jackson, Nebraska, but written and cashed in Sioux City, Iowa, an inland bill or a foreign bill requiring protest under the Negotiable Instruments Act. *Opinion*: (1) The Negotiable Instruments Act of Nebraska defines an inland bill as a bill "which is or on its face purports to be both drawn and payable within this state." While actually drawn in Iowa, the check purports on its face to have been drawn on a bank in Nebraska, and is, therefore, an inland bill under this definition, and protest thereof is not required although permissible. (*Inquiry from Iowa, May, 1918.*)

Protest of check negotiated in another state

2745. Is a check dated and payable in one state but bearing out-of-state indorsements an inland bill of exchange such as does not require protest? *Opinion*: The

Negotiable Instruments Act defines an inland and a foreign bill thus: "An inland bill of exchange is a bill which is, or on its face purports to be, both drawn and payable within the State. Any other bill is a foreign bill. Unless the contrary appears on the face of the bill, the holder may treat it as an inland bill." The act further provides: "Where a foreign bill, appearing on its face to be such is dishonored * * * it must be duly protested * * * Where a bill does not appear on its face to be a foreign bill, protest thereof in case of dishonor is unnecessary." The check in question bearing out-of-state indorsements may be protested but protest is not necessary; due presentment and notice of dishonor are sufficient. (*Inquiries from Ida., June, 1913, S. D., Dec., 1917, Jl., Mo., Oct., 1914.*)

2746. When a man in Delaware gives his check drawn upon a Delaware bank and the payee deposits the item in a New York bank, is protest for non-payment required? *Opinion:* Protest is permissible but not compulsory, because the instrument is not a foreign bill of exchange. (*Inquiry from Del., Jan., 1913, Jl.*)

2747. Is protest necessary of a check drawn and payable in New Mexico indorsed to a bank in Colorado? *Opinion:* The Negotiable Instruments Act requires protest only in case of foreign bills of exchange. Protest of inland bills and checks is not absolutely required, but is permitted by the statute and it is customary for collecting banks to protest inland checks upon dishonor, unless instructed to the contrary, the certificate of protest providing convenient proof of the fact of dishonor. The check, being drawn and payable in New Mexico, was an inland bill of exchange, and its character was not changed because it was indorsed to a bank in Colorado. Although not absolutely required, the check should have been protested according to custom, unless the Colorado correspondent expressly instructed to the contrary. (*Inquiry from N. M., Oct., 1917.*)

2748. A check, as shown on its face, was drawn and payable in South Dakota, but was issued and negotiated in Illinois. *Opinion:* Protest of the check is permissible but is not required by the Negotiable Instruments Act, even though the check was issued in one state and negotiated in another. S. Dak. Neg. Inst. Act. Secs. 117, 128, 150. *Mankey v. Hoyt*, (S. Dak. 1911) 132 N. W. 230. (*Inquiry from S. D., Dec., 1913, Jl.*)

2749. Is a check drawn and payable in the same state an inland bill such as is not required to be protested although the payee is located in another state? *Opinion:* Such a check is an inland bill of exchange and not a foreign bill, and protest upon dishonor, while customary, is not indispensable as in case of a foreign bill of exchange. Tenn. Neg. Inst. Act. Sec. 129. (*Inquiry from Tenn., June, 1914, Jl.*)

Protest of note payable in another state

2750. Should a note received for collection from another state be protested for non-payment? *Opinion:* Protest is necessary only in case of foreign bills of exchange, and a note payable in another state does not come under that category. While protest is not necessary, it is permissible, and might be of convenience to customer in case of suit, as a certificate of protest is a prima facie proof of dishonor. He could lose nothing on his claim by not having protest made, but might be put to the inconvenience and expense of calling witness to prove demand and refusal. (*Inquiry from Conn., June, 1919.*)

Stopped checks

Protest of stopped check

2751. Is it customary or proper to protest checks after payment has been stopped? *Opinion:* Banks frequently protest stopped checks, although, so far as the law is concerned, when the drawer stops payment, he is liable without notice of dishonor and protest; but if the check is indorsed, the countermand of payment by the drawer would not excuse presentment and notice to the indorser and the check should be protested as a convenient means of proving dishonor and holding him liable. (*Inquiry from N. Y., March, 1915.*)

Protest by drawee of stopped check

2752. Where the drawer not having sufficient funds in bank to meet a check, requests the drawee to return it with the statement that payment has been stopped, what should the drawee do? *Opinion:* When a check is refused payment because the drawer has countermanded same, it is dishonored and equally subject to protest as if dishonored because of insufficient funds. Where the drawer of a check bearing indorsers has not sufficient funds but requests that it be returned "payment stopped," the check should be protested and it would be merely a ques-

tion of what reason should be given by the bank for refusing payment. If it would help the customer's credit any better to give "payment stopped" as a reason rather than "insufficient funds," this course would not be improper because the customer has the right to stop payment of his check if he chooses, and the bank has a right to pay the customer's check against insufficient funds if it chooses. (*Inquiry from Me., Aug., 1916.*)

Holder's right to protest fees upon protest of stopped check

2753. At a customer's request a bank stopped payment on a check coming from a local bank which then protested it. Is the holder entitled to protest fees? *Opinion:* While protest is not strictly necessary to preserve liability of prior parties, who are bound if notice of dishonor is given, without protest, and the holder has a right of action the same as if the check was protested, he has the privilege of having protest made, and if he does so, may recover protest fees in addition. (*Inquiry from Ore., Dec., 1917.*)

Drawee protesting stopped check at request of holder entitled to fees

2754. A bank received an order from its customer not to pay his check of \$143.40. The check in question was duly protested at the request of the bank which mailed it for payment. The depositor claims that the check should not have been protested, that his credit has been injured and refuses to pay the protest fees. *Opinion:* When a customer orders payment of his check stopped, it is the duty of the bank to refuse payment and it may properly cause protest to be made at the request of the holder and recover protest fees. (*Inquiry from Va., March, 1919, Jl.*)

Time of protest

Protest of unmatured certificate of deposit

2755. An unmatured time certificate of deposit with interest for the time added to the face was protested. The proceeding is questioned. *Opinion:* Protest is authorized only upon dishonor, upon due presentment at maturity, and there can be no legal protest where the instrument is not due and payable. (*Inquiry from S. D., Sept., 1919.*)

Protest of unmatured note

2756. If an unmatured note sent in regular cash letter to correspondent bank

through error is refused by the maker for the reason that it is not due, has the collecting bank the right to make protest? *Opinion:* A collecting bank to which is forwarded for collection, through error, a note not due, with instructions to protest if not paid, does not pursue the proper course when it presents the item and, upon refusal of payment because it is not due, causes it to be protested. There is no dishonor of such an instrument, and protest of a note before it is due is an absolute nullity. The proper course for the collecting bank is to hold the item until it matures and then present and protest if not paid, advising its correspondent that it had been sent by them before due through error, or, if the maturity is a long way off, the item could be returned to the forwarding bank. (*Inquiry from Kan., Feb., 1919.*)

Protest for better security

2757. When may a protest "for better security" be made? What is the purpose and result of making such a protest? What are the formal requirements? *Opinion:* Section 158 of the Negotiable Instruments Act provides: "Where the acceptor has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, before the bill matures, the holder may cause the bill to be protested for better security against the drawer and indorsers." Section 161 of the Act provides: "Where a bill of exchange has been protested for dishonor by non-acceptance or protested for better security, and is not overdue, any person not being a party already liable thereon may, with the consent of the holder, intervene and accept the bill *supra protest* for the honor of any party liable thereon, or for the honor of the person for whose account the bill is drawn." The utility of this kind of protest seems to lie in the fact that, when the acceptor becomes a bankrupt, the causing of protest for better security and giving of notice thereof to the drawer and prior indorsers, will enable him or them to procure some friend or correspondent to accept the bill, *supra protest*, for their honor. The Negotiable Instruments Act, while authorizing a protest for better security, fails to specify the requirements of such a protest. It would seem that a certificate, made under the hand and seal of the notary, containing a copy of the bill or having the original bill annexed thereto, which should recite (following as closely as possible the language of the Act) that the acceptor has been adjudged

bankrupt before the bill has matured, for which cause the bill is protested for better security against the drawers and indorsers, would be sufficient. *Miss. Neg. Inst. Act*, Secs. 158, 161. *Ex parte Wackerbath*, 5 Ves. 574. *Chitty on Bills*, p. 385. *La Banque Nationale v. Martel*, 17 Quebec Super. Ct. 97. (*Inquiry from Miss.*, Dec., 1916, *Jl.*)

Protest must be made on day of dishonor unless delay excusable

2758. To what extent is delay excusable in protesting an instrument? *Opinion:* The Negotiable Instruments Act provides that protest must be made on the day of dishonor "unless delay is excused as herein provided." Delay is excused when "caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence." Of course, if the delay is not excusable, the protest is unavailing, but if protest is omitted and it was shown that the delay was excusable, the holder might be held negligent, for the Act provides: "When the cause of the delay ceases to operate, the bill must be noted or protested with reasonable diligence." (*Inquiries from Ark.*, Aug., 1916, *N. D.*, Oct., 1910, *Jl.*)

Protest of check by drawee bank on day following receipt

2759. Has a bank the right to hold a check over until the following day after it is received, to protest it? *Opinion:* Where a bank receives for collection a check on another bank, it may make presentment not later than the day following its receipt. Where it receives by mail from the holder a check drawn on itself, it occupies the dual relation of (1) agent for the holder to make presentment and cause protest upon dishonor, and (2) agent of the drawer to pay or refuse to pay. If such a check is to be regarded as presented for payment at the time of its receipt, then, there being insufficient funds, and the law requiring protest to be made on the day of dishonor, it would have to be protested the same day. A bank will sometimes hold a check for a short time in the expectation of the deposit of funds by the drawer. Whether a check so held until the following day and then protested would be deemed not to have been presented until such day, and the protest made according to law, is doubtful. The better course for the bank is not to hold checks over until the next day when the funds are insufficient,

but protest and return them the same day. See *Whitman v. First Nat. Bank*, 35 Pa. Super. 125. (*Inquiry from S. D.*, March, 1919.)

Time of protest of check dishonored Saturday forenoon

2760. A check is presented and dishonored on Saturday forenoon. *Opinion:* Protest should be made on Saturday, and the check should not be held over without protest until the following Monday. (*Inquiry from N. Y.*, May, 1912, *Jl.*)

Protest of check received by drawee in mail Saturday morning

2761. If a bank is instructed to return or remit all items on day of receipt, should it protest for non-payment a check received by mail on Saturday morning on that day, or return it without protest? *Opinion:* The New Jersey Negotiable Instruments Act provides, Sec. 85, that "instruments falling due or becoming payable on Saturday are to be presented for payment on the next succeeding business day," but makes the exception that instruments payable on demand may, at the option of the holder, be presented for payment before twelve o'clock noon on Saturday when that entire day is not a holiday. The Act also provides (Sec. 153) that "when a bill is protested, such protest must be made on the day of its dishonor." As checks and other demand items may be presented for payment on Saturday forenoon and when so presented must be protested on day of dishonor, it follows that the check in this case should be protested on the Saturday received and returned the same day as requested. (*Inquiry from N. J.*, Nov., 1916.)

Time of protest of demand paper presented on Saturday and of time paper maturing on Saturday

2762. Is it legal to protest a note or check on Saturday afternoon? *Opinion:* Checks can be presented on Saturday forenoon and, when so presented, protest in the afternoon is legal. Promissory notes falling due on Saturday are not presentable until the following Monday, and cannot be protested on Saturday; however, a demand note can be presented on Saturday forenoon and protested in the afternoon the same as a check. (See *Neg. Inst. Act*, Sec. 10,053.) (*Inquiry from Mo.*, March, 1918.)

Protest of check on Saturday afternoon by drawee legally doing business in afternoon

2763. A check was received by the drawee by mail on Saturday afternoon, and was refused because of lack of funds. Was it necessary to protest the check that same afternoon, Saturday being a half holiday, although the bank kept open for business? *Opinion:* Under the Negotiable Instruments Act an instrument must be protested on the day of dishonor (Sec. 157); therefore, if presentment of the check on Saturday afternoon is lawful and valid, its protest upon dishonor on that day is authorized. Section 87 of said Act permits presentment of demand paper such as checks on Saturday forenoon and in Michigan there is a proviso to the statute which validates certain bank transactions done on Saturday afternoon where valid if done before twelve o'clock. While not specifically providing for presentment and protest, the act does validate, in addition to the things specified, "any other transaction by a bank in this state" and, payment of a check being specifically covered, the presentment for payment on Saturday afternoon seems sufficiently authorized by this proviso. Therefore, it may quite safely be said that a check presented to and refused on Saturday afternoon by a bank that keeps open for business at such time should be protested on Saturday afternoon, and this would apply where the check is received by mail on Saturday afternoon. (*Inquiry from Mich., Nov., 1920.*)

Protest of note where check given in payment dishonored

2764. A check given in payment of a note was presented on the following day and payment was refused because of "insufficient funds." The holder still has the note in his possession and wishes to protest the same. *Opinion:* Although the case has never been decided, probably a valid protest of the note a day after its maturity could be made, because the note would not be regarded as dishonored until the check given as conditional payment was dishonored. *Burkhalter v. Erie Sec. Nat. Bk.*, 42 N. Y. 538. *Morse on Banks and Bank.*, Sec. 247. (*Inquiry from N. Y., June, 1913, Jl.*)

Protest of note at end of period of extension

2765. A bank received for collection a note, payment of which was extended one week. The makers defaulted in payment and the bank protested the note. The owner of the note refused to pay the protest fees,

claiming that the proper time of protest was the date of original maturity. *Opinion:* Where there is a valid extension of time of payment of a promissory note, the date of expiration of the extension and not the date of original maturity is the proper time of protest. *Ferguson v. Hill*, 3 Stew. (Ala.) 485. *Rodgers v. Rosser*, 57 Ga. 319. *Morgan v. Butterfield*, 3 Mich. 615. *Pearl v. Wells*, 6 Wend. (N. Y.) 291. *Cruger v. Lindheim*, (Tex.) 16 S. W. 420. *Craig v. Price*, 23 Ark. 633. *Haggerty v. Engle*, 43 N. J. L. 299. (*Inquiry from Ark., Aug., 1913, Jl.*)

Check may be immediately protested before close of banking hours

2766. Is it lawful to protest a check before the close of banking hours on day of presentment? *Opinion:* The Negotiable Instruments Act provides that "protest must be made upon the day of dishonor." (Sec. 155); also that "notice may be given as soon as the instrument is dishonored." (Sec. 102.) While it is customary for the notary to wait until the close of banking hours and then make formal demand and protest, this is not compulsory, and if a check is presented and refused during banking hours, it is lawful for the notary to make demand and protest immediately. Rules of certain clearing houses might modify this so far as those bound by its rules are concerned and payment be permitted up to the close of banking hours. (*Inquiries from N. J., April, 1917, Jl., Ga., Dec., 1914, Jl., La., June, 1910, Jl., Ohio, Feb., 1917, Jl., Miss., Oct., 1910, Jl., Wyo., April, 1918.*)

2767. Is a bank obliged to wait until the close of business hours to protest a check on it received from out of town, or can it be protested immediately on receipt? *Opinion:* A check is protestable immediately upon dishonor and it is not necessary to wait until the close of business hours. The rule is different with respect to a time note payable at bank. In such case the maker has the whole of banking hours in which to pay, and the instrument is not dishonored until the close of such hours. (*Inquiry from Conn., Aug., 1918.*)

Protest of note before close of business hours

2768. A note payable at the place of business of the maker was presented for payment at 3 o'clock on the day it fell due. The note was protested for non-payment at that time, although the place of business kept open until 6 o'clock. It is claimed that the note should have been held the whole

day before presenting it. *Opinion:* The note can be protested for non-payment before the closing hour of the day of maturity. *Oothout v. Ballard*, 41 Barb. (N. Y.) 33. *Etheridge v. Ladd*, 44 Barb. (N. Y.) 69. *Osborn v. Moncure*, 3 Wend. (N. Y.) 169. *Merchants Bk. v. Elderkin*, 25 N. Y. 178. (*Inquiry from N. J., June, 1911, Jl.*)

Note: The above is supported by several decisions; but in *German-American Bank v. Milliman*, 31 Misc. (N. Y.) 87, it was held that a note payable at a bank, presented and refused payment during banking hours, should not be protested until the close of banking hours because the maker had the whole of the day in which to pay and the note was not dishonored until the end of the day.

Place of protest

Protest of draft at place where drawee addressed although drawee located elsewhere

2769. A draft drawn on John Smith was erroneously addressed to Galveston, Texas, at which city John Smith was not located. The draft was protested for non-payment at Galveston. *Opinion:* The protest of the draft at Galveston, which was the place addressed, was proper to preserve the liability of the drawer and indorser. *Cox v. Nat. Bk.*, 100 U. S. 704. (*Inquiry from Tex., Sept., 1913, Jl.*)

Protest where no notary in place where drawee bank located

2770. A drawee bank in a town returned to a city bank a check unpaid because of insufficient funds; but failed to have it protested because there was no notary in the place. The officer of the drawee bank went to the city bank and there caused the check to be protested. *Opinion:* The protest was invalid because it was not made at the place of dishonor. The check could have been protested in the town where payable by "any respectable resident of the place in the presence of two or more credible witnesses." (*Inquiry from La., Sept., 1911, Jl.*)

Who may make

Cross Reference—See Notaries, 2319-2356

Protest by secretary of bank who is notary

2771. Is it legal for the secretary of a bank to protest checks or notes drawn on it, or on any other bank, which are sent to it for collection? *Opinion:* Under the New Jersey statute the secretary may as notary

public make protests of such checks and notes. (*Inquiry from N. J., May, 1917.*)

Protest by justice of peace

2772. May protest be made by a justice of the peace? *Opinion:* A statute in Louisiana authorizes justices of the peace to make protests of negotiable instruments in default of notaries and parish recorders, provided the protest is witnessed by two persons of the same parish. Rev. Laws La. 1897, 1904, Sec. 2055. La. Neg. Inst. Act, Sec. 154. (*Inquiry from La., July, 1912, Jl.*)

Certificate of protest

Certificate of protest signed by notary's clerk

2773. Bank C received a demand draft with bill of lading for collection and caused the item to be protested. The notices were drawn regularly by one of the clerks of C bank and signed by him in the name of the cashier of C bank who is the notary. The forwarding bank refused to pay the protest fee, saying that the notices and protest, although signed in the name of the cashier and notary, are not in his handwriting. *Opinion:* A certificate of protest signed in the name of the notary by his clerk is of doubtful validity. The Negotiable Instruments Act provides that the protest "must be under the hand and seal of the notary making it." The law requires that demand and notice must be by the notary personally, and cannot be delegated to a clerk, except that a few cases recognize the custom for a clerk to act, but the validity of the custom is uncertain. *Vanderwald v. Tyrell*, Mood & Malk, 87. *Stewart v. Ellison*, 6 Serg. & R. (Pa.) 324. *Onondaga County Bk. v. Bates*, 3 Hill (N. Y.) 53. *Com. Bk. v. Varnum*, 49 N. Y. 277. *Gawtry v. Doane*, 51 N. Y. 90. *Gessner v. Smith*, 2 N. Y. S. 655. *Milttenberger v. Spaulding*, 33 Mo. 421. (*Inquiry from N. C., Jan., 1915, Jl.*)

Effect of certificate of protest in Illinois

2774. What is the effect in Illinois of a certificate of protest? *Opinion:* In Illinois the certificate of protest of a foreign notary is competent evidence of the dishonor of a foreign bill of exchange by virtue of the common law rule; but the certificate of a foreign notary as to demand and notice in case of a promissory note is not competent evidence, and additional legislation is necessary to effect this. The certificate of protest of a notary within the state is com-

petent evidence of demand, dishonor and notice in case of inland bills, notes and checks by virtue of Sections 12 and 13 (unrepealed) of the Act of 1872, notwithstanding the repeal of Sections 10 and 11 of that act by the Negotiable Instruments Law. *Bond v. Bragg*, 17 Ill. 69. *McAllister v. Smith*, 17 Ill. 328. *Montelius v. Charles*, 76 Ill. 303. *Neg. Inst. Law* (Comsr's. dft.), Secs. 196, 117. *Vaughan v. Potter*, 131 Ill. App. 334. (*Inquiry from Ill., March, 1911, Jl.*)

Protest instructions

Liability of collecting bank for failure to follow protest instructions

2775. An inquiry is made as to the liability a collecting bank incurs in failing to protest checks or negotiable notes sent to it under instructions to protest if not paid, when such items are not paid. *Opinion:* Under the Negotiable Instruments Act protest is necessary only in the case of foreign bills of exchange (and a bill or check drawn in one state upon a drawee in another is a foreign bill). As protest of such is the only means of proving dishonor, the omission to protest in such case would be fatal and the collecting bank might be held liable for the entire amount of the instrument. But it is optional and not compulsory for the owner of an inland bill or check which has been dishonored to have same protested and he can, if he chooses, omit protest and prove dishonor by evidence of due demand and the giving of notice of dishonor so as to hold parties contingently liable thereon. The case is different where the owner intrusts an inland check or note to a collecting bank with instructions to protest if not paid. In such case it is not optional with the collecting bank to omit protest, but it is bound to follow instructions and if it fails to do so it is liable for any damages caused by such failure. The damages would not necessarily be the amount of the check provided the parties were held liable, but they would be limited to such incidental expense or cost as followed a failure to protest. Where an instrument is protested, in a suit thereon a certificate of protest could be introduced as evidence to prove dishonor. Without it, it would be necessary to have the testimony of the person who made the demand and who gave the notice of dishonor to make out a case. This would be at an extra cost for which the collecting bank might be held liable. (*Inquiry from Ala., Oct., 1920.*)

Conflict between letter of instructions and "no protest" stamp

2776. A draft is marked, "No protest," but the letter of instructions reads, "Protest all items \$10 and over unless marked X," and there is no X marked on the letter opposite the listed item. *Opinion:* It is safer for the collecting bank to be governed by the letter of instructions, as they are the instructions from the immediate principal. (*Inquiry from Tex., March, 1912, Jl.*)

Collecting bank should follow protest instructions

2777. Is it necessary for a presenting bank to cause protest of a check when instructed to do so in case of non-payment? *Opinion:* On an inland bill or check, parties contingently liable are held without protest provided there have been due demand and notice of dishonor. Nevertheless the statute permits protest and when the principal instructs its collecting agent to do so, the instructions should be followed. The object is not so much to preserve the liabilities of prior parties as to provide a convenient means of proving dishonor; a certificate of protest, being prima facie evidence of the fact, is competent in case of suit. (*Inquiry from Minn., Oct., 1918.*)

Conflicting protest instructions on draft and in letter

2778. A draft was sent directly to the drawee bank A for collection. It had a "no protest" slip attached; sent with draft was a letter of advice on which were the words, "items marked X no protest." The item was not so marked. Should the drawee bank protest the item? *Opinion:* It is customary where there is a conflict between the printed instruction on the draft and the instructions given by letter, to follow the letter. That is the latest instruction in point of time, and there may be some good reason, unknown to the collecting bank, why the forwarding bank desires the item protested although it is marked, "No protest." See *A. B. A. Jl.*, Feb., 1915. (*Inquiry from Ia., April, 1915.*)

2779. A collecting bank received a check upon which was stamped, "No protest," but the letter enclosing the item instructed that the same be protested. *Opinion:* The safer course for the collecting bank is to protest. (*Inquiry from Miss., March, 1911, Jl.*)

Liability of collecting bank for failure to follow protest instructions

2780. The drawee bank receives from an outside bank a check stamped "No protest," with a letter of instruction reading, "Protest all items of \$10.00 or over." The particular check was for \$100. Was the bank justified in returning the check without protest? Would the fact that the "no protest" stamp was above the signature of the payee alter the case? *Opinion:* While the check was stamped "No protest" the letter instructed protest, and this should have been followed. However, to entitle the sending bank to recover damages for the omission to protest, according to the instruction it must show injury to it from the disobedience. Assuming indorsers for value subsequent to the payee were duly charged by notice of dishonor, the liability of all parties would be preserved, the payee having waived protest and the drawer being liable without protest, and in such case no particular damage would result from failure to protest except the inconvenience of proving dishonor other than by certificate of protest. (*Inquiry from Mich., June, 1915.*)

Conflicting instructions followed by telephone instructions to protest

2781. A draft is sent to bank A with letter accompanying which contained the instruction to "protest items unless marked X or no pro." The item itself was so marked, but the letter was not marked. A's correspondent telephones it to follow letter and pay no attention to the instructions on the item. A, therefore, causes protest to be made, and desires to know if it is responsible for fees. *Opinion:* Whether or not there was any conflict between the letter and the instrument itself, A's correspondent expressly instructed it by telephone to follow the letter and pay no attention to the instructions on the item, in other words, to make protest, and in doing so, it was justified and not responsible for the protest fees. (*Inquiry from N. Mex., Nov., 1914.*)

Protest of certificate of deposit where payee's indorsement in doubt

2782. A negotiable certificate of deposit was sent to the collecting bank with instructions to protest if not paid. None of the banks through which it passed guaranteed prior indorsements, and the issuing bank refused payment claiming that the indorsement of the payee did not agree with the signature on file, but admitted that it

agreed in most respects and offered to pay the item provided the collecting bank guaranteed the indorsement. The bank refused, and caused protest to be made. Was protest proper? *Opinion:* If the signature was a forgery no protest was necessary. But there being doubt as to the fact, and express instructions being given to protest, under the circumstances, the protest was proper and justifiable. (*Inquiry from Ark., Feb., 1918.*)

Collecting bank following protest instructions entitled to collect protest fees

2783. A bank received a draft for collection, accompanied by a letter "We enclose for collection and credit. Items marked X no protest." The bank protested the draft (not marked X) but the sending bank refused to pay the protest fee. *Opinion:* The collecting bank was justified in protesting the draft and could collect the protest fees. (*Inquiry from La., Aug., 1912, Jl.*)

Protest of note presented after maturity pursuant to express instructions from holder

2784. Should an overdue note be protested for non-payment when the presenting bank has express instructions from forwarding bank to protest? *Opinion:* Ordinarily a note not presented until overdue is not protestable because not "duly presented for payment" "on the day it falls due," as provided by the Negotiable Instruments Act; but such an instrument it dishonored and protest authorized when "presentment is excused and the instrument is overdue and unpaid" or where delay in making presentment is excused by the circumstances defined in the Act, and presentment has been diligently made when the cause of delay ceases to operate and payment has been refused. As the collecting bank has been expressly instructed to cause protest to be made, and as there may have been some cause which would excuse delay in presentment of which it is not aware, the better course would be to follow instructions and have the note protested. It would thereby escape any possible liability to the holder. (*Inquiry from Fla., Nov., 1912.*)

2785. A promissory note had two indorsers for value, only the first of whom has waived over his signature protest and notice of protest. On the face of the note was the written instruction, "Protest if not paid." The note was received by the collecting

bank five days after maturity and was protested after the maker stated his inability to pay. The bank did not know the circumstances of the delay in presentment.

Opinion: Had the instrument been a foreign bill of exchange, the collecting bank would have been justified in making protest to safeguard the interest of its principal, in case the delay was excusable. In the case of a promissory note, while formal protest is not essential, it is a convenient means of proving dishonor, and as the note contained the positive instruction "protest if not paid" the collecting bank was justified in assuming that the principal desired the protest made and knew of facts which would justify the delay and make the protest efficacious. Neg. Inst. Law (Commsr's. dft.), Secs. 71, 81, 155, 159. (*Inquiry from Pa., Aug., 1915, Jl.*)

Protest of note containing waiver of protest pursuant to instructions

2786. A note comes to bank A with instructions to "protest," but demand, protest and notice are waived on the face of the note. Is the bank liable for not protesting? Would it be liable if it did protest? *Opinion:* One of the primary duties of a collecting agent is to follow instructions and bank A should have caused protest to be made. It cannot be held liable for damages in view of the waiver, for although bank A disregarded instructions, its principal would have to show damage because of failure to protest and where there is an express waiver of protest, there can be no damage, as the parties to be charged are liable without protest. (*Inquiry from Miss., Oct., 1912.*)

Liability of drawee for not protesting as instructed

2787. Payment on a check drawn and payable in the state was stopped by drawer and the drawee bank sent the check back unprotested, although instructed to protest it, if not paid. What is its liability? *Opinion:* A check does not necessarily require notarial protest where the indorsers are bound by due demand and notice of dishonor. But as the bank was instructed to make protest in case of non-payment, it should have done so, and its failure to follow instructions makes it liable for whatever resulting damage there may be. It is difficult, however, to see how the holder would be damaged by failure to protest in any case where the liability of the parties is preserved by due demand and notice unless in a suit on the instrument he would be put to more

trouble in proving dishonor than he would have been if he had attached to the check a formal certificate of protest; in that case the drawee might be looked to for the extra expense incurred. (*Inquiry from S. C., Jan., 1919.*)

Liability of drawee bank omitting protest when instructed

2788. A check subject to protest was forwarded, and, on account of insufficient funds, returned by drawee bank which did not protest it. The collecting bank again sent it on, and it was protested by the drawee. Afterwards the drawer failed, and the collecting bank claims the drawee bank owes it the amount of the check because of failure to protest the first time. *Opinion:* A drawee bank which disobeys instructions to protest is liable for any damage resulting, but if no damage can be proved, there is no liability. The omission to protest is not vital where parties contingently liable are charged by due demand and due notice of dishonor. The second protest was of no avail; but assuming the parties were duly charged upon dishonor of the check when first presented, although their protest was omitted, there would be no liability of the drawee except possibly, in case of suit, the extra expense involved in proving dishonor, which would be obviated by a certificate of protest. (*Inquiry from Tenn., Sept., 1918.*)

Liability of drawee returning item without protest where instructed to protest

2789. An item is sent for collection with instructions to protest for non-payment all items over \$10. If a check over that amount is returned unpaid and is not protested, is the drawee bank responsible to the forwarding bank where no question of prior indorsements arises? *Opinion:* The drawee bank would be liable for damages resulting from failing to obey instructions to protest; but where there are no prior parties to hold there is no damage. (*Inquiry from Ky., Jan., 1921.*)

Liability for causing omission of protest by directions to correspondent

2790. A client deposits a foreign bill of exchange drawn in favor of his bank which sends it on for collection to its foreign correspondent with a qualified indorsement with instructions, "No protest." The bill is dishonored and returned. Has the drawer the right to refuse to take it up because it was not protested. Would the legal posi-

tion of the payee be changed if it had transferred the bill by an unqualified indorsement instead of by the usual indorsement for collection? *Opinion:* The drawer would be entitled under the Civil Code of California to have the bill protested and an instruction by the payee of the bill not to protest would not deprive him of this right; hence the drawer may refuse to take up the bill. The position of the payee bank would be the same whether the indorsement is for value or to an agent for collection. (*Inquiry from Cal., May, 1917.*)

Effect of "no protest" slip

2791. A draft with the words, "No protest, tear this off before presenting," printed on a marginal strip attached to it by a perforated line, was protested for non-payment. May the collecting bank claim fee for protesting? *Opinion:* It has been held that the words "No protest" written in the margin of a bill, dispense with the necessity of protest to hold an indorser, and the same conclusion would probably be reached where the words "No protest, tear this off before presenting" were printed on a marginal strip attached to a draft by perforated lines. Assuming the slip should be held a waiver of and instruction not to protest, the collecting bank could not claim fee for protesting. It is not infrequent for banks to tear off the "No protest" slip, and then protest the draft, and such slip is regarded with disfavor by many bankers. See *Shaw v. McNeill*, 95 N. C. 535. (*Inquiry from Ala., May, 1910.*)

2792. B had discounted at a bank a foreign draft drawn by R on N. The money was deposited with the bank to the credit of B's savings account, the understanding being that B was to pay interest on the money advanced until payment was received from the foreign country. At the end of the draft was a detachable slip which read, "No protest, take this slip off before presenting." The draft was returned unpaid and unprotested. B was notified, and the bank deducted the amount of the uncollected item from B's savings account. It desires to know if it had the right to do this, and if it is in any way responsible for not causing protest. *Opinion:* The draft ordinarily would require protest, the omission of which would discharge drawer and indorser. But it had a detachable "No protest" slip at one end, and the Negotiable Instruments Act provides that "A waiver of protest, whether in the case of a foreign bill

of exchange or other negotiable instrument, is deemed a waiver of not only a formal protest, but also of presentment and notice of dishonor." Undoubtedly the "No protest" slip would be held a waiver and the drawer R and indorser B would remain liable. A collecting bank has the right to charge back the amount of an uncollected item to its customer's account, where there is no negligence or default upon its part. As the bank took the check for collection only, as agent, as is evidenced by B paying interest on the money pending collection, it had the right to deduct the amount from B's savings account and B has recourse upon the drawer R. *Shaw v. McNeill*, 95 N. C. 535. (*Inquiry from D. C., April, 1916.*)

Stamping of item "no protest" by collecting bank where forwarding bank instructs not to protest

2793. If a bank's correspondent indicates its desire not to have item protested but omits to use the N. P. stamp, is the collecting bank justified in using its own N. P. stamp? *Opinion:* If a bank receives an item from its correspondent with no instructions not to protest, it takes the responsibility if it affixes the N. P. stamp; but if the correspondent forwards the item and its letter of transmittal instructs not to protest, or if it indicates its desire not to have the item protested, but the stamp is omitted from the item itself, the collecting bank would have the right to place its own N. P. stamp on the item. (*Inquiry from N. Y., May, 1916.*)

Refusal of drawee to follow instruction to protest check received through mail

2794. A bank frequently sends checks to the drawee, the only bank in the town, with request they be presented and protested if not paid. The drawee returns the checks unprotested when not paid, disregarding all instructions. The sending bank desires to know what procedure is best. *Opinion:* If a bank undertakes a collection, then it should follow instructions and is liable if it does not. But where a check is sent direct to the drawee for collection (and this, some courts have held, is not a proper thing to do) that bank may take the position that it stands only in the relation of payor—that is to pay or refuse to pay and may refuse to assume the dual relation of collecting agent and so be compelled to follow instructions in the matter of protest, and, if it takes this ground, it is doubtful if it could be held

responsible for any damages caused by not following instructions. A bank is not obliged to undertake a collection. As there is no other bank in the place, it would be a good plan to send the checks to some responsible person there, who is a notary, and arrange with him to present and protest if payment is refused. (*Inquiry from Miss., Feb., 1914.*)

Payment of dishonored or protested checks

Authority of bank to pay check after protest

2795. Has a drawee bank authority to pay a check which has been protested for non-payment? Is the check after dishonor a valid demand for the original amount; or for the additional protest fees? *Opinion:* Where a check has been once dishonored and the liability of the parties fixed by protest, it is reasonable to conclude that this ends its function as an order to the bank to pay and it is safer for the bank to refuse payment of the face of the check when again presented and leave it for the drawer, to take up the protested item by giving a new check. There is clearly no authority for the bank to pay the protest fees. There is no decided case upon this subject, and it is not infrequent for banks to pay a protested check on a second presentment when the funds have been deposited in the interim. Such payment would probably be held chargeable to the depositor, except in a case where he had some superior equity, as where he has paid the protested check without taking it up; but in view of such possible equities the safer and better course is to refuse payment on the theory that after the check has once been protested, it has no longer any legal efficacy as an order on the bank to pay. See A. B. A. Jls. Ala., March, 1915, Ark., April, 1913, Wash., April, 1911. (*Inquiries from Ind., Nov., 1919, S. D., March, 1917.*)

Drawee has no authority to pay protested check and fees

2796. May a bank rightfully charge a protested check with or without fees to a customer's account, if again presented when the account is made good after protest? Is there any difference between paying checks that are once protested and checks that are presented and refused, and at a subsequent date presented? *Opinion:* A bank is under no duty and has no authority to pay a protested check, face and fees, upon second presentment, when the funds are sufficient, without express instructions from the drawer

so to do. Clearly there is no authority to pay the protest fees and it is doubtful if there is authority to pay the face of such a check when presented a second time without protest fees, although it is often done, because convenience may be best served by paying it out of subsequently deposited funds. A check, however, that is once presented and protested is a dishonored instrument, and the safest course for a bank to pursue is to refuse to pay when presented a second time, unless express instructions of the depositor are obtained. It would seem to be the better practice that the check should be taken up by the customer, by giving a new check. Notwithstanding the above, it appears to be the custom of many banks to pay the face of a protested check on second presentment, regarding the same as a continuing order, and there does not appear to be any difference whether the check has been protested, or simply refused payment without protest, at the time of first presentment. In either case the bank is paying a dishonored instrument, and there is a possibility a court might hold that when the check was once presented and dishonored the authority of the bank to pay was terminated, should the drawer have any equity which would give him the right to object to such payment. See A. B. A. Jls., April, 1913, March, 1915. (*Inquiry from Conn., July, 1920.*)

Liability to drawer where bank pays dishonored check on second presentment after drawer has paid same without requiring surrender

2797. A gives check to B. Check is refused payment because of insufficient funds. B notifies A who refunds him the amount, without taking up check or notifying the bank. Thereafter B again presents check and, the funds being sufficient, it is paid by the bank. It is the custom of many banks, including the inquiring bank, to pay checks where the funds are sufficient although they have previously been refused because of insufficient funds. B is irresponsible and A seeks to hold the bank for paying his check after it has been dishonored. *Opinion:* The precise question of responsibility for loss as between the bank and drawer has never been decided. The N. I. Act provides that "The instrument is dishonored by non-payment when it is duly presented for payment and payment is refused." Sec. 83. The check in question was, therefore, dishonored by non-

payment when it was refused by the drawee for insufficient funds. The question would seem to be whether the bank's authority to pay, which is conferred by the check, is revoked by its dishonor by first presentment or whether such authority continues until the check is actually paid by the bank or until receipt of notice that the check has been paid by the drawer. On the one hand, there is a custom to make payment of a dishonored check on later presentment and to regard the instrument, though dishonored, as a continuing order until paid, or payment has been countermanded, or until notice to the bank of payment by a prior indorser or the drawer; on the other hand, according to the Negotiable Instruments Act, upon the first dishonor the legal status of the check is established as a dishonored instrument upon which the drawer has an immediate right of action against prior parties and, while an innocent purchaser to whom it was afterwards negotiated would be protected (for the N. I. Act defines a holder in due course as one who, among other things, became the holder of the instrument "before it was overdue and without notice that it had been previously dishonored if such was the fact"), the drawee bank does not come within the definition of a holder in due course and, furthermore, it has notice upon the second presentment that the instrument has been previously dishonored. Payment by the principal debtor, at or after maturity, discharges or extinguishes the instrument (N. I. Act, Sec. 119) and although the holder should fail to deliver it up, the plea of payment is good against a subsequent transferee provided the payee was in possession of the instrument at the time of payment (Dan. Neg. Inst., Sec. 1233a) although payment of a protested note by the maker to an indorser without taking same up is not a good defense against the indorsee to whom the dishonored instrument had been transferred prior to such payment. *Davis v. Miller*, 14 Gratt. 1. In the case submitted, the dishonored check was in the possession of the payee at the time of payment by the drawer and such payment discharged the instrument although it was not surrendered. The bank, therefore, paid a discharged instrument and logically would seem accountable to the drawer for the money paid unless, in view of the custom to pay dishonored checks on second presentment, some duty should be held owing by the drawer to the drawee to notify the bank whenever such a check was paid without surrender, or unless it should

be held that the authority of the bank to pay a dishonored check continued until revoked by notice of its discharge. The question is problematical and until judicially settled will remain uncertain. Dishonored instruments are rarely taken up without requiring their surrender and the convenient practice of banks of paying such checks upon second presentment is reasonably safe in the large majority of instances; at the same time there is ground for maintaining that such payments are at the risk of the bank in any case where the drawer makes good the dishonored instrument without taking it up. (*Inquiry from N. Y., April 1920.*)

Tender by drawer on day of dishonor of amount of protested check and fees

2798. What effect has protest on the right of the drawer to pay the check on the day that it is presented and dishonored? *Opinion:* The drawer has the right to tender payment to the holder of the amount and protest fee at any time during the day of protest. Although the point has not been specifically decided, it would seem that a tender to the notary, the same day, of the amount due, with protest fees, while he still retains possession of the protested instrument would be a valid tender, and that upon such tender the drawer could demand a surrender of the instrument. *Bk. v. Swan*, 9 Pet. (U. S.) 33. *Ex parte Moline*, 19 Ves. 216. *Whitwell v. Bingham*, 19 Pick. (Mass.) 117. *Coleman v. Carpenter*, 9 Pa. 178. *Ohio Neg. Inst. Act*, Sec. 3174t. *McFarland v. Pico*, 8 Cal. 626. (*Inquiry from Ohio, Feb., 1917, Jl.*)

Double protest

Second protest of check unjustified

2799. Should a check be protested a second time after it has once been protested for non-payment and is again presented with demand for payment which is refused? *Opinion:* There is no justification for a second protest; it would be of no avail; the instrument has already been dishonored and the parties are all held liable by the first protest. *Harden v. Birmingham, etc., Bk.*, (Ala.) 55 So. 943. (*Inquiries from Ind., June, 1915, Jl., Ga., Dec., 1916, Jl., Mich., Feb., 1917, Mont., March, 1919.*)

2800. Should instructions to protest a second time a check already protested be followed? *Opinion:* There is no justification for protesting the check a sec-

ond time, nor is there any justification for such an instruction. Parties are all held liable by first protest. See A. B. A. Jls., June, 1917, April, 1913. (*Inquiries from Ark., March, 1917.*)

Drawer not liable for double protest fees

2801. Payment of a protested check was refused on second presentment and it was protested a second time. The depositor objects to paying double fee. *Opinion:* Even assuming there are new indorsers of the check after the first protest, the dishonor of the instrument and its protest destroy the negotiable character of the instrument, and the protested check is taken out of the category of negotiable instruments subject to protest. It appears, therefore, that a second protest of a check already protested is unjustified and there is no liability on the part of the drawer for the second notarial fee. (*Inquiry from N. Y., Nov., 1920.*)

Protest fees

Collecting agent of payee not entitled to protest fees

2802. A note was payable to a firm at a bank in Alabama. The payees sent the note to the bank for collection, and because payment was not promptly made the note was protested. The bank claimed that it is entitled to the amount expended for protest fee. *Opinion:* It is doubtful if the bank is entitled to the protest fees, as in an action on the note by the payees against the maker it is not necessary to prove demand and notice and the certificate of protest would have no utility as an item of evidence. *Farmers Nat. Bk. v. Venner*, 192 Mass. 531. *Hyman v. Doyle*, 53 Misc. (N. Y.) 597. *Florence Oil Co. v. First Nat. Bk.*, 38 Colo. 119. (*Inquiry from Ala., Dec., 1913, Jl.*)

Right of owner to protest fees where payment of check tendered before close of banking hours on day of protest

2803. A check for \$100 was presented at a bank at ten o'clock in the morning and was immediately protested for non-payment because of no funds. Before the close of banking hours on the same day the bank received funds and notified the holder that it would pay the check without the protest fees. *Opinion:* The check having been lawfully protested at ten o'clock, the holder was entitled to recover the fees in addition to the face of the check. In the absence of instructions from the maker, the better

course for the bank is to leave the matter for direct adjustment between the parties. *Daniel Neg. Inst.*, Sec. 1235. *Carey v. Bk.*, (Tex.) 24 S. W. 260. *German Nat. Bk. v. Beatrice Nat. Bk.*, 63 Neb. 246. (*Inquiry from Va., Oct., 1913, Jl.*)

Liability for protest fees on recalled item

2804. Bank A sends note to bank B for collection. Bank B forwards it to bank C; before the note became due the depositor recalls the note and bank A forwards to B, notice of recall without protest on presentation, the note is returned protested, and C claims it was not notified although B disputes this. B charges fees back to A, and depositor refuses to pay. Is he liable? *Opinion:* Although the depositor recalls the note, it is not proved that the notice of recall reached C whose duty it was to present note at maturity and have it protested if not paid, and as no negligence is shown which would make any of the collecting banks responsible, the depositor, who without recall would have been chargeable with the protest fees, is undoubtedly chargeable. (*Inquiry from N. J., Nov., 1912.*)

Liability for fees when protest not required

2805. Who is to be charged for notary fees when a bank, not being absolutely required to do so, protests indorsed paper? *Opinion:* While there have been decisions to the effect that, unless protest is strictly necessary, the notary fees cannot be collected from the maker, drawer, or indorser, but must, if collected at all, be paid by the holder, there are contrary decisions, and it would seem while demand and notice of dishonor are all that are necessary to preserve the liability of parties to the instrument, yet as a notarial certificate of protest affords a convenient means of proving dishonor in case of suit and protest is permitted by statute, the fees for such protest are a proper and legal charge against the parties liable on the paper. See *German Nat. Bank v. Beatrice*, 63 Neb., 248, 88 N. W. 480. See A. B. A. Jl., Wis., April, 1912. (*Inquiry from Ia., Aug., 1919.*)

Collecting bank entitled to protest fees from sending bank

2806. Can a bank protesting an inland item (one not leaving the border of the state) enforce collection of protest fees from the sender bank? *Opinion:* The Negotiable Instruments Act provides that

"where any negotiable instrument has been dishonored, it may be protested for non-acceptance or non-payment, as the case may be; but protest is not required except in the case of foreign bills of exchange." Under this statutory authority it is customary for banks holding inland checks for collection to cause them to be protested upon dishonor, unless express instructions are given not to protest, and wherever protest is authorized, the fees are collectible from the sender or owner. (*Inquiry from Ia., April, 1918.*)

*Liability of owner to collecting bank for protest fees and right of recovery from maker—
Liability of collecting bank
omitting protest*

2807. Is a collecting bank liable, if it neglects to protest a check, drawn and made payable within the state and bearing only state indorsement? If it protests, to whom shall it look for notary fees? *Opinion:* The check does not require protest, that is, it is not legally necessary. Due demand and notice of dishonor are sufficient to charge parties contingently liable, and this can be done without protest. The law, however, authorizes protest of such inland paper, and it is customary for collecting banks to protest because the certificate of protest is prima facie evidence of dishonor and, in case of suit, an inexpensive and time-saving means of proving non-payment. Some authorities, however, question the right of a holder to collect the fees of protest in such a case from the maker or drawer, but in view of the law's authorization, it seems there should be a proper charge against the parties liable. In the absence of instructions it would seem to be the duty of the collecting bank to have the check protested, in view of the custom so to do, and if the fees were not properly chargeable against the parties to it, they could be collected from the holder. No serious liability would be incurred in case the bank omitted to cause protest to be made, for if it gave due demand and notice of dishonor, no parties contingently liable would be released, and the only effect would be that in case of suit a more cumbersome and expensive method of proving dishonor would have to be used. (*Inquiry from Mont., May, 1920.*)

Notice of dishonor

Waiver of notice by indorser

2808. A note contained on its face the statement that the indorsers thereon "waive

protest, presentment, notice, diligence and suit." On its maturity the indorser, who knew that the maker could not pay the note, stated that he himself could not pay it and would not indorse a renewal. The indorser, when sought to be held liable some little time later, claimed non-liability on the ground that he was not notified that the note was not paid. *Opinion:* The indorser was not discharged by any omission to give formal notice of non-payment at the time of maturity of the note, both because of his express waiver and because of his actual knowledge that the note would not be paid. (*Inquiry from Wis., Oct., 1918.*)

Non-necessity of notice to accommodated indorser

2809. Where the payee of a note indorses it to C, in settlement of an account, is notice of dishonor to the payee necessary in view of Section 115 of S. C. Negotiable Instruments Law, to the effect that notice of dishonor is not required to be given to an indorser for whose accommodation the instrument was made or accepted? *Opinion:* The note requires due demand and notice of dishonor to preserve the indorser's liability, but if A made his note to B for the latter's accommodation without receiving value therefor, in order that B might use it to pay off a debt to C, notice of dishonor would not be required to hold the indorser B. (See Neg. Inst. Act, Sec. 115.) (*Inquiry from S. C., March, 1915.*)

Necessity of notice to accommodation indorser

2810. A corporation executed its note payable on demand to B, and indorsed for accommodation by C, one of its officers. Payment was demanded ninety days later and refused. C was not notified of its non-payment until several weeks thereafter. *Opinion:* Under the Negotiable Instruments Act, C, the indorser, is released from liability. Irrespective of the question whether demand of payment was made in due season, the failure to give C due notice of dishonor released C. Ill. Neg. Inst. Act, Secs. 64, 102, 103. (*Inquiries from Ill., Oct., 1915, Jl., Minn., Feb., 1914, Jl.*)

2811. Are accommodation makers and indorsers of notes entitled to notice of dishonor? *Opinion:* An accommodation maker of a note is not entitled to notice of dishonor, but an accommodation indorser, in the absence of a waiver, is so entitled. (*Inquiry from Minn., Feb., 1914, Jl.*)

Liability of officers indorsing for accommodation note of corporation which failed, where notice of dishonor omitted

2812. A customer discounted and forwarded for collection a note given by a corporation and indorsed by officers of the company as individuals. The corporation went into the hands of a receiver. At maturity the note was presented by a notary at the place of business of the company, which was also the place of business of the indorsers, but being closed he was unable to make formal demand. The notary notified the payee of the dishonor but no notice of protest was sent to the individual indorsers. *Opinion:* The officers of a corporation who indorse its note are entitled to due presentment and notice of dishonor unless the facts constitute an implied waiver or the indorser is the person to whom the instrument is presented for payment. Under the facts there would seem a fair ground for holding the indorsers liable, although there was an omission of notice of dishonor. Assuming, however, the accommodation indorsers were discharged, neither the collecting bank nor notary would be liable, because it is only obligatory upon a collecting bank to notify its immediate principal. *McDonald v. Luckenbach*, 170 Fed. 434. *Mercantile Bk. v. Busby*, (Tenn.) 113 S. W. 390. *Schlesinger v. Schultz*, 96 N. Y. S. 383. *In re Swift*, 106 Fed. 65. *Adler v. Levinston*, 120 N. Y. S. 67. *J. W. O'Bannon Co. v. Curran*, 113 N. Y. S. 359. *Bessenger v. Wenzel*, (Mich.) 125 N. W. 750. (*Inquiry from Ind., Sept., 1916, Jl.*)

Necessity of notice to indorser who was former officer of payee bank

2813. A bank holds a note payable to its order at the bank which was indorsed by a person who was then its president but who resided in another state. The whole transaction took place at the bank. When the note became due, the indorser claimed he had not received notice of protest. *Opinion:* While strict notarial protest is not required to hold an indorser, it is necessary that there be due demand and notice of dishonor. The note being payable at the bank, its holding of it at maturity constituted sufficient demand. If the indorser was president at such time, the fact of his official position would probably relieve the bank of the necessity of giving notice of dishonor, but if he was no longer president, he would be in the position of any outside indorser, and unless there were

some special circumstances which would dispense with the necessity, he would be relieved from liability. (*Inquiry from Wis., Aug., 1919.*)

Surety-maker of note not entitled to notice

2814. B and C made a note payable to A. At maturity B refused to pay. Six months later A demanded payment from C, who refused on the ground that he received no notice of dishonor. *Opinion:* No notice was required to bind C, who is one of the makers, even though he is surety for another maker. (*Inquiry from Neb., Aug., 1911, Jl.*) (*Similar inquiry from S. C., April, 1914, Jl., citing Rouse v. Wooten*, 140 C. C. 557.)

How notice of dishonor given

2815. Under the negotiable instruments law how must notice of dishonor be given? *Opinion:* The Negotiable Instruments Law governing notice of dishonor provides that: "The notice may be in writing or merely oral, and may be given in any terms which sufficiently identify the instrument, and indicate that it has been dishonored by non-acceptance or non-payment. It may in all cases be given by delivering it personally or through the mails." (*Inquiry from Pa., Nov., 1909, Jl.*)

Notice by ordinary form of letter

2816. Is notification of non-payment by ordinary form of letter sufficient? *Opinion:* It is sufficient, provided the letter sufficiently identifies the instrument and indicates that it has been dishonored by non-payment. (*Inquiry from Ill., March, 1913.*)

Time of giving notice

2817. A bank received from the payee a check drawn on a bank in a town in the state eight miles distant. In the course of collection the check was handled by two other state banks and on presentment payment was refused, the payee receiving notice of dishonor five days afterwards. The check was not protested. Is the payee liable? *Opinion:* Being an inland bill of exchange, no protest was required to hold the payee but notice of dishonor was necessary, and this the payee did not receive until five days after the check was dishonored. The check, however, went through and was indorsed by at least three banks, and the Negotiable Instruments Act provides, as to the time of giving notice, that, where the person giving and the person to receive notice reside in different places, the

notice, if sent by mail, must be deposited in the post office in time to go by mail the day following dishonor, and where a party receives notice, of dishonor he has, after the receipt of such notice, the same time for giving notice to antecedent parties that the holder has after the dishonor, and where the instrument is dishonored in the hands of an agent, who gives notice to his principal, he must do so within the same time as if he were the holder. According to these rules it would seem that the payee in this instance probably received notice of dishonor in due time and would be liable. (*Inquiry from Ark., May, 1918.*)

Notice of dishonor of time note maturing on Saturday

2818. When should notice of dishonor be given of a time note falling due on Saturday? *Opinion:* Under the laws of Oklahoma when a note falls due on Saturday it is to be presented for payment on the next succeeding business day; if not paid then, notice of dishonor may be given as soon as the instrument is dishonored and not later than the following day. (*Inquiry from Okla., March, 1920.*)

Time of giving notice—Note payable in installments

2819. A gave B his note for \$825, payable in monthly installments of \$25, with no provision that on default the whole amount should become due. A made sundry payments but not according to the agreed installments and finally owed \$135 on the note on the day the whole debt would have been discharged had the payments been regular. Notice of protest was duly mailed to C, the indorser, who claimed non-liability because he received no notice of A's failure to pay each installment according to the terms of the instrument. *Opinion:* The principle is well established that where the principal of a note is payable in installments a failure to pay one of them when due makes the note dishonored paper. An indorser is discharged by failure to give notice of dishonor upon default in payment of an installment, but according to some cases is liable for subsequent installments of the non-payment of which he is duly notified. In the case submitted upon the first default in payment the note became overdue and dishonored. C, the indorser, was discharged by failure to give notice of dishonor upon the default in payment of the installment and cannot be held except, possibly, as to

the last installment. *Vinton v. King*, 4 Allen (Mass.) 562. *Field v. Tibbetts*, 57 Me. 359. *Hart v. Stickney*, 41 Wis. 630. *McCorkle v. Miller*, 64 Mo. App. 153. *Vette v. La Barge*, 64 Mo. App. 179. *Norwood v. Leeves*, (Tex.) 115 S. W. 53. *Hinton v. Jones*, 136 N. C. 53. *Sheffield v. Johnson County Sav. Bk.*, 2 Ga. App. 221. *Fitchburg Ins. Co. v. Davis*, 121 Mass. 121. *Hopkins v. Merrill*, 79 Conn., 626, (*Inquiry from Mich., June, 1915, Jl.,*)

Time of giving and sufficiency of notice

2820. A check of \$111 on a bank in Ohio was indorsed on October 26th to a bank in Colorado by one of its depositors and forwarded for collection. Notice of protest was not received by the bank until November 11th and the amount was described as \$110. The bank immediately notified its depositor that it had received such notice of protest. The depositor refused to reimburse the bank on the ground that the notice of protest did not refer to the item indorsed by him. Notice of protest of a further check deposited at the same time was not received by the bank until November 14th. *Opinion:* The mere inaccuracy in the statement of the amount of the dishonored check did not invalidate the notice of protest where the indorser was not misled thereby. But assuming the checks were presented and protested on October 31st (the inquiry omits the date of forwarding), the notice of dishonor should have been mailed not later than November 2d, and the fact that the notice was not received in one case until November 11th and in the other until November 14th would indicate that the notice was not mailed in due season and the indorser would be discharged. The Colorado bank, however, can recover from the collecting bank if the latter was responsible for the delay which responsibility would extend to the negligence of the notary employed by it. *Neg. Inst. Law* (Comsr's. dft.) Secs. 95, 96. *Colo. Neg. Inst. Law* Secs. 5, 145, 146. *Snow v. Perkins*, 2 Mich. 238. *Rowan v. Odenheimer*, 13 Miss. 44. *Downer v. Remer*, 23 Wend. (N. Y.) 670. *Bk. of Alexandria v. Swann*, 9 Pet. (U. S.) 33. *Davey v. Jones*, 42 N. J. L. 28. *Williams v. Parks*, 63 Neb. 747. (*Inquiry from Colo., Jan., 1917, Jl.*)

Sufficiency of words "not sufficient funds" attached to returned check as notice

2821. Is a slip bearing the words "Not sufficient funds," and the names of bank and officer, pinned to the check on its return,

a sufficient notice of dishonor? *Opinion:* This would be sufficient notice and when received by correspondent bank, it would be incumbent on the latter to notify the prior parties. The Negotiable Instruments Act provides that notice of dishonor may be given in any terms which sufficiently identify the instrument and indicate that it has been dishonored by non-acceptance or non-payment. (*Inquiry from Minn., Oct., 1918.*)

Reasonable diligence in inquiry as to indorser's address

2822. Must a notary make inquiry as to the address of the indorser on a note which he protests as basis for notice of dishonor? *Opinion:* The law does not require every possible exertion which might have been made to effect notice of the dishonor of the paper when the party giving notice is ignorant of the place of residence or place of business of the party to be notified, but he must exercise due diligence in inquiring for the same. Such diligence must be ordinary and reasonable, such as men of business usually exercise when their interest depends upon correct information. What is reasonable diligence depends upon the circumstances of each case. See *Fouseca v. Hartman*, 84 N. Y. Supp. 131. *E. I. Dupont de Nemours Powder Co. v. Rooney*, 117 N. Y. Supp. 220. *King v. Griggs*, 82 Minn. 387, 85 N. W. 162. (*Inquiry from N. Y., Oct., 1915.*)

Agent may notify all indorsers or only immediate principal

2823. A drawee received through the mail an indorsed inland check, payment of which had been stopped. The drawee bank, having returned the item to the presenting bank, asks if it is its duty to notify all the indorsers of dishonor. *Opinion:* The drawee is not obliged to notify all of the indorsers but notice to the immediate principal is sufficient. *Gleason v. Thayer*, 87 Conn. 248. (*Inquiry from N. D., Dec., 1916, Jl.*)

2824. An indorsed note, issued and made payable in the same state, was not protested for non-payment and the presenting bank as collecting agent failed to notify the indorsing payee of non-payment. It did, however, immediately notify its principal, the forwarding bank, which notified its customer, who in turn notified the payee. Is the indorser justified in refusing to pay the note? *Opinion:* Formal notarial protest was not required to hold the indorser,

the instrument not being a foreign bill of exchange, and the collecting agent gave notice to his immediate principal—apparently in due season; the principal immediately notified its customer, the prior indorser, and he in turn notified his payee, the prior indorser, who is the party sought to be held liable. Consequently due notice of dishonor was given. An agent for collection may either himself give notice of dishonor to all parties liable or he may give notice to his principal and the principal himself notify prior indorsers. An express agreement would be necessary to create the duty to notify all prior parties. *Colo. Neg. Inst. Act, Sec. 5144. Wis. Neg. Inst. Act, Sec. 1678-24. Gleason v. Thayer*, 87 Conn. 248. *Brill v. Jefferson Bk.*, 159 N. Y. App. Div. 461. *State Bk. v. Bank of Capitol*, 41 Barb. (N. Y.) 343. *Phipps v. Milbury Bank*, 8 Metc. (Mass.) 79 (*Inquiry from Colo., Sept., 1918, Jl.*) (*Similar inquiry from N. Y., Jan., 1912, Jl.*)

2825. A bank states that by the Illinois law "the notary public shall, at the time of protesting, mail in the post office a notice to each individual who may be interested in the transaction." It desires to know if this law is generally accepted in most of the states, and also as to whether a notary public could force one of the customers of the bank to pay protest fees where notices have been bunched and mailed to the bank, leaving it to the bank to mail notices to all proper parties? *Opinion:* Under the law merchant and the Negotiable Instruments Law, an agent in whose hands an instrument has been dishonored may either give notice to all the parties liable thereon, or to his principal, in which latter event the principal has the same time for giving notice as if the agent was an independent holder. *Gleason v. Thayer*, 87 Conn. 248. *Blue Ribbon Garage v. Baldwin*, 91 Conn. 674. *Pate v. State Bank*, 3 Ind. 187. *Seaton v. Scoville*, 18 Kan. 433. *Moore v. Corning*, 12 La. Ann. 256. *Eagle Bank v. Chapin*, 3 Pick. (Mass.) 180. *Jones & Addington Ill. St., Sec. 7733.* The passage of the Negotiable Instruments Law in Illinois in 1907 repealed Secs. 10 and 11 of the Notary Public Act of April 5th, 1872, referred to in the statement of facts, and thereunder banks and notaries which return protested checks with all the notices of protest attached, leaving it to the receiving bank to mail such notices to the various interested parties, are within their rights in so doing, and an express agreement would be necessary to create a

duty upon their part to notify other prior parties. Whether in such case the notary would be entitled to a fee for each notice, as distinguished from a fee for making and certifying protest, would depend upon the statute of the particular state under which notaries' fees for making protest and giving notice are fixed. (*Inquiry from Ill., Aug., 1920, Jl.*)

2826. Does the law compel the correspondent of a bank receiving a note from its depositor for collection to forward notices of protest direct to the indorsers if their addresses appear on the instrument, or is it permissible to forward them to the preceding indorser, the depository bank? *Opinion:* A bank receiving a note for collection from another bank, its principal, upon which there are prior indorsers, has the right to forward the notices of protest for such prior indorsers to its principal, instead of sending them direct to such prior indorsers; and the fact that the address of one of the indorsers appears under his indorsement does not compel it to send notice to such indorser directly. (Neg. Inst. Law, Sec. 94.) (*Inquiry from N. Y., Oct., 1920. Jl.*)

Waivers

Effect of waiver on face of instrument and above signature of indorser

2827. A number of inquiries from various states present the following questions: Is a waiver of one or more or all of the following on the face of the instrument binding on the indorsers as well as on the other parties: presentment, protest, notice of protest and notice of dishonor? On whom is such a waiver above the signature of an indorser binding? *Opinion:* These matters are covered by the following express provision of the Uniform Negotiable Instruments Act: "Where the waiver is embodied in the instrument itself, it is binding upon all parties; but where it is written above the signature of an indorser it binds him only." (*Inquiries from Mass., Nov., 1916, Jl., Minn., Feb., 1914, Jl., R. I., Nov., 1916.*)

Waiver in instrument of demand, protest and notice

2828. A note contains on its face above the signature a provision that "the makers and indorsers waive demand, protest and notice of protest." *Opinion:* The provision is binding on all the indorsers and dispenses with the necessity of those steps to

preserve their liability. *Phillips v. Dippe*, 93 Iowa 35. Ala. Neg. Inst. Act, Sec. 5060. (*Inquiry from Ala., July, 1913, Jl.*)

Waiver clause and consent to extension

2829. Is the following clause embodied in a promissory note binding? "The signers and indorsers each waive demand, notice and protest of this note and non-payment thereof, and consent that time of payment thereof may be extended without notice thereof." *Opinion:* The waiver clause is valid and sufficient. The fact that the Arkansas Negotiable Instruments Act requires demand and notice to hold indorsers does not change this conclusion. The same requirement existed in the state under the law merchant before the Act, and the requirement of the Act applies only where there is no waiver; the Act itself provides for waivers of presentment and notice. The consent to extension is also binding on all parties. (*Inquiry from Ark., Nov., 1914.*)

Waiver on face of instrument binds indorsers

2830. A note bears on its face, above the signature of the maker, the following: "Each and every party to this instrument, either as maker, indorser, or otherwise, hereby waives presentment for payment, notice of dishonor, protest and notice of protest thereof." Does this bind an indorser? *Opinion:* It binds all the indorsers. (*Inquiry from Conn., Dec., 1919.*)

Holder may protest notwithstanding waiver

2831. If the words: "Demand of payment, protest and notice of protest are hereby waived," are printed on the face of a note, above the signature line, are they binding on the indorsers? If so, may the holder have the note protested? *Opinion:* The words above quoted are binding on all indorsers as a waiver of protest. By reason of such waiver, protest would be an unnecessary act as the indorser would be bound without proof of demand of payment or notice of dishonor. In answer to the second question, so far as the right to have a note protested is concerned, this is a right given to the holder by statute, and it is doubtful if the waiver would deprive the owner of the right to have the note protested, if he chose so to do, although, protest being unnecessary because of the waiver, the fees would not be recoverable. (*Inquiry from N. Y., Oct., 1916.*)

Indorser bound by a waiver on face of instrument

2832. Where an indorsed note recites on its face that the indorsers, signers and guarantors waive presentment for payment, protest and notice of protest and of non-payment, is it necessary to protest the note in order to hold an indorser? *Opinion:* The indorser is bound by the waiver of protest on the face of the instrument. (*Inquiry from Okla., Jan., 1918.*)

2833. A promissory note has printed on its face the clause, "We further waive demand, protest, and notice of demand, protest and non-payment." Is this clause binding upon a joint maker or an indorser? *Opinion:* The clause binds all parties to the instrument, including indorsers, so as to relieve from the necessity of taking the necessary steps to hold parties contingently liable. Of course, protest is not necessary to hold the maker in any event. (*Inquiries from S. C., Feb., 1913, N. Y., July, 1914.*)

Waiver clause with guaranty of payment

2834. A bank holds a note, made by A and indorsed by B, containing the following clause: "The drawers and indorsers of this note severally waive presentment and notice of protest and guaranty payment at any time after maturity." If through inadvertence the bank fails to present the note to A at maturity, does that relieve B of his responsibility as indorser, provided A had sufficient funds to pay the note when due? *Opinion:* The waiver of presentment and notice by the indorser would dispense with the necessity of such steps to hold him liable. (*Inquiry from S. D., Nov., 1919.*)

Waiver of presentment and protest on face and back with agreement that if notice of dishonor given it shall not affect validity of waiver

2835. Is the following clause appearing on the face of a note, and also on the back above the signatures of the indorsers, binding? "We, the indorsers of this note, also hereby waive the presentment of and demand for payment, and also waive the protest, notice of dishonor and non-payment of this note; and we expressly agree that should the holder of the note give notice of presentment, demand for payment, protest, notice of dishonor and non-payment of same, that the giving of such notice shall in no wise or in any manner affect the validity of the above waiver, but the

waiver shall be as valid and binding as though such notice had not been given."

Opinion: The waiver is binding on all parties according to its terms. (*Inquiry from W. Va., Jan., 1913.*)

Waiver of protest binding on accommodation indorser

2836. Does the clause "all indorsers and parties hereto jointly and severally waive protest" on the face of a note render protest unnecessary as to an accommodation indorser? *Opinion:* The note need not be protested. The waiver would be binding on an accommodation indorser as well as an indorser for value. (*Inquiry from Pa., Nov., 1913.*)

Waiver dispenses with necessity of protest and right to fees if protested

2837. A note contains the following: "The makers and indorsers hereof hereby severally waive protest, demand, and notice of protest and non-payment in case this note is not paid at maturity and agree to all extensions and partial payments before, on, or after maturity, without prejudice to holder." Is there need of protest? *Opinion:* The note contains an express waiver of protest, demand and notice by the makers and indorsers. This is binding on the indorsers, and in view of the waiver there is no necessity to protest such a note for non-payment at maturity. It being unnecessary, protest fees would probably not be recoverable if it was protested. (*Inquiry from Okla., Aug., 1920.*)

"Protest waived" above signature of first of three accommodation indorsers

2838. "Protest waived" was written on the back of a note and signed by three officers of a corporation individually. Does this operate against any other than the first signer? In case the corporation does not pay the note, are the officers jointly liable as indorsers? *Opinion:* The Uniform Negotiable Instruments Act expressly provides that "Where the waiver is embodied in the instrument itself, it is binding upon all parties, but where it is written above the signature of an indorser, it binds him only." As the three corporation officers signed as individuals, the waiver would be binding on the first indorser only. The Act further provides that "as respects one another, the indorsers are liable prima facie in the order in which they indorse; but evidence is admissible to show that as

between or among themselves, they have agreed otherwise." Under this, it has been held that the fact that the indorsers of a note are accommodation indorsers, and known to each other to be so, does not change the rule of liability and it is necessary to prove an express agreement to render them liable ratably as between themselves. *In re McCord*, 174 Fed. 72. Under this, unless there is a special agreement as to sharing liability, the first indorsers would be ultimately liable for the full amount. (*Inquiry from Mo., Nov., 1916.*)

Oral waiver

2839. Need a waiver of demand and notice be in handwriting? *Opinion:* The law does not so require. *Bk. v. Mill. etc., Co.*, 129 Cal. 263. (*Inquiry from Mass., Nov., 1916, Jl.*)

Implied waiver of demand and notice

2840. The holder of a note before its maturity asked an indorser if he would take care of the note at the proper time as the maker had gone into bankruptcy. The indorser stated that the receivership or bankruptcy proceeding was merely of a friendly nature and that a mistake would be made in enforcing collection of note at that time, but that it was collectible and if payment was insisted upon, naturally he would be compelled to pay it. The note was not forwarded to bank in time to make presentment on the day of maturity. Is the indorser released? *Opinion:* The indorser would be released because of inexcusable delay in presentment unless the facts show an implied waiver of presentment and notice. The Negotiable Instruments Act provides that "presentment for payment is dispensed with * * * (3) by waiver of presentment express or implied." It also provides that "notice of dishonor may be waived, either before the time of giving notice has arrived or after the omission to give due notice, and the waiver may be express or implied." It would seem in this case there was virtually a request by the indorser to the holder to wait or give time and an assurance that the note would be paid by the indorser, and this constituted an implied waiver of demand and notice. The fact that the maker was in bankruptcy did not excuse presentment, but the fact that the indorser, knowing that the demand upon the maker would be futile, asked the holder to hold off and virtually promised to pay the note constituted a waiver of

demand and notice. See *In re Swift*, 106 Fed. 65. *Kent v. Warner*, 94 Mass. 561. *Bessenger v. Wenzel*, 161 Mich. 61, 125 N. W. 750. *Gove v. Vining*, 48 Mass. (7 Metc.) 212. *O'Bannon Co. v. Curran*, 113 N. Y. Supp. 359. (*Inquiry from Ind., Aug., 1916.*)

Effect as waiver of clause, "This note subject to privilege of one renewal"

2841. Does the clause in an indorsed note "this note subject to privilege of one renewal of like period" constitute an implied waiver of demand, protest and notice of dishonor? *Opinion:* Such clause is an implied waiver by the indorser at least until the expiration of the extended period, and by later cases also waives those steps at the end of the period of extension. It would be better to have an express waiver of protest in the note to avoid all question. *Ridgeway v. Day*, 13 Pa. 208. *Barclay v. Weaver*, 19 Pa. 396. *First Nat. Bk. v. Ryerson*, 23 Iowa 508. *Cady v. Bradshaw*, 116 N. Y. 118. *McGonigal v. Brown*, 45 Ohio St. 499. *Worden v. Mitchell*, 7 Wis. 161. *Long v. Moore*, 2 Brev. (S. C.) 172. *Sheldon v. Horton*, 43 N. Y. 93. *Amoskeag Bk. v. Moore*, 37 N. H. 539. (*Inquiry from Cal., Sept., 1916, Jl.*)

General waiver of all paper bearing customer's indorsement

2842. A depositor discounts with his bank a large number of his customers' notes. He has requested that in case of non-payment the notes be not protested, and has left with his bank a form in which he waives demand and notice of protest on any paper bearing his indorsement. In case of the non-payment of any of the notes would such a form hold him as indorser? *Opinion:* Where a depositor requests the bank to omit protest of paper bearing his indorsement in case of non-payment, and files with the bank a written waiver of demand and notice of protest on all such paper, he is bound as indorser without the necessity of such steps. *Duvall v. Farmers Bank*, 7 Gill & J. (Md.) 44. *Hayward v. Empire State Sugar Co.*, 93 N. Y. Suppl. 449. *Davis v. Miller*, (Iowa) 55 N. W. 89. (*Inquiry from Mass., Sept., 1919, Jl.*)

General waiver of presentment until funds sufficient

2843. A customer of bank A frequently overdraws in large amounts and, instead of immediately protesting and, sending items

back for want of funds, the bank holds them for several days until the requisite funds are deposited, this course of procedure being understood by all parties. Checks which are drawn to a single payee are deposited in bank B which forwards to bank C for collection, the latter not giving bank B credit until it receives returns from bank A. It is asked if a waiver by bank B alone or by bank C alone would relieve bank A of liability in holding checks *Opinion:* A waiver of protest embodied in the check itself would be binding on all parties and sufficient for the purpose, as this would constitute a waiver of presentment as well as notice of dishonor and formal protest. If the waiver was indorsed on the back of check it might bind only the indorser above whose signature it appeared. As these transactions relate to the business of a particular customer and regularly go through the same two banks, it might be well for bank A to obtain special letters from the other two banks authorizing it to hold the customer's checks for a reasonable period, if funds are insufficient, before returning, them protested or unprotested. (*Inquiry from Tenn., June, 1913.*)

Meaning of waiver of "protest"

2844. Does a waiver of "protest" also constitute a waiver of presentment and notice of dishonor? *Opinion:* The Uniform Negotiable Instruments Act expressly provides that "a waiver of protest, whether in the case of a foreign bill of exchange or other negotiable instrument, is deemed to be a waiver not only of a formal protest, but also of presentment and notice of dishonor." (*Inquiry from Minn., Feb., 1914, Jl.*)

Waiver of notice not a waiver of presentment

2845. What is the effect of the following clause contained in a note: "We waive notice of protest and consent to the extension of payment of this note without notice"? *Opinion:* It is questionable whether waiver of notice of protest would be a waiver of presentment or protest. It might be better to provide that "the makers and indorsers severally waive presentment for payment, protest and notice of protest or of non-payment and consent to the extension of time of payment of this note without notice." (*Inquiry from Mo., Sept., 1913.*)

2846. In the body of a note was inserted "notice of protest is hereby waived by all parties liable herein." *Opinion:* This is

binding on all parties as a waiver of notice, but might not be construed as a waiver of presentment. See Sections 89, 112-114, S. C. Neg. Inst. Act, *Rouse v. Wooten* 140 S. C. 557. (*Inquiry from S. C., April, 1914.*)

Person waiving protest on back of note with provision that he becomes security for payment

2847. A bank uses a waiver of protest which reads: "For value received I hereby become security for the payment of the within note and waive protest and notice of protest and demand on same." It asks whether, by using such stamp, it is mixing up its rights against the indorser by having him agree to become surety, instead of holding him to his liability as indorser. *Opinion:* The Negotiable Instruments Act provides that "A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor is deemed to be an indorser unless he clearly indicates by appropriate words his intention to be bound in some other capacity." In the present case the person signing on the back indicates his intention to be bound as security and as such he is bound without protest or notice and there is no necessity for a waiver. A better form of waiver would probably be a simple waiver of protest, demand and notice to be signed by the indorsers omitting the provision that he becomes "security" for the payment of the note. This would have the effect of changing the indorser's liability from a contingent to an absolute one and there would be no necessity for a further provision that he becomes security for payment. (*Inquiry from W. Va., April, 1917.*)

Waiver on original note as affecting indorser of renewal note

2848. The following waiver of protest, "For value received. . . . hereby guarantee the payment of the within note and any renewal of the same, and hereby waive protest, demand and notice of non-payment thereof," was rubber stamped on the back of an old note and attached to a renewal note containing no such waiver. *Opinion:* The waiver on the original note also constituted a waiver by the indorser of demand, protest and notice of the renewal. *Duval v. Farmers Bk., 7 Gill & J. (Md.) 44.* (*Inquiry from W. Va., Feb., 1916, Jl.*)

Indorser liable without protest when protest waived

2849. Where the indorser of a note expressly waives presentment for payment,

demand, notice of dishonor, protest and notice of protest thereof, is he liable in the absence of protest? *Opinion:* Protest, when expressly waived, is not necessary to hold the indorser. (*Inquiry from Ill., Feb., 1917.*)

Omission of protest by collecting bank when waived

2850. Bank A forwards to bank B for collection a note with waiver of protest clause on its face. No instructions are sent. Can bank A hold bank B for the amount of the note if that bank returns it unpaid and not protested? *Opinion:* It is the general duty of a collecting bank to cause protest to be made as a convenient means of proving dishonor, but where the note waives protest and there is no instruction of the sending bank to make protest, it is not incumbent on the collecting bank to cause protest to be made. Even if the sending bank had instructed protest and the collecting bank failed to make it, there would be no liability, as the parties having waived protest are not discharged. (*Inquiry from Mich., June, 1915.*)

2851. A bank received for collection a note containing the following waiver printed on its face: "The drawers and indorsers severally waive presentment for payment, protest and notice of protest and non-payment of this note." No instructions were given as to protest. *Opinion:* The proper course for the collecting bank was to omit protest. (*Inquiry from Miss., Dec., 1912, Jl.*)

Instruction to "deduct freight" is not a waiver of protest

2852. A bank in Nebraska sent to a Wyoming bank a demand draft on a party in Wyoming. The draft bore no instructions in regard to protest, but the letter transmitting the draft contained the instructions: "Deduct freight and attach bill to remittance. No other deductions to be made for collection or exchange." It is now claimed that this was sufficient notice that this was not a "protest item." Is this correct? *Opinion:* Where a sight draft drawn by a customer of a bank in one state upon a party in another is forwarded by a bank in the state where drawn to a bank at the home of the drawee for collection, it is the duty of the collecting bank to cause the draft to be protested upon dishonor, and a notation in the letter of advice, "Deduct freight and attach bill to remittance," etc., is not to be construed as an instruction not

to protest. (*Inquiry from Wyo., June, 1920, Jl.*)

Waiver of protest by payee

2853. A check signed by John Doe, payable to the Sears-Roebuck Co., or bearer, was indorsed by the payee to a national bank "No protest"; indorsed by the national bank to the order of any banker and presented to the drawee bank. Should the check be protested for non-payment? *Opinion:* The Negotiable Instruments Act permits the protest of an inland instrument, such as this check, the object to which is to afford a convenient means of proving dishonor. The waiver of protest is by the payee and is binding on it only. The national bank to which the check was indorsed placed a restrictive indorsement thereon, which made the subsequent banks collection agents. It is, therefore, not an indorser for value but simply the owner of the instrument, which it has forwarded for collection through agents. As no protest is necessary to prove dishonor against the drawer (notice of dishonor is not required where the drawer has stopped payment or where he has no right to expect that the drawee will honor the instrument), as the payee has waived protest, and as the national bank has not parted with title to the instrument and is still owner, it would seem that there is no necessity for protesting the check. (*Inquiry from Ida., Jan., 1921.*)

Waiver in demand note of presentment and notice

2854. Under what conditions may a bank safely accept a note payable on demand, bearing one or more indorsements? What should be indorsed on the back of the paper in order to bind indorsers? *Opinion:* Under the Negotiable Instruments Act a note payable on demand becomes due "within a reasonable time," but there is no certainty in the New York decisions as to just what period of time would be deemed reasonable. To charge an indorser there must be presentment for payment of such a note within a reasonable time, as his liability is conditioned on due presentment and notice. It would be well to insert in the face of a demand note the following: "The indorsers hereof waive presentment and notice of dishonor." The bank discounting such a note could hold the note up to the period of the statute of limitations and the indorsers would be liable thereon, they having waived presentment and notice. It

would be better that the waiver be printed in the body of the note rather than on the back; for in the latter case it would be binding only upon the indorser above whose signature it appeared and not upon all the indorsers. (*Inquiries from N. Y., May, 1917, N. Y., Feb., 1918.*)

2855. What is the period within which an indorser on a demand note may be held liable for its payment? *Opinion:* The Negotiable Instruments Act provides that where a note is payable on demand, presentment must be made within a reasonable time after its issue to charge the indorsers. The courts of the state do not, however,

appear as yet to have held what is such a reasonable time, and the only guide is the Act itself which further provides that "in determining what is a reasonable time, or an unreasonable time, regard is to be had to the nature of the instrument, the usage of trade or business (if any) with respect to such instrument, and the facts of the particular case." If it is desired to hold an indorsed demand note as an investment for any length of time it would be well to couple with the indorsement a waiver of demand and notice. See *Columbian Banking Co. v. Bowen*, 134 Wis. 218. *Schlesinger v. Schultz*, 910 N. Y. App. Div. 356. (*Inquiry from Wis., June, 1919.*)

SET-OFF

Bank's right of set-off against depositor

Right of set-off against depositor-maker exists whether note acquired from him directly or from third person

2856. The rule that a bank has a right to set off a deposit against its customer's matured indebtedness applies equally to his indebtedness upon paper discounted for the customer and paper of the customer purchased from a third person in the usual course of business. The bank purchasing from a third person would have the right to apply the deposit of the maker of a note equally as if it had been discounted for the maker directly, subject, of course, to the limitation that the paper was acquired in the usual course of business and not purchased for the express purpose of enabling the seller to realize out of the funds of the maker approaching insolvency. The right of set-off of unmatured paper upon the depositor's insolvency is not recognized in Pennsylvania. The rule is conflicting in other states but it exists under the National Bankrupt Act. It would seem competent for a bank to make an agreement with its customer giving the former the right to such set-off. *Melander v. Western Nat. Bk.*, 21 Cal. App. 462. *Mechanics Bk. v. Seitz*, 150 Pa. 632. *Chipman v. Bk.*, 120 Pa. 86. *Frank v. Mercantile Nat. Bk.*, 182 N. Y. 264. (*Inquiry from Pa., July, 1917, Jl.*)

Bank's general right of set-off

2857. A bank asks what right it has against the deposit credits of a customer based on his notes to the bank. Has the bank any preferred rights against his deposit account? *Opinion:* Where the

note of a customer owned by the bank has matured, it has a right to apply the deposit, but the right does not exist where the note is not matured, unless the depositor is insolvent. In the latter event some courts hold insolvency gives the bank a right of set-off of unmatured paper, while other courts deny such right. There seem to be no decided cases in Colorado one way or the other. If, however, the depositor is adjudicated a bankrupt, the right exists to set off unmatured paper against his deposit under the National Bankrupt Act. (*Inquiry from Colo., Oct., 1914.*)

2858. The rule is well settled that a bank may look to deposits in its hands for the repayment of any indebtedness to it on the part of the depositor and may apply his deposits on his debts to the bank as they become due. A bank holding a matured note of its depositor has the right to apply his deposit to payment of the note. In some jurisdictions, to wit, California, Kentucky and Massachusetts, it has been held that a bank is not entitled to apply a deposit to a debt of a depositor which is fully protected by other collateral. *Hodgin v. Bk.*, 124 N. C. 540, 125 N. C. 503. *Guarini v. Swiss-Amer. Bk.*, 162 Cal. 181. *Mc. Kean v. German-Amer. Sav. Bk.*, 118 Cal. 334. *Furber v. Dane*, 203 Mass. 108. *Cockrill v. Joyce*, 62 Ark. 216. (*Inquiry from N. C., May, 1918, Jl.*)

Set-off by bank of customer's note

2859. A bank holds a past due and protested note which it discounted for a customer. He has \$300 on deposit with the bank which wishes to bring suit on the

note. The bank asks whether it has a right to charge his account \$300 and credit same on note before getting judgment for the balance. *Opinion:* The law allows a bank which owns a past due note of a customer to apply the deposit towards its payment. In the case stated the bank has the undoubted right to apply the \$300 to the credit of its customer towards payment of the note before getting judgment for the balance. (*Inquiry from N. J., Aug., 1917.*)

Set-off of past due note against depositor's account

2860. A bank states that it holds a note dated September 13, 1912, with interest paid thereon to May 13, 1913. The bank asks whether it can charge this note against the checking account of its depositor if he should refuse to pay it on presentment. *Opinion:* The note being past due, the bank can charge it up against the checking account of its depositor and it is not necessary to attempt to attach or garnish his money on deposit. It is a general rule that a bank has a right to appropriate the funds due upon a general deposit to the payment of any debt due to the bank from the depositor. This has been so held by the Ohio Supreme Court in *Bank of Marysville v. Windisch Mulhauser Brew. Co.*, 50 Ohio State 151. (*Inquiry from Ohio, March, 1914.*)

Set-off of overdrawn check not charged to account when smaller check presented

2861. A bank inquires as to the effect of paying a depositor's check calling for more than his balance, but instead of charging the check against his account, the bank holds it as a cash item, and afterwards a check is presented for an amount less than the customer's balance, payment thereof being refused. *Opinion:* When a bank pays an overdraft and holds the check as a cash item instead of charging it against his account, the item is none the less an indebtedness of the depositor to the bank which the latter has a right to set off. Consequently, if another check should be presented for an amount less than the customer's balance, the bank would, it seems, have a right to refuse payment and would not be liable to the customer for dishonoring his check. In one or two states it is held the deposit must be actually appropriated upon the indebtedness by charge to account before the subsequent check was presented; but this is not the general rule.

As the case stands, the depositor owes the bank more than the amount of the balance, and it has a prior right to such balance by reason of paying his overdraft and can rightfully refuse to pay the later check, for the balance belongs to the bank rather than to the depositor. (*Inquiry from Fla., April, 1916.*)

Set-off against maker's account without first presenting at place of business where payable

2862. A note of A was discounted for B, the indorser, by a bank in which both A and B were depositors. The note was not paid at maturity and the bank charged the note to A's account without first presenting it at A's place of business, where it was payable. *Opinion:* The bank probably had the right of set-off by charging the note to A's account, without first presenting it to him for payment at his place of business. The same conclusion would apply where the note was discounted for A instead of for B. In a case where such a note was presented at A's place of business and protested, a similar right of set-off would exist against A's account, but not against B's account, where A's account was sufficient. See citations in opinion 2909 and *Lamb v. Morris*, 118 Ind. 179. (*Inquiry from Pa., May, 1912, Jl.*)

Debt must be contracted in good faith

2863. A bank held a deposit to the credit of A. One B, who owned an unmatured note executed by A, asked the bank to discount the note on his personal guarantee, and to use A's deposit as a set-off at maturity. *Opinion:* Ordinarily the bank would have the right to set off A's note indorsed by B against A's deposit, but there is a possibility that a court would deny the right of set-off on the ground that the note was acquired by the bank to enable B to gain an unfair advantage over A, and that the indebtedness of A to the bank was not a bona fide debt subject to set-off. *Bk. v. Henninger*, 105 Pa. 496. *Gillet v. Bk.*, 160 N. Y. 549. (*Inquiry from Pa., Dec., 1912, Jl.*)

Set-off of note held as collateral against maker's account

2864. An officer of a bank buys a note signed by a customer payable to an outsider, and then attaches this note as collateral to his own note payable to the bank. The question is whether, after the maturity of both notes, the bank can charge up the collateral note signed by its customer against

his deposit account. *Opinion:* One taking negotiable paper before maturity as collateral is, for all practical purposes, the owner of it and a bona fide holder for value and may collect it, at least to the extent of the debt for which it was pledged, without regard to the equities between the original parties. Jones on Collateral Securities, sec. 89, and cases cited. In this case, therefore, there was a right of set-off of the note held as collateral against the maker's account. (*Inquiry from Wyo., Feb., 1919.*)

Set-off against correspondent's balance of items mailed to it for collection

2865. A bank states that it is indebted to various correspondents for a balance of account and sends to such correspondents various items for collection. The question seems to be: When does the correspondent become debtor to the bank by reason of such items so as to permit the right of set-off? *Opinion:* The right of set-off exists at the point of time the correspondent becomes debtor for the items. The charge of an uncollected item against the correspondent's account does not necessarily make it debtor, prior to collection. Even then, the item may be received for collection and remittance and not for collection and credit. The reply to the question depends largely upon the facts of the particular case. (*Inquiry from Pa., Dec., 1915.*)

Set-off against widow's account of decedent's debt assumed by her

2866. A bank received wire from Mrs. H to pay her husband, since deceased, \$10. The bank misread the wire and paid \$50. Mrs. H subsequently advised the bank she would assume the difference; consequently the bank did not file claim against the husband's estate but looked to her. Mrs. H failed to pay and recently deposited some money with the bank which the bank appropriated to the old debt. Mrs. H now repudiates her former actions and threatens bank with suit unless it returns the money appropriated. Has the bank a good defense? *Opinion:* The right of set-off is based on the theory that the parties owe each other mutual debts. If it could be established that the \$40 was a debt of Mrs. H owing by her to the bank, there would be a right of set-off. The promise by Mrs. H was to pay the debt of another, her husband. It might be contended there was a consideration for such promise, namely, the refraining from proving claim against the husband's

estate. The Oklahoma statute requires that a promise to answer for the debt of another must be in writing. There is an exception, however, "where the promise being for an antecedent obligation of another is made upon the consideration that the party receiving it cancels the antecedent obligation, accepting the new promise as a substitute therefor." It might possibly be held that the bank in effect cancelled the debt against the husband by not filing any claim against his estate and thereby brought the case within the exception. In *Laughlin v. Dalton*, 200 Ill. App. 342, however, it was held that a promise to repay money loaned the promisor's wife to pay a bill is within the statute of frauds and not enforceable in the absence of a new consideration moving to the promisor. It is somewhat doubtful, therefore, whether the bank had a right to set off the \$40 against Mrs. H's deposit and whether it would have a defense. (*Inquiry from Okla., Sept., 1918.*)

Deposit received after maturity of note

2867. A bank purchased from the indorser a note which was not paid at maturity by the maker, who claimed failure of consideration. After maturity the bank received funds deposited to the general account of the maker, against which funds it set off the note. The bank had previously started suit against the maker but discontinued it after it had set off the note. *Opinion:* The bank had a right to apply to the payment of the note not only all the funds deposited in the bank when the note matured but all funds afterwards received. Such right is not affected by the fact that the bank began and discontinued suit. *Jordan v. Nat. Shoe, etc., Bk.*, 74 N. Y. 467. *Shotwell v. Sioux Falls Sav. Bk.*, (S. Dak.) 147 N. W. 288. *Muench v. Valley Nat. Bk.*, 11 Mo. App. 144. *Blair v. Allen*, Fed. Cas. No. 1483, 3 Dill. 101. (*Inquiry from S. Dak., Aug., 1915, Jl.*)

Set-off of claim for interest

2868. A bank, receiving a note for collection, collected from the maker and after payment to the holder and surrender of the note discovered that through error the maker still owed \$4.64 interest. The bank paid this amount to the payee, the maker acknowledging his indebtedness. Later the maker of the note became a depositor for \$200 and against this account the bank charged the \$4.64 for which the depositor

brings suit. *Opinion:* In the discharge of the liability for \$4.64 the bank became subrogated to the rights and remedies of the holder of the note and there arose a legally subsisting cause of action in its favor against the maker of the note. The bank had the right to set off his matured indebtedness against the deposit. *Heuser v. Sharman*, 89 Ark. 355. *So. Cotton Oil Co. v. Napoleon Hill Oil Co.*, 108 Ark. 555. *Holland Bk. Co. v. See*, 146 Mo. App. 269. *Capen v. Garrison*, 193 Mo. 341. *Jones v. Bacon*, 72 Hun. (N. Y.) 506. *Rachal v. Smith*, 101 Fed. 159. *Union Bk. v. Tutt*, 5 Mo. App. 342. *Muench v. Valley Nat. Bk.*, 11 Mo. App. 144. *Ehlermann v. St. Louis Nat. Bk.*, 14 Mo. App. 591. (*Inquiry from Mo., March, 1917, Jl.*)

Set-off against deposit of pension checks

2869. A bank inquires as to its right of set-off against the pension checks of a depositor mingled with other deposits. *Opinion:* The U. S. Rev. Stat., Sec. 4745, makes void "any pledge, mortgage, sale, assignment or transfer of any right, claim or interest in any pension" * * *. And Section 4747 Rev. Stat. exempts sums of money due or to become due any pensioner from attachment, levy, or seizure by or under any legal or equitable process, where the sum remains with the pension office or is in course of transmission to the pensioner. But where a pensioner deposits his pension check in bank and receives credit to his account, it does not seem either of the above provisions would deprive the bank of the right of set-off, especially where, as in the instant case, he mingles his pension checks with his other deposits and carries on a general checking account. It has been held that a gift of a check for pension money is not void under Sec. 4745 (*Farmer v. Turner*, 64 Iowa, 690) and also that a verbal promise by a pensioner to pay a debt thereon is not a "pledge, mortgage, assignment, transfer or sale" under Sec. 4745. It seems after the pensioner had deposited the check at the bank and received credit therefor, the proceeds ceased to be pension money and the bank became a mere debtor therefor, and has a right to set off such debt against a note of the pensioner. (*Inquiry from Pa., March, 1919.*)

Set-off of customer's indebtedness upon overdraft against certificate of deposit transferred by customer after maturity

2870. A bank issued a time certificate of deposit to one of its customers who negoti-

ated it after maturity. The customer subsequently overdrew his account in the bank. Would the bank have the right to set off the overdraft against the certificate?

Opinion: One of the essentials to constitute a holder in due course is that he must have become the holder of the instrument before it was overdue. An indorser after maturity takes subject to equities of the maker against the payee. Presumably the maker of a certificate of deposit, being debtor to the payee thereon would have a right to set off such debt against a debt owed by the payee upon overdraft and where the payee transfers such certificate after maturity presumably the transferee would take it subject to this right of set-off against the payee. In the present case, however, the debt upon overdraft was not created until after the customer had negotiated the overdue certificate and in such case it would be questionable whether a right of set-off existed. See *Davis v. Miller*, 14 Gratt. 1. (*Inquiry from Kan., Dec., 1920.*)

Set-off against city deposit

2871. A city in Indiana was indebted on an overdue note to a national bank holding the city's funds, which were sufficient to meet the note. The bank accordingly applied the deposit to payment of the note and accrued interest. *Opinion:* In the absence of a statute to the contrary (no apparent restriction in Indiana) the bank had the right to apply such deposit to payment of the city's indebtedness, the same as in case of an individual depositor. *U. S. v. Bk. of Metropolis*, 15 Pet. (U. S.) 377. *State v. Cobb*, 64 Ala. 156. *Town v. First Nat. Bk.*, 37 Colo. 344, 86 Pac. 75. *Citizens Bk. v. Alexander*, 120 Pa. 476. *McDowell v. Bk.*, 2 Del. Ch. 1. *U. S. v. Nat. Bk.*, 73 Fed. 379. *Boyd v. Bell*, 69 Tex. 735. *State v. Corning St. Sav. Bk.*, 128 Iowa 597. *Wagner v. Citizens Bk.*, 122 Tenn. 164. (*Inquiry from Ind., Aug., 1914, Jl.*)

County warrant set off against deposit of county

2872. A bank in Georgia purchased certain county orders or scripts, being the matured obligations of the county, drawn against the county treasurer by the board of county commissioners. It was the practice of the bank to cash these orders and hold them until the end of the month, when the treasurer would give his check on the account to take them up. Upon going out of office, at

the time the office of treasurer was abolished, he refused to give his check taking up the orders that had accumulated, but, instead, gave a check for the entire balance to be used in the new county depository. The bank seeks to charge the said scripts to the treasurer's account, before his balance check is presented. *Opinion:* Where a bank purchased county orders upon the county treasurer under an arrangement by which, at the end of the month, the treasurer would pay such orders by his check upon the county deposit held by the bank, the latter, upon the treasurer's failure so to do, would probably be held to have a right to set off the county orders, as a matured indebtedness owing it by the county against the deposit. *Shepard v. Meridan Nat. Bk.*, 149 Ind. 532. *Aidala v. Savoy Tr. Co.*, 128 N. Y. S. 219. *Hayden v. Alton Nat. Bk.*, 29 Ill. App. 458. *Citizens Bk. v. Bowen*, 21 Kan. 354. *Fory v. Amer. Nat. Bk.*, 136 La. 298. (*Inquiry from Ga., Sept., 1917, Jl.*)

Consent of and notice to depositor of set-off

Consent of depositor generally unnecessary

2873. A bank owned its customer's note of \$100 due at the bank August 5th. On that date the customer had \$100 to his credit at the bank. *Opinion:* The bank had the right at the maturity of the note to charge it up to his account without first notifying him or obtaining his consent. *McDowell v. Bk.*, 1 Harr. (Del.) 369. (*Inquiry from Del., Aug., 1909, Jl.*)

Bank can charge matured note against maker's account without his consent

2874. A bank's customer recently objected to its charging to his account the amount of a note which was made payable at the bank. The objection was based upon the fact that the note failed to recite that the bank could pay the same, and that the customer should have been notified and his consent procured before charging the same. *Opinion:* There are only one or two states in the Union wherein the law requires the depositor's consent before the bank is entitled to set off his matured note. The general rule which prevails in Ohio, as elsewhere, is that the bank has a right to set off the money due on general deposit account against the matured indebtedness of the depositor. Unquestionably the bank has a right of set-off in this case. (*Inquiry from Ohio, Aug., 1916.*)

Bank's right of set-off exists without special instruction of depositor

2875. Bank A discounted and became owner of a note drawn by its customer Smith in favor of Jones, made payable to Bank B, where Smith also keeps an account. The note was protested at maturity. *Opinion:* Bank A has the right to charge up the note against Smith's account without special instructions from Smith, although he should be notified that the note has been so charged up. (*Inquiry from N. J., June, 1911, Jl.*)

Consent of depositor required in Louisiana

2876. John Doe deposited funds in his bank on the same day upon which his note held by it became due. He had been carrying the note from year to year for four years, having it renewed each year. The bank without Doe's consent charged the note to his account, and refused to honor his checks, whereupon Doe brings suit. *Opinion:* Under the rule generally prevailing a bank has a right to set off a matured debt against a customer's account without his consent, but in Louisiana a special rule prevails that the bank is not authorized to apply a customer's deposit to payment of his debts, unless there is a special mandate from the depositor or agreement or course of dealing so authorizing. *Morgan v. Lathrop*, 12 La. Ann. 257. *Gordon v. Muehler*, 34 La. Ann. 604. *Hancock v. Citizens Bk.*, 33 La. Ann. 592. *Succ. of Grayard*, 106 La. 298. *Fory v. Amer. Nat. Bk.*, 136 La. 298. (*Inquiry from La., Nov., 1918, Jl.*)

Notice to depositor in South Carolina

2877. A bank asks whether it is proper to charge up a past due note against the maker's checking account without his consent. *Opinion:* The courts quite generally hold that a bank has a right to set off or charge up a matured note owned by the bank against the maker's account. The maker's consent is not a prerequisite. In Louisiana it has been held that the bank cannot charge up a past due note without the maker's consent and in South Carolina without notifying him; but this is not the rule in general. (*Inquiry from Cal., March, 1913.*)

Notice of set-off must be given indorser in South Carolina

2878. A depositor was indebted to a bank in South Carolina as an indorser on a note discounted for him. The bank set off

the note against the depositor's account. *Opinion:* The bank had the right of set-off but under the law of South Carolina must give the depositor notice of application of the deposit, and checks drawn before such notice must be paid. Where the note is discounted for the maker and the depositor is an accommodation indorser, it is doubtful if the latter's deposit can be set off. *Callahan v. Bk. of Anderson*, 69 S. C. 374. *Loan & Sav. Bk. v. Farmers, etc., Bk.*, (S. C.) 54 S. E. 364. *Southern Seating, etc., Co. v. First Nat. Bk.*, (S. C.) 68 S. E. 962. *Hiller v. Bk. of Columbia*, (S. C.) 75 S. E. 789. *Milhouse v. Citizens Bk.*, (Ga.) 80 S. E. 703. *Ticonic Bk. v. Johnson*, 21 Me. 426. *Shackamaxxon Bk. v. Kinsler*, 16 Weekly Notes Cas. (Pa.) 509. *Van Winkle Gin Co. v. Citizens Bk.*, 89 Tex. 147. *Harrison v. Harrison*, 118 Ind. 179. *O'Grady v. Stotts City Bk.*, 106 Mo. App. 366. (*Inquiry from S. C., July, 1915, Jl.*)

Where debt not matured

Unmatured note cannot be set off in absence of fraud or (in some states) insolvency

2879. A depositor owes his bank \$1,100 on a note not yet matured, and, having quarreled with the bank, intends withdrawing his account and doing business with another bank. He refuses to allow the bank to charge his account with the amount of the note. *Opinion:* Unless the loan made to the depositor upon his note was induced by fraud upon his part or unless he is now insolvent, the bank would have no right to apply his deposit upon his unmatured note. A bank has no right to apply a deposit to a debt of the depositor until such debt matures unless (as held in some states, but denied in others) the depositor becomes insolvent before maturity, or unless the debt has been created by fraud, in which event the credit given for the note can be rescinded. *Clearwater County v. Pfeffer*, 236 Fed. 183. *Bk. v. Crayter*, (Ala.) 75 So. 7. *Com. Nat. Bk. v. Proctor*, 98 Ill. 558. *Homer v. Nat. Bk. of Com.*, 140 Mo. 225. *Bradley v. Seaboard Nat. Bk.*, 167 N. Y. 427. *Mann v. Franklin Tr. Co.*, 158 N. Y. App. Div. 491. *Andrews v. Artisans Bk.*, 26 N. Y. 298. *Flatow v. Jefferson Bk.*, 135 N. Y. App. Div. 24. *Peyman v. Bowery Bk.*, 43 N. Y. Suppl. 826. (*Inquiry from Ark., Sept., 1918, Jl.*)

Set-off of unmatured mortgage note against garnisheed account

2880. An account in a bank subject to check has been garnisheed. *Opinion desired*

as to whether bank can charge a mortgage note which matured three days after service of the garnishment against the garnisheed account? *Opinion:* Where the account of a depositor is garnisheed, the bank has no right to set off an unmatured note of the depositor against the account so as to defeat the garnishment; (*County v. Pfeffer*, 236 Fed. 183. *Bank v. Crayter*, [Ala.] 75 So. 7. *Bank v. Presnall*, [Tex.] 194 S. W. 384. *Oatman v. Batavian Bank*, 77 Wis. 501, 46 N. W. 881) except that in some states (but not in Wisconsin) insolvency of a depositor gives the bank a right to set off his unmatured paper against his deposit. (See *Kinsey v. Ring*, 83 Wis. 536, and *Union Nat. Bank v. Hicks*, 67 Wis. 189.) (*Inquiry from Wis., Jan., 1921, Jl.*)

Where depositor insolvent or declared bankrupt

Set-off of unmatured note against insolvent depositor in Connecticut

2881. A depositor maintaining an active account and receiving discount accommodations based somewhat upon his balance, made an assignment for the benefit of creditors, owing the bank on unmatured notes. The question is asked whether, under the laws of Connecticut, the bank can hold the depositor's balance and apply the same against such notes. *Opinion:* An exhaustive search fails to disclose a Connecticut case passing upon the precise point submitted. The quite recent decision of the Supreme Court of Errors growing out of the failure of the Thames Loan & Trust Co., 90 Atl. Report 369, deals with the right of set-off of depositors against an insolvent bank having commercial and savings depositors, but is not an authority upon the question submitted. The decisions in other states conflict. (*Inquiry from Conn., July, 1914.*)

Set-off of unmatured note against insolvent's account in Missouri

2882. A bank asks whether decisions in Missouri hold that a bank can, or cannot, set off an unmatured note against its depositor's account, upon the latter becoming insolvent. *Opinion:* Missouri is in the latter class which denies the right of set-off in such case, unless the note contains a special clause which authorizes the bank so to do upon the maker's becoming insolvent. In a case where the bank's customer was put into bankruptcy under the National Bankrupt Act the right of set-off would exist. It has been held under that Act that, where

the borrower becomes bankrupt, the bank has a right to apply his deposit upon his notes, though unmatured. See, for example, *Germania Savings Bank & Trust Co. v. Loeb*, 188 Fed. 285. (*Inquiry from Mo., Aug., 1915.*)

Unmatured note cannot be set off against insolvent's deposit in Missouri

2883. A bank held two notes of its depositor, one being a demand note for \$320, the other, payable in six months, for \$1,000. The date of maturity of the latter was extended three months by contract indorsed on the note. Before the \$1,000 note matured, the depositor made a general assignment to creditors. The bank, having on its books \$1,065 to the depositor's credit, debits the amount of the demand note, and also seeks to set off the unmatured note. *Opinion:* In Missouri, bank holding unmatured note of depositor cannot apply balance upon note in event of depositor's insolvency. Where maturity of note extended and depositor becomes insolvent before end of period of extension, note is unmatured paper and cannot be set off unless contract of extension can be rescinded, because of fraud or on other equitable ground. *Meunch v. Valley Nat. Bk.*, 11 Mo. App. 144. *Ehlermann v. St. Louis Nat. Bk.*, 14 Mo. App. 591. *Homer v. Nat. Bk. of Com.*, 140 Mo. 225. *Beckwith v. Bk.*, 9 N. Y. 211. *Dougherty v. Central Nat. Bk.*, 93 Pa. 227. *Knecht v. U. S. Sav. Bk.*, 2 Mo. App. 563. *Bk. v. Union Tr. Co.*, 50 Ill. App. 434. *Kling v. Irving Nat. Bk.*, 160 N. Y. 698, 21 App. Div. 323. 6 Cyc. 288. (*Inquiry from Mo., Aug., 1917, Jl.*)

Unmatured note cannot be set off against insolvent's deposit in New York

2884. A depositor made a general assignment. The bank held a note for a larger amount than his balance, but not yet due. The bank, claiming a set-off, holds the money until maturity of the note. *Opinion:* Under the law of New York the bank cannot set off the deposit against the unmatured note, but the rule in the federal courts and under the Bankruptcy Act allows a set-off. *Heidelberg v. Nat. Park Bk.*, 87 Hun (N. Y.) 117. *Delahunty v. Central Nat. Bk.*, 63 N. Y. App. Div. 177. (*Inquiry from N. Y., June, 1914, Jl.*)

Credit form—Clause maturing debt of insolvent depositor

2885. A bank submits a proposed clause

for insertion in its credit blank, reading as follows: "And it is further agreed that, upon any bankruptcy proceedings being instituted by or against me, or upon my becoming insolvent, all sums due on deposit with you or in your hands belonging to me shall immediately become the subject of offset against any indebtedness due or to become due you from me, either directly or contingently, and all such sums so in your hands may be charged immediately against any such liability." The bank asks whether an insolvent depositor could be legally held by the terms thereof. *Opinion:* Under the National Bankruptcy Law, a bank holding an unmatured note of a depositor who becomes bankrupt has the right to set off the note against the deposit, and the same rule prevails in some of the states, but in others, including New York, a bank cannot apply the deposit of a customer to the payment of an indebtedness owing to it by him which has not matured, though he be insolvent, unless it is authorized to do so by contract. *Heidelberg v. National Park Bank*, 87 Hun 117. It seems that the clause framed by the bank for insertion in its credit blank would constitute a contract under which it could acquire the right of set-off of debts of its customer not due, upon his becoming insolvent. (*Inquiry from N. Y., March, 1918.*)

Form of contract authorizing bank to set off unmatured paper upon maker's insolvency

2886. Where a borrower becomes bankrupt, the bank has the right, under the provisions of the National Bankrupt Law, to apply his deposit upon his notes, though unmatured. Aside from the Bankrupt Act, the right of set-off of an unmatured note against the deposit upon the insolvency of the maker is recognized in some states and denied in others, but where the right is given by contract it can be enforced. The following form of contract, if inserted in the borrower's note, would protect the bank: "The bank at which this note is payable is hereby authorized, in the event of the maker's insolvency before maturity hereof, to thereupon apply any balance in said bank standing to the credit of the maker in payment of this note." *Germania Sav., etc., Co. v. Loeb*, 188 Fed. 285. *Jordan v. Nat. Shoe, etc., Co.*, 74 N. Y. 467. *Heidelberg v. Nat. Park Bk.*, 87 Hun (N. Y.) 117, 33 N. Y. S. 794. *Roe v. Bk.*, 167 Mo. 406. *Bk. v. Mahon*, 78 S. C. 408. (*Inquiry from S. Dak., Oct., 1914, Jl.*)

Unmatured note may be set off against insolvent's deposit in Ohio

2887. The general rule is that a bank has a right to apply a deposit to the payment of any matured debt due the bank from the depositor. It has been held in Ohio and other states (but the right is denied in many states) that a bank may apply a deposit to the payment of the depositor's indebtedness not yet matured, provided the depositor is insolvent. Under the National Bankrupt Act a bank may set off an unmatured note against the deposit of the maker. *Bk. v. Windsch, etc., Brew. Co., 50 Ohio St. 151. German-Amer. Sav. Co. v. Grossman, 15 Ohio Cir. Ct. 378. Frank v. Mercantile Nat. Bk., 182 N. Y. 264. (Inquiry from Ohio, June, 1913, Jl.)*

Set-off of unmatured note against bankrupt's account

2888. A bank states that it secured a judgment against P who later executed a deed of trust to another bank for \$1,250, which amount was credited to his account by the other bank, and the inquiring bank garnished the money. P afterwards took the benefit of the Bankruptcy Law. The other bank charged the note back to his account, showing an overdraft of two checks which had already been paid. *Opinion:* It has been held under the Bankrupt Law that, although a note against the bankrupt has not matured, the bank holding same has a right to set off the amount against the bankrupt's deposit. *Frank v. Mercantile Nat. Bk., 182 N. Y. 264.* The Supreme Court of the United States in *Schuler v. Israel, 120 U. S. 506*, also allowed a bank which held the unmatured note of an insolvent customer to hold his deposit as against an attachment process by a creditor of the customer. It seems in the present case, therefore, the other bank was within its rights in charging up the unmatured notes against the bankrupt's account. *(Inquiry from Ark., Feb., 1917.)*

Set-off against bankrupt's debt of proceeds of checks deposited for collection

2889. A bank states that a few days before a person went into bankruptcy he deposited with it for collection some notes which were not collected before the appointment of a receiver. The bankrupt was indebted to the bank in a large amount. The bank asks if the proceeds of the checks may be applied toward the indebtedness. *Opinion:* It was held, in *re Farnsworth,*

Fed. Cas. 4673, 14 N. B. R. 148, that, if the banker has received drafts for collection, the proceeds of which afterwards come into his hands, he may offset them against debts due to him by the bankrupt. But see *Moore v. Third Nat. Bank of Phila., 24 A. B. R. 568*, in which it was held that, where a bank accepts a check for collection, and receives the proceeds on the following day without having paid out in the meantime anything on account of the deposit, it cannot apply the proceeds of the check toward a debt due by the depositor, where it appears that on the day the check was deposited for collection, but at a subsequent hour, a petition in bankruptcy was filed against the depositor. *(Inquiry from Ga., May, 1914.)*

Collection proceeds set off against bankrupt

2890. A bank received from its customer notes deposited for collection at a time when bankruptcy was not contemplated by the customer. After the customer went into bankruptcy the notes were collected and the bank applied the proceeds of the notes upon a claim it held against the customer. *Opinion:* The bank had a right to set off the proceeds of the notes deposited for collection at a time when bankruptcy was not contemplated and collected after the bankruptcy. In *re Farnsworth, Fed. Cas. No. 4673. N. Y. Co. Nat. Bk. v. Massey, 192 U. S. 138. (Inquiry from Ga., Jan., 1915, Jl.)*

Set-off of claim for rent against bankrupt's deposit

2891. A bank leased rooms to a corporation depositor, the rent being payable monthly in advance. The corporation has gone into the hands of a receiver and owes the bank two months' rent. Has the bank a right to offset rent against deposit? *Opinion:* It has been repeatedly held that the amount of a bankrupt's credit in a bank at the time of filing his petition in bankruptcy may be set off against a debt due him from the bank. In view thereof, in the present case the bank has a right to apply the deposit in bank upon the indebtedness for two months' rent which the corporation owed the bank at the time it went into the hands of a receiver. *(Inquiry from Ill., March, 1916.)*

Set-off of demand note against bankrupt's deposit two weeks before bankruptcy

2892. A bank states that a customer owes it \$4,000 on a demand note which was

charged to the customer's account with accrued interest, and two weeks thereafter the customer was adjudged bankrupt. The bank asks whether it is obliged to turn over to the receiver said sum and interest. *Opinion:* Under the National Bankruptcy Act, where the depositor goes into bankruptcy the bank may retain his deposit in satisfaction of any debt due it from the depositor, or can set off an unmatured note against the deposit. In *re Meyer*, 1007 Fed. 86. *Ex parte Howard Nat. Bk.* 12 Fed. Cas. No. 6764. In *re Farnsworth*, 8 Fed. Cas. No. 4673. In *Habegger v. First Nat. Bank*, 103 N. W. (Minn.) 216, it was held that money deposited in the bank by an insolvent within four months of bankruptcy does not constitute a preference and the bank may set off the deposit upon a debt due from the bankrupt. In the instant case the bank would be entitled to apply the \$4,000 upon the customer's demand note and accrued interest and would not be required to turn the money back to the receiver where the customer was declared bankrupt within two weeks thereafter. (*Inquiry from Ill., May, 1918.*)

Set-off of demand note two months before threatened bankruptcy

2893. A bank held a demand note of its depositor, who had on deposit a balance smaller than the amount of the note. The bank applied the deposit in partial payment of the note, and two months later the depositor was threatened with bankruptcy. *Opinion:* The application of the customer's deposit to his demand note two months before it became likely that the depositor would be forced into bankruptcy was a valid set-off. The bank can retain such balance and prove its claim for the amount remaining due against the estate and recover its pro rata share. *Nat. Bankruptcy Act*, Secs. 60a, 68a. *N. Y. County Nat. Bk. v. Massey*, 192 U. S. 138. *Germania Sav., etc., Co. v. Loeb*, 188 Fed. 285. (*Inquiry from Iowa, Aug., 1912, Jl.*)

Deposit subsequent to bankruptcy representing assets existing at time of bankruptcy cannot be set off

2894. A bank states that one of its depositors has recently been adjudicated a bankrupt, since which time he made a deposit in his regular account, subject to check. It is claimed by the receiver's attorney that the bank has no right to apply the bankrupt's balance for the pur-

pose of reducing a demand note held by the bank. *Opinion:* Assuming that the deposit made by the bankrupt after he had been adjudicated such was not money earned by him or given to him since the bankruptcy, in which case it would not be part of the assets of the estate, but was the earnings, profit or incident of property which existed beforehand as assets of the estate, the receiver would be entitled to the money. (*Inquiry from Md., Oct., 1914.*)

Set-off of deposits not made in view of insolvency

2895. The deposit balance of a customer who has gone into bankruptcy may be set off against his indebtedness to the bank, whether due or not, provided his deposits have been received in usual course subject to check and not in view of his insolvency with an intention to make a preferential appropriation in reduction of his indebtedness. *U. S. Bankruptcy Act*, Secs. 68, 63. *N. Y. County Bk. v. Massey*, 192 U. S. 138. *Habegger v. First Nat. Bk.*, 94 Minn. 445. *Frank v. Mercantile Nat. Bk.*, 182 N. Y. 264. *Wiley v. Bunker Hill Nat. Bk.*, 183 Mass. 495. *Re Percy Ford Co.*, 199 Fed. 334. (*Inquiry from Mass., Feb., 1914, Jl.*)

Set-off of bankrupt's balance against note

2896. A firm advertises that it is going out of business. The firm seems to be solvent, but owes the bank on demand notes which were charged against the firm's account. It developed later that the firm will not be able to pay creditors in full. The bank asks whether it can be compelled to turn over to trustee or receiver in bankruptcy the moneys so credited to the account. *Opinion:* It seems, in the case stated, that the bank can hold the amount of the deposit covered by the notes that were charged against the firm's account and would not be compelled to turn same over to the trustee or receiver. The deposit balance of a customer who has gone into bankruptcy may be set off against his indebtedness to the bank, whether due or not, provided his deposits have been received in usual course subject to check, and not in view of his insolvency with an intention to make a preferential appropriation in reduction of his indebtedness. *New York County Nat. Bk. v. Massey*, 192 U. S. 138. *Habegger v. First Nat. Bk.*, 94 Minn. 455. *Frank v. Mercantile Nat. Bk.*, 182 N. Y. 264. *Studley v. Boylston Nat. Bk.*, 33 Sup. Ct. Rep. 806. (*Inquiry from Minn., Sept., 1915.*)

Set-off of bankrupt's note against deposit after adjudication

2897. A bank received a deposit for a bankrupt the day after he was adjudged a bankrupt, but before notice of such adjudication was received by the bank; in fact, before papers were received from the court by the local referee. A demand was made on the bank by the trustee in bankruptcy to turn over the funds to him, but the bank is holding them as a set-off against a note of the bankrupt held by it. Opinion is desired as to whether it can legally do this. *Opinion:* When a customer of a bank is adjudicated a bankrupt, his property at once vests in the trustee subsequently to be appointed, remaining meanwhile *in custodia legis*, and a deposit made to the credit of the bankrupt a day or two after adjudication cannot be applied as a set-off against the bankrupt's note owned by the bank. *Smith v. Berman*, (Ga.) 68 S. E. 1014. *White v. Schoerb*, 178 U. S. 542, 20 Sup. Ct. Rep. 1007. *Collier on Bankruptcy* (6th Ed.) p. 35. See also *Chapman v. Mills*, 241 Fed. 715. (*Inquiry from Mont., Feb., 1920, Jl.*)

Set-off of demand note against account of depositor approaching bankruptcy

2898. A bank made a loan to its customer on his personal note, crediting the customer with the money loaned. The customer has drawn 75 per cent. of the money by check and is about to go into bankruptcy. The note is past due. The bank cannot obtain a new note for the balance due, but has a verbal understanding with the customer that no more money will be drawn out. *Opinion:* The bank can apply the deposit against the customer's matured note, and in case of his bankruptcy can prove its claim against the estate for the balance. The circumstances of this case do not show that a preferential transfer was made. *Falkland v. Bk.*, 84 N. Y. 145. *N. Y. County Nat. Bk. v. Massey*, 192 U. S. 138. *Re George M. Hill Co.*, 130 Fed. 315. (*Inquiry from N. Y., Feb., 1914, Jl.*)

Set-off of demand note two days before depositor's failure

2899. A had \$2,000 on deposit with his bank, which owned his demand note of \$1,000. The bank applied the deposit in payment of the note and two days afterwards A failed. *Opinion:* The bank had the right to apply the bankrupt's deposit upon his demand note. Money deposited in a bank in the due course of business by an

insolvent within four months of the time he is adjudged a bankrupt is not a transfer of property amounting to a preference within the meaning of the Bankruptcy Act of 1898. *Nat. Bankruptcy Act*, Secs. 60a, 68a. *N. Y. County Nat. Bk. v. Massey*, 192 U. S. 138. *Habegger v. First Nat. Bk.*, 94 Minn. 445. *Frank v. Mercantile Nat. Bk.*, 182 N. Y. 264. (*Inquiry from Ohio, Sept., 1910, Jl.*)

Set-off against deposits made in usual course within four months of bankruptcy

2900. A bank held certain overdue notes of a lumber company. The company made several deposits subject to check which the bank applied to payment of the notes. The company then became bankrupt. The bank had been employed by the company as sales agent on salary. *Opinion:* The deposits, if made in the usual course, subject to check within four months of bankruptcy, may be set off against the bankrupt's notes, whether due or not, but it is otherwise if the bank deposits were made by the company in view of insolvency with an intent to give a preference. The Bankrupt Act provides that wages to salesmen are preferred payments, but it is very doubtful that the act would be construed to include the salary to an incorporated state bank which acted as a sales agent. See citations in opinion No. 2895 and *Studley v. Boylston Nat. Bk.*, 33 U. S. Sup. Ct. Rep. 806. *Nat. City Bk. v. Hotchkiss*, 34 U. S. Sup. Ct. Rep. 20. *Merchants, etc., Bk. v. Ernst*, 34 U. S. Sup. Ct. Rep. 22. *Continental, etc., Bk. v. Chicago Title, etc., Co.*, 199 Fed. 704. (*Inquiry from S. Dak., April, 1914, Jl.*)

Set-off against indorser's deposit*Set-off of demand note against indorser's account*

2901. A bank discounted for the indorser, who was its customer, a demand note. The indorser guaranteed the payment thereof. The note was dishonored by the maker. *Opinion:* The bank had the right to charge up the note when dishonored against the indorser's account, assuming his liability as indorser has been duly preserved. *Ticonic Bk. v. Johnson*, 21 Me. 426. *Mechanics, etc., Bk. v. Seitz*, 150 Pa. 632. *First Nat. Bk. v. Shreiner*, 110 Pa. 188. (*Inquiry from N. Y., April, 1913, Jl.*)

Right of set-off of past due notes against indorser

2902. A bank asks whether it has authority to charge notes which are past due

against the indorser's account. *Opinion:* The law gives such right where he has been duly charged with liability. This is on the principle of set-off. The indorser owes the bank on the note and the bank owes the indorser on deposit account. The law allows the bank to set off one against the other and call the balance the true debt. Of course, this principle does not apply when the note has not matured. (*Inquiry from Okla., Sept., 1920.*)

Right to charge indorser's account where liability fixed

2903. A bank has the right to charge a dishonored note to the indorser's account, provided the latter's liability is duly fixed by protest and notice. (*Inquiry from Pa., Sept., 1910, Jl.*)

Bank can set off note against indorser's account without first obtaining judgment

2904. A bank cashed for its depositor a check indorsed by him, payment of which was refused by the drawee bank. The depositor's liability as indorser was fixed by due demand and notice of dishonor. The bank wishes to set off his deposit against his indebtedness as indorser. *Opinion:* There existed a mutual debt between the bank and its depositor, which would entitle the bank to apply the indorser's deposit against his indebtedness as indorser. The bank would not be compelled to first sue and obtain judgment against the indorser who did not consent to such application. Tiffany on Banks (Ed. 1912), p. 71, 73. Shackamaxon Bk. v. Kinsler, 16 Weekly Notes Cas. (Pa.) 509. Ticonic Bk. v. Johnson, 21 Me. 426. (*Inquiry from Tenn., Nov., 1912, Jl.*)

Indorser's liability must be fixed to entitle set-off

2905. A bank cashed a note given by a party, payable at the bank, and indorsed by one of its customers. The note was not paid at maturity, and was charged to the account of the indorser. The item was not protested. The bank asks whether the note should have been protested and then charged to the account of the indorser. *Opinion:* Unless the liability of the indorser was preserved by notice of dishonor at maturity he would be discharged and the bank would have no right to charge the amount to his account. But where the bank has preserved his liability by notice of dishonor, whether

the note was protested or not, the bank would have a right to charge the amount to the account of the indorser. (*Inquiry from Wis., June, 1913.*)

2906. A bank takes and discounts notes of a customer, in due course of business, indorsed by him, with the understanding that should any of the notes become uncollectible he would take care of the same. The bank asks whether, if these notes should remain unpaid for a time after they became due, it would be acting contrary to banking rules if it charged the same to the customer's account. *Opinion:* The rule of law is that, when a note owned by the bank is unpaid at maturity, the bank has a right to set off the note against the maker's account; in other words, charge the note up against the account. The same right exists where the customer is an indorser on the note except that the liability of an indorser must be duly fixed by demand and notice. When the indorser's liability is fixed he becomes indebted to the bank for the amount and the bank can then charge the indebtedness against his account the same as the indebtedness of the maker of a note. (*Inquiry from Wis., Feb., 1914.*)

Set-off against maker's deposit in interest of indorser

Conflict of decision as to obligation to set off note against maker's account in the interest of indorsers

2907. Where a bank owns an indorsed note, and at maturity has sufficient funds of the maker on deposit to pay it, the decisions conflict as to whether failure to charge the note to the maker's account will release the indorser. If, however, note by its terms is payable at bank, under Negotiable Instruments Law, being an order to the bank to pay, indorser would be released by failure to charge up. But bank is under no obligation, in interest of indorser, to apply maker's deposit to note owned by it where funds insufficient at maturity, nor (according to majority of courts, a few contra) to apply sufficient subsequent deposits. Central Bk. v. Thein, 76 Hun (N. Y.) 571. Bk. v. Henninger, 105 Pa. 496. Pursifull v. Pineville Bk. Co., 97 Ky. 154. Camp v. First Nat. Bk., 44 Fla. 497. Davenport v. St. Bk. Co., 126 Ga. 136. Bk. v. Smith, 66 N. Y. 271. Bk. v. LeGrand, 103 Pa. 309. Bk. v. Shreiner, 110 Pa. 188. Bk. of Taylorsville v. Hardesty, (Ky.) 91 S. W. 729. (*Inquiry from N. C., March, 1911, Jl.*)

Omission to apply maker's deposit in partial satisfaction of note does not release indorsers

2908. At maturity of a note made by a corporation and bearing several indorsements, the maker had on deposit with the bank owning the note a sum less than the amount of the note. After maturity the corporation drew out its balance and failed, leaving the note unpaid. *Opinion:* A majority of the courts hold that the bank is not obliged to apply the maker's deposit towards a partial satisfaction of the note in the interest of the indorsers and sureties. The bank's omission to apply the partial deposit will not release the indorsers, although the maker subsequently draws out the balance and then fails. *Armstrong v. Warner*, 49 Ohio St. 376. (*Inquiry from Ohio, June, 1914, Jl.*)

Bank in Pennsylvania bound to apply maker's deposit in relief of indorser

2909. A bank owned an overdue note. The maker and indorser both carried accounts with the bank. The maker's deposit was not sufficient to meet the note at maturity. *Opinion:* The bank has a right to set off against the indorser's account; but where the maker's account is sufficient at maturity, the bank is bound to apply the maker's deposit in relief of the indorser, and failure so to do will discharge the indorser; if insufficient at the time, subsequent deposits will not raise that duty. *German Nat. Bk. v. Foreman*, 138 Pa. 474. *Com. Nat. Bk. v. Henninger*, 105 Pa. 496. *People's Bk. v. LeGrand*, 103 Pa. 309. *First Nat. Bk. v. Peltz*, 176 Pa. 513. *Mechanics Bk. v. Seitz*, 105 Pa. 632. *Bk. v. Ralston*, 3 Phila. (Pa.) 328. (*Inquiry from Pa., April, 1916, Jl.*)

Set-off where bank holds collateral

Rule in California where debt protected by collateral

2910. A bank holds a past due note of its customer in favor of the bank. The customer's account is sufficiently large to meet the indebtedness. *Opinion:* The bank has the right to apply the deposit to payment of the depositor's matured indebtedness, but in California, if the note is secured by a mortgage of real or personal property, the bank cannot apply the deposit until the security is exhausted. *McKean v. German-Amer. Sav. B.*, 118 Cal. 334. (*Inquiry from Cal., Dec., 1913, Jl.*)

2911. A bank in California owned a past due note for \$500, drawn by its depositor

who had a balance of \$1,000 with the bank. At maturity of the note the maker had refused to pay. *Opinion:* Under the law in California the bank has a right to apply the maker's deposit upon his unpaid note at maturity unless it holds security for the indebtedness. This right also extends to a note of the depositor purchased by the bank from an indorser. Where a note has been discounted for an indorser's benefit, his deposit may be applied in payment at the bank's option. *Morgrage v. Nat. Bk. of Cal.*, 24 Cal. App. 103. *Marble Co. v. Merchants Nat. Bk.*, 15 Cal. App. 347. *McKean v. German-Amer. Sav. Bk.*, 118 Cal. 340. *Blair v. Allen*, Fed. Cas. No. 1483. *Ticonic v. Johnson*, 21 Me. 426. *Bk. v. Ralston*, 3 Phila. (Pa.) 328. *Manitou v. Bk.* 37 Colo. 344. *Pollack v. Bk.*, 168 Mo. App. 368. (*Inquiry from Cal., April, 1916, Jl.*)

Set-off against deposit of debt secured by collateral

2912. A owes a bank \$1,000 secured by a chattel mortgage. The chattel mortgage is due and the bank starts foreclosure proceedings. Can money on deposit to the credit of the mortgagor in the bank be appropriated towards the payment of the note and mortgage, or must the chattel security be first exhausted? *Opinion:* In California, by statute, and in several other jurisdictions by judicial decision, where a bank has a mortgage security for a debt it must exhaust that security before it can apply in reduction of the debt any money belonging to the debtor on general deposit. (*Guarini v. Swiss American Bank*, 162 Cal. 181, 121 Pac. 726. *Bank v. McFerran*, 11 Ky. Law Rep. 183. *Furber v. Dane*, 203 Mass. 108, 89 N. E. 227. *Cal. Code. Civ. Proc.*, Sec. 726). And, under the California statute, the mortgage cannot be waived and an action brought on the indebtedness. (*Com. Bank v. Kershner*, 120 Cal. 495, 52 Pac. 848. *McKean v. German Sav. Bank*, 118 Cal. 334. *Barbieri v. Ramelli*, 84 Cal. 154. *Marble Co. v. Merchants Nat. Bank*, 15 Cal. App. 347.) (*Inquiry from Cal., Nov., 1919, Jl.*)

Bank in Michigan not compelled to first resort to collateral

2913. A bank has the right to apply the funds to the general credit of a customer toward payment of his demand note, held by the bank, although no demand for payment has been made. Where the demand note is "secured by sundry notes deposited as

collateral" the bank can set off the demand note against the general deposit, and is not compelled to first resort to such collateral. *Citizens Sav. Bk. v. Vaughan*, 115 Mich. 156. *Bolles, Banks*, Sec. 374. *Gibbons v. Hacox*, 105 Mich. 513. *Palmer v. Palmer*, 36 Mich. 487. *Beardsley v. Webber*, 104 Mich. 88. *Peninsular Sav. Bk. v. Hosie*, 112 Mich. 351. *Furber v. Dane*, 203 Mass. 108. *Marble v. Merchants Nat. Bk.* (Cal.) 115 Pac. 59. *Cockrill v. Joyce*, 62 Ark. 216. *Rush v. Citizens Nat. Bk.*, 114 Ark. 170. (*Inquiry from Mich., July, 1918, Jl.*)

Mississippi bank can set off deposit against indebtedness of depositor notwithstanding it holds collateral

2914. A bank held collateral security for two items of indebtedness of one of its depositors who had an account with the bank. The bank applied the deposit to one of the debts before it had matured, reducing the balance to \$90. A check for \$100 was presented after the debts had become due and was refused. *Opinion:* The bank had a right at any time to offset any matured indebtedness owing by the depositor against his credit without prior resort to any collateral security held by it and without first obtaining the consent of the depositor. A few states, (not Mississippi) require prior exhaustion of collateral. At the time the check for \$100 was presented, the bank owed the depositor \$90 and was justified in refusing payment. *Morgrage v. Nat. Bk.*, 24 Cal. App. 103. *Guernsey v. Marks*, 55 Ore. 323. *Patterson v. St. Bk.*, 55 Ind. App. 331. *Royal Tr. Co. v. Molsons Bk.*, 27 Ont. Law 441. *Eyrich v. Capital St. Bk.*, 67 Misc. (N. Y.) 60. *Cockrill v. Joyce*, 62 Ark. 216. (*Inquiry from Miss., June, 1916, Jl.*)

Debts must be mutual

General rule

2915. It is the general rule that a bank has a right to set off a debt from the depositor against his deposit, but the mutual debts thus set off must be in the same right; for example, it is generally held that a bank cannot apply a deposit of an individual to debt of a firm of which he is a member, or cannot apply deposit of trustee to debt of the trustee where his indebtedness to the bank is personal. *Tiffany on Banks* (Ed. 1912), p. 71. *Shackamaxon Bk. v. Kinsler*, 16 Weekly Notes Cas. (Pa.) 509. *Ticonic Bk. v. Johnson*, 21 Me. 426. (*Inquiry from Tenn., Nov., 1912, Jl.*)

Partnership note cannot be set off against partner's individual account

2916. The firm of Doe and Roe owes a bank \$165 upon its note. Doe has sold out his interest to Smith, and has deposited the purchase money in the bank to his individual credit. Later, as a result of a dispute, Doe agrees to refund part of the purchase money to Smith, and has given Smith an order on the bank for \$1,000. The bank has paid Smith all but \$165 thereof, claiming the right to set off the firm's note. *Opinion:* Under the law of North Carolina the bank cannot set off the firm's note against the partner's individual account. But in an action by Doe, the partner, or by Smith, the assignee, for the deposit, the bank can plead the firm's indebtedness by way of counterclaim, or can recover the same in an independent action against the partner. *N. C. Neg. Inst. Act*, Sec. 2338. *Hawes v. Blackwell*, 107 N. C. 196. *Adams v. Bk.*, 113 N. C. 332. (*Inquiry from N. C., Aug., 1913, Jl.*)

Partnership note cannot be set off against assignee's account

2917. A and B, co-partners, gave to a bank their note of \$300, due one day after date, and later assigned their business to C for the benefit of creditors. C ran the business as assignee and kept his account with the bank. The note not having been paid, the bank wants to charge it to the assignee's account. *Opinion:* The bank has the right to set off the partnership note against the deposit existing at the time of the assignment, but cannot exercise such right against the deposits of the assignee. *Com. Sav. Bk. v. Hornberger*, 140 Cal. 19. *Marble Co. v. Merchants Nat. Bk.*, 15 Cal. App. 347. *Cal. Code Civ. Proc.*, Sec. 726. *Guarini v. Swiss-Amer. Bk.*, 162 Cal. 141. *McKean v. German Sav. Bk.*, 118 Cal. 334. *Clark v. Northampton Nat. Bk.*, 160 Mass. 26. *Templeman v. Hutchings*, 24 Tex. Civ. App. 1. *State v. Corning Sav. Bk.*, (Iowa) 105 N. W. 159. *Wagner v. Citizens Bk.*, (Tenn.) 122 S. W. 245. (*Inquiry from Cal., Oct., 1916, Jl.*)

Set-off of customer's note against his account put in partnership name to defraud bank

2918. John Doe gives his note to the bank for borrowed money. He is insolvent and cannot pay his debts. Doe has obtained money on mortgage from a building and loan association on property solely belonging to him, which he has deposited in bank to the credit of Doe Brothers, to escape

paying the bank. Can bank charge the note at maturity to this account? *Opinion:* Ordinarily, of course, a bank cannot set off the note of an individual partner against the account of the firm; but in this case the deposit did not belong to the firm although put in their name, but belonged to John Doe individually. Assuming that John Doe is insolvent and cannot pay his debts, the money obtained on mortgage from the building and loan association is the personal property of Doe, its deposit in the bank to Doe Brothers, when Doe is insolvent, would be a fraud against the bank, and the bank would be allowed to set off its individual indebtedness. (*Inquiry from Ark., May, 1920.*)

Deposits impressed with trust character

2919. A note for \$2,700 secured by a chattel mortgage on cattle was given by A to B, who sold it to Bank C. A wrongfully sold the mortgaged cattle and deposited the proceeds with Bank D, part of which were attached by one of A's creditors and the balance was applied by the bank upon an indebtedness of A. B, knowing that the cattle had been disposed of, repurchased the note and the mortgage from Bank C and brought suit against Bank D to recover the proceeds as a trust fund. *Opinion:* According to the weight of authority (a few cases contra) Bank D was entitled to apply the deposit upon the indebtedness of A, and not obliged to account for it as a trust fund if it had no knowledge of its trust character. The bank, however, has no such right of set-off where it knows that a general deposit is impressed with a trust character. *Clemmer v. Drovers Nat. Bk.*, 157 Ill. 206. *Cady v. South Omaha Nat. Bk.*, 49 Neb. 125. *Smith v. Des Moines Nat. Bk.*, 107 Iowa 620. *Wilson v. Farmers First Nat. Bk.*, (Mo.) 162 S. W. 1047. *Globe Sav. Bk.*, v. *Nat. Bk.*, (Neb.) 89 N. W. 1030. *Meyers v. N. Y. County Nat. Bk.*, 36 N. Y. App. Div. 482. *McStay Supply Co. v. John S. Cook & Co.*, (Nev.) 132 Pac. 545. *Burnett v. First Nat. Bk.*, 38 Mich. 630. *Swift v. Williams*, 68 Md. 236. *Hurd's Rev. St. Ill.*, 1911, Ch. 95, Secs. 6, 7. (*Inquiry from Ill., July, 1915, Jl.*)

Set-off by bank of deposit known by bank to belong to another or held by depositor in trust

2920. A bought and paid for a load of mules and sent them to B who lived in an adjoining county. B was to sell the mules

and to receive as compensation one half the net profits. The mules were sold by B who took checks in payment thereof to his own order and deposited them in his bank to his personal account and sent A his check for the proceeds. The bank had knowledge that B was selling the mules for A on commission. A cashed the checks, but before they reached B's bank it had applied the deposit in payment of B's note and refused payment on the checks which were protested and returned to A. The bank asks whether B's bank was justified in taking such course. *Opinion:* B's bank acted improperly in applying B's deposit to his personal indebtedness because it had knowledge that the deposit did not belong to B, but to A. The case would be different if the bank had no knowledge that the funds deposited did not belong to the depositor and were held by him in trust. (*Inquiry from Ill., July, 1917.*)

Bank's right of set-off against proceeds of live-stock draft

2921. A shipped live stock and deposited a draft for the amount involved with his bank for collection. Subsequently A drew against the amount deposited, but the bank, having applied the amount to A's overdraft, refused to pay beyond the balance. A afterwards went into bankruptcy and the holders of A's checks are endeavoring to recover from the bank the amount of credit which was applied on the overdraft. Advice is asked whether an action will lie against the bank. *Opinion:* The Negotiable Instruments Act expressly provides that "a check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank and the bank is not liable to the holder unless and until it accepts or certifies the check." Even if the set-off and the refusal of the bank to pay the checks were wrongful, on the assumption that the bank knew that the live stock belonged to other persons, it is doubtful if the holders of A's checks would have a right of action against the bank. (*Inquiry from Ill., Aug., 1919.*)

Set-off by bank of claim as trustee for bondholders of defaulting corporation against latter's checking account

2922. A bank inquires whether it would be acting without authority or right to appropriate a checking account of a corporation towards payment of money due by the corporation to the bank as trustee. *Opinion:* The right of a bank to apply a deposit

to the payment of a debt due and payable from the depositor to the bank only exists where each occupies the relation of debtor and creditor and where the demands owing by each to the other are in the same capacity and right. *Harrison v. Harrison*, 20 N. E. (Ind.) 746. *Hodgin v. Peo. Nat. Bk.*, 34 S. E. (N. C.) 709. In the present case the bank owes a corporation upon checking account but the corporation is not indebted to the bank upon the bank's own claim but it has defaulted in certain payments, which matures the principal of a debt and makes same due to the bank as trustee for bondholders, so that it became the bank's duty to collect the principal and interest. In such a case it seems clear that the right of set-off or application of the deposit does not exist, but that the bank, as trustee, must proceed at law or equity to enforce the rights of bondholders according to the deed of trust. See *Nolting v. Nat. Bk.*, 37 S. E. (Va.) 804. *Johnson v. Payne & Williams Bank*, 56 Mo. App. 257. *Wagner v. Citizens Bank & Trust Co.*, 122 S. W. (Tenn.) 245. (*Inquiry from Fla., Aug., 1919.*)

Set-off of surety's deposit against note of principal and surety

2923. B is surety on a note for A. B has on deposit in the bank money represented by certificates of deposit drawn in the usual form, but marked "Non-negotiable." A defaulted on his note, and the bank refuses to pay the certificates, and thereafter suit is brought against A and B jointly. The question is whether the bank has the right of set-off of the note against the certificates. *Opinion:* It is doubtful that the bank has a right to set off its indebtedness on the certificates of deposit against B's liability on the note. B is not principal maker of the note, but the surety, and it has been held in several cases that a bank cannot, without the depositor's consent, apply a deposit against a note on which he is surety. See *Harrison v. Harrison*, 118 Ind. 179. *New Farmers' Bank's Trustee v. Young*, 100 Ky. 683. (*Inquiry from N. Y., Oct., 1915.*)

Where depositor has two accounts

Overdraft on commercial account can be set off against savings account

2924. A bank which carries both a commercial and a savings account submits for consideration four check forms as follows: Check A is an ordinary form of bank check, but underneath the name of the bank are the words "savings department," and the

check contains the notation, "Book must accompany this check, otherwise it will not be honored unless entry is made in book, or book is left for entry of check when presented." Check B is the ordinary form of bank check. Check C is the same form with the words "Commercial Department" under the name of the bank. Check D is the same as C with the notation, "This check is to be paid from funds on deposit in commercial department only." The bank uses forms A and B, but suggests use of form C to guard against customer who overdraws his commercial account, and to avoid getting the bank into trouble in declining payment for insufficient funds, even though the depositor has sufficient funds in his savings account. The bank asks desirability of using forms C or D. *Opinion:* Where a bank carries both a commercial and savings account and pays an overdraft on the commercial account, it has the right to set off the check against the customer's savings account, but where funds in the savings account are payable under special agreement, requiring production of pass-book, bank is not obliged to pay overdraft on commercial account and charge same to sufficient funds in savings account. The adoption of form C would serve the useful purpose of training customer that, in withdrawal of funds from either commercial or savings account, a special form is required. Form C is more desirable than form D, for the reason that the notation on the latter states a condition which may affect its negotiability. *Lippitt v. Thames Loan & Tr. Co.*, (Conn.) 90 Atl. 369. (*Inquiry from Ill., Sept., 1918, Jl.*)

Set-off against savings account of overdraft on checking account

2925. A bank carries two accounts for a customer, a savings account and a checking account, and the customer is indebted to the bank because of overdraft upon the checking account. The bank asks whether it has the right to apply sufficient of the amount to the customer's credit in the savings account to liquidate the debt. *Opinion:* The relation between the bank and depositor as to the savings account is that of debtor and creditor equally as in the case of a checking account. The savings account is not a trust fund but a debt due by the bank. In *Hiller v. Bank of Columbia*, 75 S. E. 789, the court said: "When a depositor, having two accounts in his own right, kept separately merely for his own convenience, draws on one of them beyond

the amount to his credit, without any arrangement with the bank that he should do so, the bank is justified in the inference that he intends the check to be protected by the other account. Certainly it would be most unreasonable that the bank should be required, under such conditions, to pay to the depositor the credit on one account without deducting the debit on the other." In the case stated, there being mutual debts, although carried in different accounts, the bank has a right of set-off. (*Inquiry from S. C., May, 1918.*)

Set-off of overdraft where depositor carries more than one account

2926. A depositor besides his ordinary account in a bank carried two other accounts, one being marked "special" and the other "agent." The bank did not know whether the depositor owned the funds in said two accounts or whether he held them in a fiduciary capacity. The depositor became indebted to the bank, created by an overdraft on his personal account, and the bank seeks to apply the balance in either of the other accounts in settlement. *Opinion:* The bank can set off the overdraft upon the accounts styled "special" and "agent," provided such accounts are owned by the depositor in his own right and are thus designated merely for convenience. But, if the accounts so marked are held as agent or trustee for another, they cannot (according to the weight of authority) be applied upon the depositor's individual indebtedness, and the bank is put upon inquiry by the form of the account so styled. *Jordan v. Nat. Shoe, etc., Bk., 74 N. Y. 467. Falkland v. St. Nicholas Bk., 84 N. Y. 145. Ford v. Thornton, 30 Va. 695. Hiller v. Bk. of Columbia, (S. C.) 75 S. E. 789. Laubach v. Leibert, 87 Pa. 55. Comfort v. Patterson, 2 Lea (Tenn.) 670. Nat. Bk. v. Insurance Co., 104 U. S. 54. Burnett v. First Nat. Bk., 38 Mich. 630. Gerard v. McCormick, 130 N. Y. 261. Squire v. Ordermann, 194 N. Y. 394. Prosser v. First Nat. Bk., (Tex.) 134 S. W. 781. Silsbee St. Bk. v. French Market Grocery Co., (Tex.) 132 S. W. 465. (Inquiry from N. Y., Jan., 1917, Jl.)*

Opinion in New York case that, unless depositor consents, savings account cannot be charged with overdraft on commercial account

2927. Where a depositor carries both a commercial and a savings account with a bank and is indebted to the bank upon matured

notes, and the funds in the commercial account are insufficient, a New York court has held the bank has no right, without the depositor's consent, to charge the notes to the depositor's savings account. The opinion in this case, however, is merely obiter and would seem contrary to general principles of set-off. *Heinrich v. First Nat. Bk., 145 N. Y. S. 342, 149 N. Y. S. 1086. Tufts v. People's Bk., 59 N. J. L. 380. Hiller v. Bk. of Columbia, (S. C.) 75 S. E. 789. (Inquiry from N. J., Dec., 1918, Jl.)*

Set-off where depositor carries both checking and savings account

2928. A depositor carries both a checking and a savings account with a bank and is indebted to the bank upon a matured loan in excess of the checking but within the savings account. *Opinion:* The bank can charge the indebtedness to the savings account. *Callahan v. Bk. of Anderson, 69 S. C. 374. Hiller v. Bk. of Columbia, (S. C.) 75 S. E. 789. Hiller v. Bk. of Columbia (S. C.) 79 S. E. 899. (Inquiry from S. C., Dec., 1914, Jl.)*

Where depositor deceased

Set-off of matured debt of decedent

2929. The administrator of an estate draws a check against the account of the deceased, which the bank refuses to pay, claiming that it is entitled to set off against the account a debt due at the time of depositor's death. *Opinion:* The bank has a right to set off against the account of the depositor a matured debt owing by him at the time of his death, and to refuse to pay the check of the administrator upon the deposit so set off. *Rev. St. Mo., 1899, Sec. 4489. Padgett v. Bk. of Mountain View, (Mo.) 125 S. W. 219. (Inquiry from Mo., May, 1917, Jl.)*

Set-off of past due notes against decedent's account

2930. A bank held two past due unsecured notes of a customer who carried a balance with the bank subject to check. The customer died. *Opinion:* Upon the death of the depositor the bank had the right to set off the past due notes against his account. The decisions conflict as to the right of set-off where the notes have not matured. In Montana such right is denied. *Little v. City Nat. Bk., (Ky.) 74 S. W. 699. Gardner v. First Nat. Bk., 10 Mont. 149. (Inquiry from Mont., March, 1914, Jl.)*

2931. The maker of a note died, leaving a balance to his checking account. The bank seeks to know whether it has the right of set-off before returning the balance to the administrator. *Opinion:* A bank owning the note of a customer who has deceased has the right, if the note has matured, to apply the maker's deposit upon the note and in North Carolina, if the estate is insolvent, may apply such deposit, even though the note is not due. If the deposit is not sufficient to meet the note, the balance would be a debt payable by the administrator. The administrator in declaring a dividend would only be required to base same upon the balance due after the deposit was set off. *Moore v. Greenville Bk., etc., Co., (N. C. 1917), 91 S. E. 793. Wagner v. Citizens Bk., 122 Tenn. 164. Lumber Co. v. Tr. Co., 93 Wash. 563. Lutz v. Williams, (W. Va. 1917) 91 S. E. 460. Hodgins v. People's Nat. Bk., 124 N. C. 540 (overruled on another point in 125 N. C. 503). St. Bk. v. Armstrong, 15 N. C. 519. (Inquiry from N. C., March, 1919, Jl.)*

2932. When a depositor dies, indebted to the bank, the latter has the right to apply the balance to his credit at the time of his death upon a matured indebtedness of the depositor, and is not accountable to the administrator therefor, except for the excess when the balance exceeds the indebtedness. *St. Bk. v. Armstrong, 4 Dev. (N. C.) 519. Little v. City Nat. Bk., 115 Ky. 629, 74 S. W. 699. Padgett v. Bk. of Mountain View, (Mo.) 129 S. W. 219. (Inquiry from Wyo., Nov., 1912, Jl.)*

Set-off of unmatured judgment note against decedent's account

2933. A bank loans \$100 receiving therefor a judgment note for that amount. The maker of the note subsequently deposits \$600 in a savings account and several days later dies, the note having one month to run. The bank seeks to set off the unmatured indebtedness against the account. *Opinion:* Bank in Pennsylvania has the right to set off unmatured note against savings account of solvent decedent if note matures prior to commencement of suit for deposit; but set-off not allowed if estate of decedent insolvent. *Bosler v. Exch. Bk., 4 Barr. (Pa.) 32. Appeal of Farmers, etc., Bk., 48 Pa. 57. Blum Bros. v. Girard Nat. Bk., (Pa.) 93 Atl. 942. Com. v. Tradesmen Tr. Co., 250 Pa. 372. (Inquiry from Pa., March, 1917, Jl.)*

Right of set-off of unmatured note against decedent's insolvent estate denied in Pennsylvania

2934. A customer was indebted to a bank on a note which became due several days after he died. The bank held sufficient funds of the decedent to apply on the note. *Opinion:* In Pennsylvania the bank may charge the note to the account of the maker, though the note does not become due for several days after his decease, provided his estate is solvent, but such right of set-off does not exist if the estate is insolvent. *Bosler v. Exch. Bk., 4 Barr. (Pa.) 32. Appeal of Farmers, etc., Bk., 48 Pa. 57. (Inquiry from Pa., Jan., 1914, Jl.)*

Set-off of A's (decedent's) deposit against note of A and B

2935. A bank says it is carrying a note which will fall due in a day. One of the makers died a month previous leaving a checking account balance ample to cover the note. There was another signer to the note who refuses to pay, stating that he paid amount of note to the first signer before his death. The deceased maker really signed for accommodation of the other. The bank asks if it would be proper to charge the note to account. *Opinion:* The general rule is that to authorize a set-off the debt must be mutual—it must mutually exist between the same parties and in the same capacity or right. For example, many courts have held that a bank cannot set off the note of a partnership against the individual deposit of one of the partners, but a few courts have held that such right of set-off exists. In a recent case in Arkansas where A and B executed to a bank a note, it was held that the bank, on maturity of the note, was entitled to apply A's general deposit to its payment and that it was immaterial that the bank had no demand or set-off against the other joint maker. *Rush v. Citizens Nat. Bk., 169 S. W. (Ark.) 77.* There seem to be no decisions in Wyoming on this question and, in the absence thereof, it is doubtful what the bank's rights are, but it might be advisable to charge the note to the account on the claim that the bank had a lien on the deposit and a right of set-off. *(Inquiry from Wyo., Feb., 1919.)*

Set-off against check holder

Drawee cannot deduct debt of check holder before payment

2936. The payee of a check who presents it to a bank owes the bank on the past due

note, the amount being less than the amount of the check. The bank in cashing the check desires to deduct the amount of the indebtedness and deliver him the balance. *Opinion:* Drawee bank, upon presentment of a check by the payee indebted to it, cannot deduct the amount of indebtedness from the amount of the check, paying only the balance to the holder. In so doing it would be violating its contract with the drawer, namely, to pay his checks according to his order and direction. *Brown v. Leeke*, 43 Ill. 497. *Percival v. Strathman*, 112 Iowa, 747. (*Inquiry from Ill., Oct., 1917, Jl.*)

Bank cannot set off debt of presenting check holder

2937. A bank holds a sale note signed by three persons, which is past due. The bank frequently cashes checks for the first signer, although he has no account. The bank asks whether the amount due the bank on the note may be taken from the amount due him on his check and give him balance in cash. *Opinion:* A bank, upon presentment of check by the payee who is indebted to it, cannot deduct the amount of the check, paying only the balance to the holder. If it did so, it would be violating its contract with the drawer, i. e., to pay his checks according to his order and direction. If the check holder had an account with the bank, and the note was his individual note, past due, the account could be charged with the amount of the note. But in this case the note is signed by three persons, and it has been held that a bank has no right to appropriate to the payment of a joint and several note, made to it by A as principal and B and C as sureties, funds on deposit belonging to A alone. *Dawson v. Real Estate Bk.*, 5 Ark., 283. (*Inquiry from Ohio, April, 1920.*)

Depositor's right of set-off

Depositor can set off deposit in insolvent bank against his unmatured note

2938. Depositor in insolvent bank has right to set off his deposit against his indebtedness to the bank, whether due or not. *Steelman v. Atchley*, (Ark.) 135 S. W. 902. *Kirby's Ark. Dig.*, Secs. 6098, 6101. (*Inquiry from Ark., Aug., 1913, Jl.*)

2939. A bank held a note for \$5,000 of its depositor who had on deposit \$5,000. The bank failed before the note matured. *Opinion:* The depositor has the right to set off the deposit standing to his credit at time of insolvency against his liability on the

note. *Thompson v. Union Tr. Co.*, 130 Mich. 508. In re Van Allen, 37 Barb. (N. Y.) 225. *Jack v. Klepser*, 196 Pa. 699. *Colton v. Dover, etc.*, Ass'n, 90 Md. 85. (*Inquiry from Mass., Jan., 1913, Jl.*)

2940. A depositor in an insolvent bank, who is indebted to the bank as maker upon a note, has a right to set off his deposit against such indebtedness, whether the note is due or not yet matured. Where the depositor is an indorser, some courts hold the same right of set-off exists, but others that the indorser cannot set off his deposit unless the maker is insolvent. *Scott v. Armstrong*, 146 U. S. 499. *McCagg v. Woodman*, 28 Ill. 84. *Colton v. Drovers, etc.*, Ass'n, 90 Md. 85. *Thompson v. Union Tr. Co.*, 130 Mich. 508. *Clute v. Warner*, 8 N. Y. App. Div. 40. *Jack v. Klepser*, 196 Pa. 187. *Jones v. Piening*, 85 Wis. 264. *Yardley v. Clothier*, 49 Fed. 337. *Davis v. Industrial Mfg. Co.*, 114 N. C. 321. *Borough Bk. v. Mulqueen*, 125 N. Y. S. 1034. (*Inquiry from Wash., Dec., 1914, Jl.*)

Depositor can set off note but not stockholder's liability

2941. A depositor has (1) a right to set off his deposit in an insolvent national bank against his liability on a note held by the bank, but (2) no right to set off his deposit against his double liability as a stockholder. *Williams v. Rose*, 218 Fed. 898. (*Inquiry from Ark., Sept., 1916, Jl.*)

Depositor's right of set-off against insolvent bank not a discrimination against other depositors

2942. A is a depositor in a bank which failed. A owed \$500 on a note to the bank and carried a balance of \$500. B and others are depositors but not indebted to the bank. B asks if it is not discriminating against him in favor of A to allow A to set off his indebtedness. *Opinion:* A has a right to set off his balance against his indebtedness to the bank, whether due or not. The exercise of such right is not discriminating against B or the other depositors. *Jack v. Klepser*, 196 Pa. 699. (*Inquiry from Pa., Aug., 1913, Jl.*)

Indorser's right to set off deposit against note held by insolvent bank

2943. A bank has a deposit of \$5,000 subject to check in B Bank, and owes B Bank a note of \$10,000. B Bank fails. A Bank desires to pay B Bank \$5,000 and set

off the other \$5,000. *Opinion:* It is generally held by the courts that when a bank becomes insolvent, and holds the note of a depositor who is the maker, whether due or not due, and also has a balance to the credit of the depositor, the latter has the right to set off the deposit against the note. But where the depositor is indorser on note of a solvent maker some cases hold that the right of set-off does not exist. *Thompson v. Union Tr. Co.*, 130 Mich. 508. *Jack v. Klepser*, 196 Pa. 699. *Steelman v. Atchley*, (Ark.) 135 S. W. 902. *New Farmers Bk. v. Young*, 100 Ky. 683, 39 S. W. 46. (*Inquiry from Ky., Jan., 1915, Jl.*)

Difference between right of set-off where depositor maker and where indorser of note of a solvent maker

2944. A bank holds a matured note of a depositor for an amount larger than his account in said bank. The bank becomes insolvent. *Opinion:* The depositor may have his deposit set off against his note, whether matured or unmatured at the time of the bank's insolvency, whether state or national. This right of set-off could be exercised by the depositor tendering to the receiver of the bank the difference between the amount of his balance and the amount due upon his note. But it is questionable whether a depositor who has indorsed such a note can have it set off against his deposit in the insolvent bank unless the maker is insolvent. Where, however, the depositor discounted his wife's note with his indorsement, and is the accommodated party and the real debtor, he is entitled to a set-off on equitable ground. *Waggoner v. Patterson Gas Light Co.*, 23 N. J. L. 283. *Scott v. Armstrong*, 146 U. S. 499. *In re Hatch*, 155 N. Y. 401. *Davis v. Industrial Mfg. Co.*, 114 N. C. 321. *Borough Bk. v. Mulqueen*, 125 N. Y. S. 1034. *Building, etc., Co. v. Northern Bk.*, (N. Y.) 99 N. E. 1044. (*Inquiry from N. J., Jan., 1914, Jl.*)

Set-off by depositor of his share of partnership deposit in insolvent bank

2945. A bank asks whether A who owes a note to an insolvent national bank can have one half of the partnership deposit account of A & B applied on the note. *Opinion:* The general rule is that a partnership debt cannot be set off against an individual debt because

the claims are not in the same right. *Jones v. Blair*, 57 Ala. 457. Apparently the only North Carolina cases upon that subject are *Hodgin v. Bank*, 124 N. C. 540, holding that a partnership is not liable for the debts of its members and that a bank has no right to apply deposits standing in the name of the firm in payment of the individual indebtedness of any of its members. See also *Adams v. First Nat. Bank*, 113 N. C. 332. But see *Montz v. Morris*, 196 Pa. St. 392, and *Sec. Nat. Bk. v. Hemingray*, 34 Ohio St. 381, holding that, where one who is indebted to a firm is insolvent, in an action by him against the individual partner of such firm, his indebtedness to the partnership may be set off with the assent of the other partners. It is possible, therefore, that the insolvency of the bank might create a special equity which would entitle A to have his share of the deposit indebtedness of the bank to A and B applied upon his note although there are no North Carolina cases to that effect and the general rule is that partnership and individual debts, not being in the same right, are not subject to set-off. (*Inquiry from N. C., June, 1916.*)

Set-off by depositor of his note to insolvent bank against indorsee for value

2946. John Doe borrowed \$2,000 on his note from the State Bank of P., which occasionally borrowed upon its bills receivable, and listed this note among others as additional capital. Before maturity of the bills receivable the bank suspended payment. The correspondent bank demands payment of the note from John Doe who refuses to pay more than \$1,000, claiming a set-off of \$1,000 which represents his balance in said State Bank. Has he the right of set-off? *Opinion:* If the note of John Doe was held by the State Bank of P. at the time of its failure, John Doe would have a right to set off his \$1,000 balance against the amount due on the note. But the note having been transferred for value before maturity to the correspondent of that bank as collateral for a loan, such bank would be a holder in due course to the extent of its lien and would have the right to enforce the note against John Doe free from his claim of set-off. See, for example, *Balbach v. Frelinghuysen*, 15 Fed. 675. (*Inquiry from Iowa, Nov., 1920.*)

SALES

Conditional sale of buggy—Necessity of record

2947. A contract note is submitted, the body of which is as follows: "Received of F. B. R., under contract of the sale thereof, one Top Buggy, Reliance make. I do hereby give security on one Gray Mare, twelve years of age, practically sound, weight 1200 pounds. For value received I do hereby agree to pay the sum of \$80.00, namely, \$—— down, and the balance in installments of \$25.00, payable as follows: \$25.00 on July 27, 1914, \$55.00 Oct. 27, 1914; until the whole is paid with interest at 7%. The express condition of the purchase and sale of said buggy is such that the title, ownership or right of possession does not pass * * * until this note and interest are paid in full. Neither shall the property be * * * moved away * * * and said F. B. R. has power to declare this note due and take possession at any time he may deem himself insecure * * * without process of law * * * and in case he shall take such article said F. B. R. shall not be liable to refund any moneys * * * but he shall be deemed paid rent for same." An opinion is requested as to validity of this form of note, and whether same should be recorded. *Opinion:* Under the note or contract submitted, if the maker defaulted in payment, R. could retake the buggy, as title would still remain in him until payment of the price, and if the maker should have sold the buggy, this would not have foreclosed R.'s rights, as the property was still his. Concerning the gray mare, it does not seem that the contract gives R. the right, in case of default of payment, to enter the premises and take the mare. There appears to be no statute in Michigan requiring the recording of such conditional sales; it appearing that the instrument would, if presented to the courts, be held to evidence a conditional sale. (*Inquiry from Mich., July, 1914.*)

Sale of cow—Includes unborn calf not known to seller but known to buyer

2948. A bank presents this case: A sold to B a cow that was carrying a calf, which latter fact was known to B but not to A. Can A recover possession of the calf, and if so, would B be entitled to compensation for the time the calf was with and sucked the cow? *Opinion:* B would be

entitled to the calf, as the sale of the cow would include the unborn calf. The general rule is that, in contracts of sale, disclosure of information is not ordinarily incumbent on the buyer, and the mere failure to disclose facts which would enhance the price, or other material facts, does not constitute fraud. *Hayner v. McIlwain*, 53 Ill. App. 652. (*Inquiry from Mo., June, 1920.*)

Unrecorded bill of sale—Alabama

2949. Inquiry is made as to the value of unrecorded bills of sale as collateral on loans. *Opinion:* The Civil Code of Alabama, Sec. 3376, provides that conveyances of personal property to secure debts or to provide indemnity must be recorded in the county in which the grantor resides and also in the county where the property is at the date of the conveyance unless, etc.,—then follows provision where the property is removed from one county to another. Assuming that a bill of sale is a conveyance of personal property, this would seem to require record of same; but in the case of *Stuart v. Michum*, 135 Ala. 546, the court, after citing this section, says: "We confess that we are unable to see any analogy between a bill of sale and a mortgage; besides, the law does not require that a bill of sale should be recorded." If the Alabama law does not require the record of a bill of sale, then it would seem that an unrecorded bill of sale would be as valuable as collateral as one which has been recorded. Yet this conclusion is hardly satisfactory and it would be the safer practice, if a bill of sale is taken as security for a loan, to have same recorded. (*Inquiry from Ala., Nov., 1919.*)

Bulk sales law. Notice to creditor bank where sale of goods by partner (debtor to bank) to co-partner

2950. A bank inquires whether it, as a creditor of A, is entitled to five days' notice under the Bulk Sales Law, where A sells his business to his partner B. *Opinion:* It is the duty of the purchaser to give notice to the bank of the sale, and the failure so to do makes the sale voidable in proper proceedings. See Pa. Laws 1905, Sec. 62. *Wilson v. Edwards*, 32 Pa. Super. Ct., 295. *Schnucker v. Lawler*, 38 Pa. Super. Ct. 578. (*Inquiry from Pa., March, 1919.*)

Purchaser not obliged to accept nor liable for damaged goods

2951. Upon receipt of a set of books and a bookcase, the purchaser found that the case was damaged and that the pages of the index volume were not arranged in numerical order, which created annoyance and confusion in the use of the index. Whereupon the purchaser returned the books and the case. Is the purchaser entitled to a return of partial payment made? Can the seller enforce payment? What effect has an offer to deliver another set of books and another bookcase, coupled with a refusal of the offer by the buyer? *Opinion:* The purchaser can recover the partial payment made and is not required to pay for the goods. It was an implied condition of the seller's contract that the bookcase should be undamaged,

and that the books should be in consecutive order of paging. There was a failure to comply with this condition. The purchaser was not obliged to find this out prior to delivery of the purchase to him by the carrier, as presumably there was no right of inspection by opening the box and examining the contents before delivery. Since the defects were discovered within a reasonable time, the purchaser could cancel the contract. The offer to deliver another set of books and a new bookcase required the consent of the purchaser in order to change the legal status of the parties. The general rule is that a seller who has delivered imperfect goods cannot prevent a cancellation of the contract by an offer to substitute goods conforming to the contract. (*Inquiry from Md., Aug., 1914.*)

SECURITIES—PUBLIC AND MUNICIPAL**Warrant drawn for municipal debt not negotiable**

2952. The general rule is that warrants, drafts or orders drawn for payment of municipal debts by one public office on another are not negotiable instruments, and this class of instruments includes school district warrants. *Fox v. Shipman*, 19 Mich. 218. *School Dist. v. Stough*, 4 Neb. 357. *State v. Huff*, 63 Mo. 288. (*Inquiry from N. M., Jan., 1914, Jl.*)

City warrants not negotiable but indorser warrants validity

2953. Does a person who puts his name on the back of a city warrant without any qualification assume any responsibility or does he merely transfer his rights, without assuming any obligation? *Opinion:* City warrants are not negotiable instruments so as to preclude defenses available against the original payee, even in the hands of a bona fide purchaser, and this is so without any regard to any recitals in the warrant. The word *negotiable* can be applied to them only in the broad sense as including any written security which can be transferred so as to vest the legal title. *McQuillan on Municipal Corporations*. In the case of *West Phila. Title & T. Co. v. City of Olympia*, 19 Wash. 150, 52 Pac. 1015, the Washington Supreme Court held that city warrants are not within the principles controlling the transfer of negotiable paper; that an indorsee had no better right than the original payee. See, also, *Wall v. County of Monroe*, 103 U. S.

74. *Mayer v. Ray*, 19 Wall (U. S.) 468. *People v. Johnson*, 100 Ill. 544. *Miner v. Vedder*, 66 Mich. 101. *Shakspear v. Smith*, 77 Cal. 638. *People v. Stupp*, 49 Hun (N. Y.) In some jurisdictions (Washington included) the liability of the indorser of a non-negotiable instrument is simply that of an assignor of a chose in action, which is as follows: In the absence of an express warranty, the assignor of a chose in action, for a valuable consideration, impliedly warrants to the assignee that the same is a valid, subsisting obligation in his favor against the debtor to the extent to which it purports to be such. *Galbreath v. Wallrich*, 45 Colo. 537. *Thompson v. First St. Bk.* 102 Ga. 696. *Eaton v. Mellus*, 7 Gray (Mass.) 566. *Miners' Bank v. Burrell*, 164 Mo. App. 690. *Sanders v. Aldrich*, 25 Barb. (N. Y.) 63. *Flynn v. Allen*, 57 Pa. St. 482. *Giblin v. North Wis. L. Co.*, 131 Wis. 261. (*Inquiry from Wash., Oct., 1917.*)

Non-negotiability of township order

2954. A township order is in the form of a negotiable promissory note, signed by three supervisors, promising to pay on or before a specified date to the order of a named payee at a designated bank a certain amount for culvert pipe, with interest. Is the order negotiable? *Opinion:* The order is negotiable in form, that is, if it were signed by an individual or a private corporation through its officers it would be negotiable. However, the courts generally hold such orders non-negotiable on the ground that

there is no implied authority in the township officers to execute negotiable instruments. Under this rule, the purchaser of the instrument takes it subject to equities. Some cases hold that where the instrument is in negotiable form and the township authorities have been empowered by law to issue such instruments, they are negotiable, but the authorities are not in accord. (*Inquiry from Pa., Jan., 1915.*)

Liability of indorser of non-negotiable state warrants

2955. (1) What rights does a holder by indorsement of non-negotiable instruments, such as state warrants acquire against the maker and the previous indorsers? (2) Does an indorsement "without recourse" relieve an indorser? (3) Can the payor of the warrant compel refund from a holder for value of warrant regularly issued on a fraudulent claim? *Opinion:* (1) A purchaser of such a non-negotiable instrument takes subject to defenses. *People v. Johnson*, 100 Ill. 544. *Miner v. Vetter*, 66 Mich. 101. *People v. Supervisors*, 11 Cal. 170. There is a conflict of authority as to the liability of an indorser of a non-negotiable instrument. In a few cases it is held that the liability is the same as that of the indorser of a negotiable note. *First Nat. Bank v. Falkenhan*, 94 Cal. 141. But the majority of courts hold that the indorser simply transfers the title, without assuming liability to the indorsee, and this it seems, is the rule in the state of Washington. See *Thomson v. Koch*, 113 Pac. 1110. (2) An indorser without recourse of a negotiable note can be held upon an implied warranty that it is valid and that there is no fraud in the consideration (*Drennan v. Dunn*, 124 Ill. 175. *Challis v. McCrum*, 22 Kan. 157), and it would seem that equally the indorser or assignor of a non-negotiable instrument might be held as implied warrantor. See *Keller v. Hicks*, 22 Cal. 460, holding that the indorser of a non-negotiable warrant is liable to refund the consideration where the instrument is not valid and legal according to its purport. (3) The holder of the instrument would be under an implied contract to refund the money received without right to retain. (*Inquiry from Wash., June, 1916.*)

Collection of municipal bond payable at bank

2956. A savings bank in New York inquires whether there is necessity for the sale and assignment of a registered municipal bond issued by a city in Ohio as a condition

of obtaining payment. It seems the bond is made payable to the inquiring bank at a national bank in New York and on the back provides a small space for a sale and assignment in the event the owner desires to sell and assign. The savings bank presented the bond by messenger with a letter from its treasurer, requesting payment by check to the order of the savings bank; with copy of its by-laws showing authority in the treasurer to collect. Payment was refused because (1) signature of treasurer was unknown; (2) the bond must be "sold and assigned" by a resolution of the board of trustees in order to collect it. *Opinion:* Where the owner does not desire to sell but only to collect, the requirement that he must first execute the "sale and assignment" on the back of the bond would seem absurd. There is no necessity to sell and assign a registered bond when it is presented by the payee for payment. Legally speaking, the payor is not obliged to pay by check, but has the strict legal right to pay in cash and could require satisfactory evidence of authority to the person presenting the bond. But business is not done at the present day on technicalities, and it seems that the method of presentment adopted by the savings bank, with attached copy of the by-laws, would be all sufficient. (*Inquiry from N. Y., Jan., 1920.*)

Interest on school district warrants

2957. Do school district warrants drawn on the sheriff, which are not paid because of insufficient funds, draw interest from the date that they are indorsed by the sheriff as "presented for payment" until actual payment, in view of the ruling by the tax commissioner of West Virginia that they do not draw interest? *Opinion:* The West Virginia Code of 1906 (Chap. 39, Sec. 1250) expressly provides for interest on all county orders or warrants when not paid on presentation after maturity, and the supplement of 1909 (Chap. 45, Sec. 1707) specifically provides for interest on school warrants, where the sheriff fails to pay the same on presentation. The authority on which the state tax commissioner bases his ruling that the warrants in question do not draw interest is not clear. An examination of the West Virginia code under the caption of duties and powers of the tax commissioner fails to disclose any authority or jurisdiction conferred on him to pass upon the question of interest on school warrants in any manner, shape or form. (*Inquiry from W. Va., Dec., 1914.*)

Outlaw of county warrants in Missouri

2958. Missouri county warrants which are over five years old have been presented to the county court each year, but payment denied, apparently on the ground of lack of funds. However, each year the county treasurer has paid interest, pursuant to an order of the county court. Are these warrants outlawed? *Opinion:* The statute of limitations has not run against the warrants. (*Inquiry from Mo., Feb., 1921.*)

Contract for municipal improvements as basis for loan

2959. The city council of Miami caused to be advertised bids for a river improvement and proposed to enter into a contract for such work and to pay for the same eighteen months from the date of the contract. This leads to the inference that the city did not have the funds on hand, but expected to pay the cost from some assessment, income or revenue in the next year. Would it be safe for a bank to advance money on such a contract? May a taxpayer enjoin the letting or the execution of the contract? *Opinion:* The method in which a municipality shall enter into a contract for a public improvement and the elements essential to the validity of such a contract are usually expressly defined by statutory or charter provisions. The power to make improvements, given in general terms, carries with it implied authority to make contracts therefor. *Keator v. Dalton*, 29 Misc. (N. Y.) 692. *Smith v. Westport*, 105 Mo. App. 221. The authority to make such contracts is usually vested in the city council, to be exercised by either ordinance or resolution. *Stockton v. Creanor*, 45 Cal. 643. *Cunningham v. Cleveland*, 98 Fed. 657. In the absence of legislative provisions governing the making of improvements and the manner of paying for the same, the city in the exercise of its general powers may improve its streets, or sewerage system, and defray the cost from its general funds. *Slusser v. Burlington*, 42 Iowa 378. *Woolsey v. Rondout*, 4 Abb. Dec. (N. Y.) 639. *Detroit v. Detroit United R. Co.* 133 Mich. 608.

Where an improvement ordinance provides for payment out of funds to be raised by general taxation, the contractor can enforce payment out of a general fund created by the sale of bonds, since the bonds are payable from funds derived from taxation.

DuQuoin First Nat. Bank v. Keith, 183 Ill., 475, 56 N. E. 179.

In the absence of statutory prohibition, or some prohibitive clause in the charter of the city of Miami, there appears to be no valid reason why its city council cannot enter into the proposed contract so as to bind the city; in which case the bank might safely advance money on the contract. Taking this view of the matter, there would seem to be no grounds on which a taxpayer might enjoin. (*Inquiry from Fla., March, 1913.*)

Erroneous delivery of Liberty bonds

2960. A bank delivered \$3500 in Liberty bonds to the manager of a local corporation, finding later that it had in error delivered him bonds, for which he had personally signed, acknowledging receipt, and which did not belong to him. The bank called on the manager to return the bonds. He advised bank that he only had \$2600 of bonds in his possession; and, while he did not deny that he received the full amount, has called on bank to verify its records showing shipment of the serial numbers which bank's records show he received. Can bank hold the corporation, which is worth the amount involved; and if not, is the manager personally liable for the amount involved? Also can bank replevin the bonds wherever found? *Opinion:* Where a bank erroneously delivered Liberty (coupon) bonds to the manager of a corporation who personally acknowledged receipt, an action will lie against the manager to recover the value of the bonds or an action of replevin will lie to recover their possession against the manager, if still in his possession, or against any person to whose hands the bonds may come, except an innocent purchaser for value. No action will lie against the corporation unless the manager received the bonds or their proceeds as agent of such corporation or on its behalf. *Hughes v. Stringfellow*, 15 Ala. 324. *Ehrman v. Rosenthal*, 117 Cal. 491. *Fairbanks v. Blackington*, 9 Pick. (Mass.) 93. *Bongdon v. Penney*, 35 Minn. 204. *Lee v. Portwood*, 41 Miss. 109. *Burnham v. Ayer*, 36 N. H. 182. *Jaycox v. Cameron*, 49 N. Y. 645. *Norfolk South. R. Co. v. Barnes*, 104 N. C. 25. *Krebs Hop Co. v. Taylor*, (Oreg.) 97 Pac. 44. *Smith v. Austin*, 4 Brewst. (Pa.) 89. *Doon v. Ravey*, 49 Vt. 293. (*Inquiry from Ore., Sept., 1919, Jl.*)

STOPPING PAYMENT

Drawer's right to stop payment

Customer has right to arbitrarily stop payment

2961. May the drawer of a check, without any good reason, arbitrarily stop payment of his check? Must the bank obey his instructions without questioning his motives? *Opinion:* The Negotiable Instruments Act provides that "A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder unless and until it accepts or certifies the check." Under this Act, therefore, the check is a mere order on, and authority to, the bank to pay and the customer has the right to revoke such authority and countermand such check. After receiving a stop payment notice, the bank will pay the check at its peril. It is the duty to obey the instructions and refuse to pay and in such event, as shown by the section above quoted, it is under no liability to the holder whose sole recourse is against drawer and any prior indorsers. The drawer has this power of countermand irrespective of any fraud or misrepresentation. The bank is under no duty to inquire into his motive. As between bank and customer, the latter has the right to revoke the bank's authority to pay and it is the bank's duty to obey his instruction. (*Inquiry from S. C., April, 1919.*)

Former opinions where check an assignment

2961a. Opinions, published in the earlier editions of the "Digest of Legal Opinions," that, under the laws of Illinois, South Carolina and South Dakota, the drawer could not stop payment, because in those states a check constituted an assignment, have been omitted, as the enactment of the Negotiable Instruments Law has changed the rule in those states and a check is no longer an assignment; but the drawer has the right to stop payment.

Stopping payment of bearer check

2962. A bearer check not being an assignment, but merely an order and authority to the bank to pay, the drawer has right to stop payment equally as in case of a check payable to order. (*Inquiry from Mass., Aug., 1914, Jl.*)

Check "given as earnest money on land trade"

2963. A check bears the following notation, "Given as earnest money on land trade." The bank questions its right to pay the instrument without first inquiring as to the status of the land trade, also the right of the drawer to stop payment. *Opinion:* The check would be construed as an unconditional order to pay, the notation being a mere statement of the consideration for which the check was given. If the check operated to assign the fund in the bank, as soon as delivered, the drawer would have no right of countermand, but if it was a mere order or an authority to the bank to pay and did not have the legal effect of assignment, the drawer would have the right to stop payment. According to the weight of authority in Texas, a check does not operate as an assignment. *Doty v. Caldwell*, (Tex. Civ. App.) 38 S. W. 1025. *Vaughn v. Farmers, etc., Bk.*, (Tex. Civ. App.) 126 S. W. 690. *Central Bk. & Tr. Co. v. Davis*, (Tex. Civ. App.) 149 S. W. 290. *Davis v. State Nat. B.*, (Tex. Civ. App.) 156 S. W. 321. *First Nat. Bk. v. Texas Moline Plow Co.*, (Tex. Civ. App.) 168 S. W. 420. *Peters v. Harden*, (Tex. Civ. App.) 168 S. W. 1035. (*Inquiry from Tex., Dec., 1916, Jl.*)

Note: The Negotiable Instruments Law, providing that a check does not operate as an assignment, was passed in Texas in in March, 1919.

Stop payment of check by partner

2964. Can a partner stop payment of a check issued in the firm name of his co-partner, each having the right to draw, whether given for private or firm business? *Opinion:* While there are numerous cases upon the liability of a bank where it pays a check after stop payment by the drawer, there is a dearth of authority upon the right of a partner to stop payment of a check issued in the firm name by his co-partner. However, upon principle either party has the right to stop payment and the bank should obey the order and would thereafter make payment at its own risk. There are several decisions involving joint accounts in savings banks to the effect that, if the bank pays after notice by one of the parties, it does so at its own risk and may be compelled to pay over again if the payment proves to have been made to one not entitled thereto. See,

for example, *Metropolitan Savings Bank v. Murphy*, 33 Atl. (Md.) 640. If a check is given for private business of a partner and the bank knows this, there is, of course, good reason for the other partner to stop payment because the money is being used for private purposes. But equally where the check is given for firm business, the bank would take the risk if it failed to obey the stop order of the partner who did not draw the check, for there might be some good business reason why the payee was not entitled to collect same. The only safe rule to follow is to obey the stop order of either partner, no matter by which partner the check is drawn. (*Inquiry from Pa., June, 1915.*)

Stopping payment of check on branch bank

2965. Can a depositor stop the payment of his check drawn on a branch bank after it has been cashed by the parent bank? *Opinion:* Payment can be stopped at any time before the check has been presented at the branch bank. (*Inquiry from Ala., May, 1917, Jl.*)

After check stamped "Paid" and remittance draft drawn

2966. A check presented by mail is stamped "Paid," and the remittance to cover the check is written up; but before the check has been charged to the customer's account or the letter containing the payment for it mailed, the drawer demands that the payment be stopped. The bank inquires as to its duty in the matter. *Opinion:* Nineteenth Ward Bank v. First National Bank, 184 Mass. 49, 67 N. E. 670, held where a bank drew a remittance check, stamped the word "Paid" on the face of the item, cancelled same by perforation, and filed it with the paid checks, that this constituted payment even though it was not charged to the account of the drawer. From this it would seem that in the present case what was done constituted an acceptance and payment of the check, so that it would be too late thereafter for the drawer to stop payment. (*Inquiry from S. C., Dec., 1919.*)

Notes and acceptances payable at bank

Maker has right to stop payment

2967. In the event the maker of a note payable at a bank does not desire bank to pay at maturity, it is necessary for him to stop payment; where the bank wrongfully refuses to pay a check when in funds, the

courts have in many cases awarded the depositor damages for injury to his credit, and, it would seem, the same principle would apply to notes payable at bank. (*Inquiry from Ala., Nov., 1911, Jl.*)

2968. Note payable at bank is equivalent to order to bank to pay same for account of maker and latter has right to stop payment. N. Y. Neg. Inst., Act., Sec. 147. (*Inquiry from N. Y., July, 1914, Jl.*)

2969. A gave his promissory note to B, payable at A's bank. B negotiated the note in his own bank and at maturity payment was stopped, although there were sufficient funds to cover the note. *Opinion:* A note payable at a bank constitutes an order to the bank to pay the same for the account of the maker, but payment should be refused where the maker instructs the bank not to pay. *Bk. v. Henninger*, 105 Pa. 496. (*Inquiry from Pa., March, 1914, Jl.*)

Stop payment by acceptor

2970. B purchased goods of A, giving him in payment an acceptance covering the invoice, payable at a bank at a future date. Before maturity B stopped payment, although B had on deposit in the bank sufficient funds. *Opinion:* An acceptance or note payable by the acceptor or maker at a bank is not an assignment of the deposit to the holder and is subject to countermand by the maker before the bank has paid the acceptance or accepted or paid the note. *Edgerton v. Fulton Nat. Bk.*, 43 How. Pr. (N. Y.) 216. *Grissom v. Com. Nat. Bk.*, 87 Tenn. 350. *Elliott v. Worcester Tr. Co.*, (Mass.) 75 N. E. 944. (*Inquiry from Wash., Feb., 1917, Jl.*)

Maker orally instructing bank not to pay any of his notes

2971. A gave his note to B who indorsed it and had it discounted at the inquiring bank, the note being payable at X bank. On its due date it was presented for payment at X bank, which refused to pay same. The cashier of X bank stated that, while the note was good, A having sufficient funds on deposit to pay same, A had from time to time orally instructed the bookkeepers not to pay any of his notes. The inquiries are: (1) Whether, under the circumstances, the bank could by protesting note charge the indorsers with liability on this note. (2) Is X bank liable to inquiring bank for the payment of this note because of its refusal to pay, as X bank had no written instruc-

tions as to non-payment of notes and not having received any notice of non-payment of this particular note? *Opinion:* Under the Negotiable Instruments Law, "Where a note is made payable at a bank it is equivalent to an order on the bank to pay the same for the account of the principal debtor thereon." The note being an order on the bank to pay, the maker has a right, as between himself and the bank, to stop payment if he so desires. In the absence of a requirement of the bank that stop payment orders must be in writing, a notice to stop payment may be given orally. In this particular case, although there was no notice to stop payment of this particular note, the maker has orally instructed the bank from time to time not to pay any of his notes that were presented, and this may be interpreted as a sufficient instruction not to pay this particular note. Answering queries: (1) The inquiring bank by protesting the note could charge the indorsers with liability. It was duly presented and payment refused. (2) X bank would not be liable to the inquiring bank nor any of the parties on this note. The recourse of the holder would be against the maker and prior indorser. (*Inquiry from N. J., Aug., 1917.*)

Written notice to stop payment

Ineffective where check inaccurately described

2972. In April a customer, wishing to stop payment on his check, notified the bank and described the check as being for \$50, payable to John Doe and dated some time in April. The exact date he did not know. A check payable to John Doe for \$50 and dated July 2 was presented and paid by the bank. The customer seeks to hold the bank liable for violating his stop order. He claims he omitted to date the check and the payee supplied the date. *Opinion:* The bank is not liable, as the check was not described with sufficient accuracy. When stopping payment he did not describe the check as dated, but stated it was dated in April. This misdescription was material. *Mitchell v. Security Bk., 147 N. Y. S. 470. (Inquiry from Ala., Oct., 1916. Jl.)*

Sufficiency of stop notice where check fully described, but wrong number given

2973. A bank having before it an order stopping payment of a post dated check, describing the check by name of the drawer, number, date, amount and payee, nevertheless paid the check when presented on the day of its date because the number of the

check (12) was different from that (13) given in the stop order. The bank endeavored in vain to reach the drawer before payment, but construed the order to refer to another check. *Opinion:* Notwithstanding a mistake in the number of the check, the order was sufficient as an instruction to the bank not to pay the presented check. (*Inquiry from Cal., Aug., 1915. Jl.*)

Stopping payment of original and issuing duplicate after original paid and returned to depositor

2974. A depositor, after his check had been paid and returned to him as a paid voucher, in ignorance thereof, issued a duplicate check and notified the bank in writing not to pay the original. *Opinion:* The bank is not liable to the depositor because the duplicate is paid. The bank is not chargeable with knowledge that the original was paid and returned and that the stop payment order was issued in error. (*Inquiry from Ohio, Dec., 1915. Jl.*)

Notice holds good indefinitely

2975. An order to stop payment can be made by a customer to his bank before the check has been paid or accepted and such order does not expire after a certain time limit, but holds good indefinitely. (*Inquiry from N. J., Jan., 1917. Jl.*)

2976. A bank which pays a check after receiving a stop-order from its depositor does so at its peril. The usual custom of banks in New York City with respect to accepting notices of stop payment is to keep the orders on file indefinitely; if a check is three or four years old, the banks inquire of the drawer whether or not there was a stop payment order. (*Inquiry from Va., Feb., 1909. Jl.*)

No time limit on stop payment order

2977. An opinion is asked respecting the liability of a bank when a depositor has issued a check and, before same is presented to the bank for payment, the customer notifies the bank not to pay the check; and if the bank is held responsible for the payment of this check by mistake, should it be presented, and if the time of responsibility for payment of same is in any manner limited. *Opinion:* There is no time limit to the liability of a bank which inadvertently pays a stopped check, short of the statute of limitations. When a customer stops payment, he revokes the authority of the bank to pay and payment of a stopped check is without authority

by the bank. Such revocation of authority continues indefinitely. In other words, there is no time limit on a stop payment order. Of course, after a certain period of time, say, a year or so, an outstanding check would become stale and would not be paid by the bank in any event. (*Inquiry from Ark., April, 1919.*)

Oral notice

Sufficiency of oral notice to stop payment

2978. Under the Negotiable Instruments Law a drawee bank is not liable to the holder of a check unless it accepts or certifies the check, and the maker has the right to stop payment. An oral notice to stop payment is probably sufficient and a written order is not necessary, although the point has not yet been judicially passed upon. (*Inquiry from Ala., Dec., 1911, Jl.*)

Note: In *Peoples Sav. Bank & Trust Co. v. Lancey*, 40 So. (Ala.) 346 it was held that a depositor may prove a verbal notice given by him before payment to the bank's receiving teller not to pay a check, though afterwards at request of the teller he reduced the notice to writing.

Payment by bank two years after check orally stopped

2979. A made his check to B in payment of a debt but later verbally stopped payment because he had settled the debt by giving B a note. Two years later, after the debt was paid, B deposited the check for collection and the same was paid. *Opinion:* The drawee cannot charge the amount to A's account, because it has violated the stop order and has paid a stale check. The drawee, however, can recover from the payee under the rule that money obtained by deceit and in bad faith is recoverable. *People's Sav. Bk. v. Lacy*, (Ala. 1906) 40 So. 346. *Lancaster Bk. v. Woodward*, 18 Pa. 357. *Spokane, etc., Tr. Co. v. Huff*, (Wash.) 115 Pac. 80. *Manufacturers, etc., Bk. v. Swift*, (Md.) 17 Atl. 336. *Schaller v. Borger*, 47 Minn. 357. *Stothwer v. McFarlane Grain Co.*, (Iowa) 90 N. W. 620. (*Inquiry from N. D., July, 1916, Jl.*)

Check paid by bank one year after oral stop notice

2980. John Jones issued a check, which was presented and paid about one year later. The depositor claimed that he stopped payment a few days after the issue, but the bank had no record of the stop order. *Opinion:* If the depositor can prove an oral

instruction not to pay, he can recover, unless the bank can prove that the check when paid was in the hands of a holder in due course who could enforce the check against the drawer. If a check is stale it places the bank on inquiry before payment, but whether a check one year old can be called stale is an unsettled question. *People's Sav. Bk. v. Lacy*, 146 Ala. 688. *Merchants, etc., Nat. Bk. v. Clifton Mfg. Co.*, 56 S. C. 320. (*Inquiry from Okla., April, 1913, Jl.*)

Oral notice given away from bank

2981. One of a bank's customers gave a check to another customer after banking hours for an automobile. During that night the garage burned and the automobile was destroyed. The maker of the check saw the president and cashier of the bank at the fire, and there told them not to pay the check. The bank inquires whether payment was legally stopped, or if it should have paid the check when presented the next morning. *Opinion:* It has been held that a notice to stop payment may be oral (*Lacey's case*, 40 So. Rep. 346) but it has never been held that an oral notice not to pay given to the proper officer away from the bank is binding on the bank, where it is not executed at the bank. There are certain cases in which transactions with an officer away from the bank do not bind the bank. For example, if a deposit is handed to an officer away from the bank and he loses it and it never reaches the bank, the bank is not bound. He is the agent of the depositor and not of the bank until the money actually reaches the bank. So if the customer of a bank should meet an officer outside of banking hours and instruct him not to pay a described check, and the officer should, on reaching the bank next day, forget and omit to make note of the stop payment, and the stopped check was paid, or if it was paid before he reached the bank, it is unlikely the bank would be liable; certainly not in the last stated case. The point has never been decided. But we think the true rule is that, while a bank may act upon an oral stop payment received by an officer away from the bank, and might have done so in the present case, still the bank is not bound by such an order where not communicated to the proper officer at the bank or where the check is paid before the order is entered at the bank, and, until properly communicated at the bank, the officer receiving the order must be deemed the agent of the depositor and not of the bank. (*Inquiry from Ohio, Aug., 1918.*)

Note: A decision has recently been rendered by the Court of Civil Appeals for the Third District of Texas holding an oral notice to stop payment given to the cashier away from the bank, at his place of residence, valid. *Hewitt v. First National Bank of San Angelo*, decided 1921. A depositor delivered his check on Saturday and on Sunday called the cashier over the telephone at his residence about one-half mile from the bank and told him not to pay the check. The cashier replied he would make a written memorandum and attend to it when he returned to the bank. On the following Monday the cashier was detained at his home by sickness and did not arrive at the bank until forty minutes after the opening hour. Upon his arrival he instructed the teller not to pay the check and then learned that the check had been presented a few minutes before and had been paid. The depositor sued the bank and the District Court held that his attempt to stop payment on Sunday when the bank was closed, only by instruction to the cashier away from the banking house and records was negligent and that payment of the check thereafter before the cashier's arrival at and notice of the revocation was communicated to the bank did not create any liability to refund the money paid on his lawful order; that such payment did not constitute negligence. The Court of Civil Appeals, reversing the judgment, held that the notice was valid, though given on Sunday; that notice to the cashier was notice to the bank and, even if the cashier be regarded as only an agent, it was his duty to act upon the information he had received. Answering the contention that the notice was not binding because not given at the bank, the court held that while there are some transactions which a bank can properly attend to only at its place of business, still in the instant case the cashier was not requested to transact any business away from the bank but, acting upon the information which he had received, he was requested to stop payment at the bank. He was as much the cashier at home on Sunday as he was when at the bank. The court conceded that notice to the cashier given away from the bank would not be binding on the bank until, by use of reasonable diligence, he was able to communicate such notice at the bank. But in the instant case no reason was shown why the cashier, if he knew that he would not be at the bank when it was opened Monday morning, should not have communicated the information which he had received to the paying

teller. There was no contributory negligence on the part of the depositor. When he notified the cashier not to pay the check, he did all that reasonable prudence on his part required him to do.

The bank, in this case, has filed a petition for rehearing but no decision has been made thereon up to the time this digest goes to press.

Oral notice away from bank supplemented by written memorandum at bank

2982. The customer of a bank met its cashier at a social function and verbally notified him to stop payment on a certain check. The next day the cashier made a written memorandum of the order. About a month later the check was paid. *Opinion:* The notice was valid and binding on the bank. The law does not require that the notice be in writing, and although an oral notice might not be valid when given outside of the bank, the fact that a written memorandum of the notice was made by the cashier at the bank would validate it. *Norse on Banks and Banking*, Sec. 168. *People's Sav. Bk. v. Lacy*, (Ala. 1906) 40 So. 346. (*Inquiry from Del., Feb., 1909, Jl.*)

Validity of stop payment over telephone

2983. A call was received by a bank over a long distance telephone from a person representing himself to be a customer ordering payment stopped on a certain check. The bank was not sure of the identity of the person calling and informed him it must have an order in writing. Such written order was received but before receipt the check was presented and paid. Is the bank liable? *Opinion:* It has been held that an oral notice not to pay, given the receiving teller before the check is paid, is valid and may be proved. *Peo. Sav. Bk. & Trust Co. v. Lacy*, 146 Ala. 688. But an oral notice over the long distance telephone is a different matter, in view of the difficulty of determining its authenticity. It would seem that the bank could maintain such an order cannot be relied on as genuine and that it is entitled to a written order signed by the drawer of the check. Such a rule of the bank would seem necessary for its protection; otherwise banks would be at the mercy of dishonest persons impersonating drawers and telephoning fictitious stop payment orders. The courts have held that a bank may, but is under no obligation to pay a deposit upon an oral order, being entitled to a written order for its protection. *Aurora*

Nat. Bk. v. Dils, 118 Ind. App. 19. In Mayor v. Boyle, 132 N. Y. Supp. 729, it is held that notice of dishonor by telephone is not sufficient under the Negotiable Instruments Act. It has also been held in England that a bank is not bound to accept an unauthenticated telegram as sufficient authority to refuse payment. Curtice v. London City and Midland Bank, 98 L. T. N. S. 190. Until the point is definitely decided, we think the view reasonable that a bank is not bound to accept a notice to stop payment over the telephone as a valid order and may insist on a written order, although it may, if it chooses, accept the order over the telephone and take the risk of proving its authenticity. (*Inquiry from Cal., Dec., 1915.*)

Note: In Hewitt v. First National Bank of San Angelo, in the Court of Civil Appeals of Texas, Third District, decided 1921, it was held (reversing the lower court) that a telephone notice to stop payment was valid even though given to the cashier at his residence away from the bank and on a Sunday. A petition for rehearing of this case is pending.

Practice of stamping check "Payment stopped"

Beneficial effect of practice

2984. Following its usual custom, a bank to which a check was presented stamped across the face "Payment stopped" and returned the same to the payee. The maker of the check had previously countermanded payment. The payee claimed that, as the check was his property, the bank had no right to deface it by such stamp. *Opinion:* Custom of bank to stamp a countermanded check "Payment stopped" before returning to the holder serves a beneficial purpose without injury to a bona fide holder and will doubtless be sustained by the courts. (*Inquiry from N. Y., Sept., 1917, Jl.*)

Bank not liable for defacing property of holder

2985. A bank refused payment of a check in pursuance of instruction from the drawer not to pay, and stamped "Payment stopped" upon the instrument before returning the same to the holder. The presenting bank objected to this action, taking the position that the drawee had no right to so mark the check, which was not its property. *Opinion:* The act of stamping "Payment stopped" upon the check was proper in view of the custom so to do, the beneficial purpose thereby served, and the fact that no

substantial right of the holder is violated. Burbridge v. Manners, 3 Camp. 193. District of Columbia v. Cornell, 130 U. S. 659. Andrews v. Pond, 13 Pet. (U. S.) 65. Goodman v. Harvey, 4 Adol. & El. 870. Fowler v. Brantley, 14 Pet. (U. S.) 318. (*Inquiry from Pa., May, 1912, Jl.*)

Note: It has been held that no action for damage will lie against a bank for defacing a note, as by writing on the face thereof the words "Payment stopped." McKinley v. American Exchange Bank, 7 Rob. (N. Y.) 663.

No law forbidding practice

2986. There is no law expressly forbidding a drawee bank from stamping "Payment stopped" upon a check which has been refused for that reason. Such a practice has the beneficial result of warning subsequent holders that payment has been stopped, thereby preventing further negotiation. (*Inquiry from N. Y., Aug., 1911, Jl.*)

Criminal liability of depositor

Where check stopped after cattle received

2987. A live-stock dealer purchased five head of cows, giving his check for \$95 in payment. He drove the cattle to another state and then stopped payment of the check, which in the meantime had been purchased by a bona fide holder. *Opinion:* The holder can enforce payment from the drawer and prior indorser, assuming the latter's liability has been preserved by due notice of dishonor. As to criminal liability, the drawer could be convicted of obtaining goods upon false pretenses, provided a jury could be convinced that he gave the check and received the cattle with the fraudulent intent to stop payment of the check. (*Inquiry from La., April, 1915, Jl.*)

Where depositor stops check after receiving goods

2988. A depositor purchases goods of a wholesaler, giving his check in payment. After receiving the goods the depositor stops payment. *Opinion:* The drawer's liability to punishment for obtaining goods under false pretenses depends upon proof of intent to stop payment at the time of giving the check. A bank is not liable to the holder for obeying the stop payment order of its depositor, but where the drawer continually practices such fraud, the best course for the bank is to close his account. (*Inquiry from Pa., April, 1915, Jl.*)

Revocation by cause other than drawer's order

Drawer of check a fugitive from justice

2989. A depositor committed a crime and became a fugitive from justice, his whereabouts being unknown. A check drawn by him still remains outstanding and a creditor notifies the bank to withhold payment of the deposit. *Opinion:* While death, insanity or insolvency of a depositor revokes the authority of a bank to pay his check, it has never been decided that the fact that a depositor is a fugitive from justice operates, *ipso facto*, as a revocation. A bank should pay his outstanding check in the absence of circumstances showing that the fugitive is seeking to defraud his creditors and that the check is given in bad faith. (*Inquiry from Pa., June, 1919, Jl.*)

Where payee or third person requests payment stopped

Effect of notice not to pay by payee or indorsee

2990. A gives B a check for labor performed; B indorses the check and hands it to C, and before the check is presented at paying bank, B, the payee, asks stoppage of payment, claiming the check was lost. Almost immediately thereafter the check is presented for credit by C who has an account at the paying bank. Question: Can B stop payment? *Opinion:* The payee has no legal right to order payment of the check stopped, as the contract of the bank is with the drawer to pay his check and the bank is under no contract obligation to the payee. It has been held, however, that, although the notice by the payee to stop payment is not binding, because not given by the proper party, it is sufficient to put the bank on inquiry as to the equities against the check in the hands of the holder, so that, if it makes a wrongful payment it is at its peril. *Public Grain & Stock Exchange v. Kune*, 20 Ill. App. 137. In the instant case the payee had received the check for labor and had indorsed and delivered it to C. Then, claiming the check was lost, he asked the bank to stop payment, but as C immediately thereafter presents the check for payment, this indicates that the check was not lost as claimed and that the reason given for requesting payment to be stopped falls. It appears, therefore, in this particular case, unless some further good reason is given putting the bank on inquiry as to the bona fides of the holder, the check could be safely credited to the account of the holder and

request for stop payment ignored. (*Inquiry from Ida., June, 1916.*)

Bank may be put on inquiry

2991. A gives his check to B and the latter negotiates to a third party who loses the check. Has the bank on which check is drawn authority to stop payment on notice by the third party? *Opinion:* The only person who has the right to stop payment of a check is the drawer. The payee of the check or indorsee who loses it might request the drawer to instruct the bank not to pay, but would have no right himself to do so. If the check were indorsed in blank when lost it might get in the hands of an innocent purchaser for value who could enforce payment from the drawer if the bank refused payment pursuant to his instruction. The question whether the check was or was not negotiable in form when lost—that is to say, whether it bore an indorsement in blank or was specially indorsed to the third person and did not bear his indorsement in blank—might have weight with the drawer in determining whether or not he should stop payment. The notice of loss by the payee, or holder, to the bank, however, might be held to put it on inquiry as to the title and bona fides of a person who subsequently presents the check for payment. (*Inquiry from W. Va., May, 1917.*)

Notice by third person of adverse claim and not to pay depositor's checks

2992. A gave B a check on X bank, but, before the check was presented for payment, C called at X bank and notified it not to honor any checks drawn against the account of A. The bank has no knowledge as to whether C has any right to file a stop payment order against A's account. Should the drawee bank honor C's stop payment order as a safety measure to the bank? And should a bank for its self protection honor any and all stop payment orders regardless of who might file them? *Opinion:* A third person has no right to stop payment of a check given by a customer of a bank to another by a mere notice not to pay. Where the third person makes an adverse claim of ownership to a deposit and forbids the bank to pay its customer's checks, the bank will thereafter pay its customer's check at its peril. But a mere notice not to pay, without presenting any facts to afford a reasonable ground for belief that the deposit belongs to the person giving the notice, is not sufficient. (See opinion, *A. B. A. Jl., Jan., 1921*,

p. 496, for collection of authorities governing adverse claims to deposit, and sufficiency of notice). (*Inquiry from N. Y., Jan., 1921.*)

Duty and liability of bank

Bank must obey depositor's instructions

2993. Inquiry is made as to whether a bank should stop payment on a check when so instructed by a depositor. *Opinion:* Where a bank receives an instruction from its depositor to refuse payment of a check, it should obey such instruction and there is no liability to the holder even though the depositor has obtained value on his check, and his countermanding payment is not in good faith. Under the Negotiable Instruments Act, a bank is not liable to the holder prior to acceptance of the check; its only relation is to the drawer and if the latter stops payment, the bank is in duty bound to comply with his instructions whether they be rightful or wrongful. It is not for the bank to question his motive; that is a matter between the drawer and the holder of the check. After receipt of instruction not to pay, the bank will pay the check at its peril. (*Inquiry from Okla., Aug., 1910.*)

Bank cannot charge stopped check to customer's account

2994. Is a bank liable to a customer for its failure to obey his instruction to stop payment of a check? Is it material that the notice was given by telephone after the closing of the bank? *Opinion:* It is a general rule that if a bank pays a check after it has been notified to stop payment, it pays on its own responsibility and cannot charge the amount to the customer's account. *Lunt v. Bank of North America*, 49 Barb. (N. Y.) 221. It is immaterial that the notice is given after the bank closed where it is given before the check is presented and is accepted by the bank as a stop payment order. It might be, however, that if the payee had a valid claim against the customer for the amount of the check, the bank could succeed to his rights as an equitable purchaser of the check and look to the customer for reimbursement. Whatever claim might be made along this line, no charge could be made against the account of the customer until an adjustment of the claim, either in or out of court. (*Inquiry from N. Y., Dec., 1920.*)

Liability of bank paying stopped check through oversight

2995. A depositor drew his check and ten days later stopped payment. Through

an oversight the bank paid the check. *Opinion:* The bank is liable to depositor for any resultant damage; but if the bank could prove payment had been made to a holder who had enforceable rights against the drawer, probably it would escape liability. (*Inquiry from N. J., March, 1913, Jl.*)

Mistaken payment of stopped check

2996. A gave B his check which B lost, after he had indorsed it in blank. A stopped payment, but the bank inadvertently paid the check contrary to the stop order. *Opinion:* If check paid to a holder in due course, bank not liable for loss because drawer not damaged, holder having right to enforce payment from drawer and payee and check operating as payment of drawer's debt to payee; but if check paid to finder or other than holder in due course, drawer's debt to payee would remain and bank would be liable for loss. *People's Sav. Bk. v. Lacy*, (Ala.) 40 So. 346. *German Nat. Bk. v. Farmers Deposit Nat. Bk.*, 118 Pa. 294. *Unaka Nat. Bk. v. Butler*, (Tenn.) 83 S. W. 655. *Nat. Park B. v. Levy*, 17 R. I. 746. *Holmes v. Briggs*, 131 Pa. 233. *Brown v. Shintz*, 202 Ill. 509. *Public Grain, etc., Exch. v. Kune*, 20 Ill. App. 137. (*Inquiry from Pa., Aug., 1917, Jl.*)

Bank need not notify payee

2997. Should a bank give notice to the payee of a stopped check? *Opinion:* There is no legal obligation upon a bank to notify the payee that payment of a check has been stopped nor to request the drawer to do so. (*Inquiry from Pa., July, 1914.*)

Recourse of bank paying stopped check

Recourse upon drawer as equitable purchaser

2998. A customer requested his bank to stop payment on his check of \$200. The stop order was unfortunately overlooked and the check was paid. The bank had evidence from the holder that the maker received value for the check, and the holder refuses to refund the amount. In the event the maker recovers the amount from the bank, it believes he will be receiving double value. *Opinion:* Where a bank pays a stopped check it does so at its peril, but where payment is made to a holder in due course or where the drawer has received full value for the check, there is ground for maintaining the contention that the bank can set off the amount against the drawer's account as equitable purchaser of the check. Where a

stopped check is an enforceable obligation against the drawer in the hands of a holder in due course, the former is not damaged because of its payment by the bank, for, if refused payment, the drawer would be answerable to such holder. *German Nat. Bk. v. Farmers Deposit Bk.*, 118 Pa. 294. *Bk. v. Williams*, (Ga.) 90 S. E. 718. *American Defense Soc. v. Sherman Nat. Bk.*, 162 N. Y. S. 1081. *Unaka Nat. Bk. v. Butler*, (Tenn.) 83 S. W. 355. *Pease v. State Nat. Bk.*, (Tenn.) 88 S. W. 172. *Bedford Park v. Acoam*, 125 Ind. 584. (*Inquiry from Pa., Dec., 1917, Jl.*)

Payment of stopped check to holder in due course recoverable from drawer in Indiana and Tennessee but not in New York unless ratified

2999. A draws a check payable to bearer, and later stops payment on it at the drawee bank. In the meantime the check is passed on to a holder in due course, who presents it to the bank, which refuses payment because of the stop payment order. Has the drawee the right to stop payment on such check? What recourse would the bank have had if they had paid the check under conditions recited above? Would they stand in the shoes of the holder in due course? *Opinion:* Where a bank inadvertently pays a stopped check to a holder in due course, or to the payee justly entitled to it, the depositor having suffered no loss, the bank can charge the amount to his account as equitable purchaser of the check upon proof of the payee's or holder's enforceable rights, according to the rule laid down by the Indiana and Tennessee courts. *Bedford Bank v. Acoam*, 125 Ind. 584. *Unaka Nat. Bank v. Butler*, (Tenn.) 83 S. W. 655. The New York Court of Appeals, however, holds that the bank cannot set off the amount simply by showing the payee was justly entitled to payment, but must further prove that the depositor ratified the unauthorized payment of his stopped check. *American Defense Soc. v. Sherman Nat. Bank* (N. Y.) 122 N. E. 695. (*Inquiry from Va., Aug., 1919, Jl.*)

Subrogation of bank to drawer's rights against payee

3000. A gave B a check for \$100 as part purchase on some lots, provided the land was high. He afterwards found the land to be low, with some water on it. He stopped payment on the check, but the bank through error paid it to a third party, C. The bank

reimbursed A the \$100. Can the bank recover from B, admitting it made a mistake in paying the check after receiving a stop payment order on it? In other words, would the court correct the mistake made by the bank and decide B must return the money, he now having both the money and the land? *Opinion:* Under the conditions named, the bank is entitled to be subrogated to the rights of A against B, so as to recover from the latter money to which he is not entitled. *Muir v. Berkshire*, 52 Ind. 149. *Cobb v. Dyer*, 69 Me. 494. *Crump v. McMurtry*, 8 Mo. 408. *Arlington State Bank v. Paulsen* 57 Neb. 717, 78 N. W. 303. *N. J. Mid. R. Co. v. Wortendyke*, 27 N. J. Eq. 658. *Durante v. Eannaao*, 72 N. Y. S. 1048. *Moring v. Prevost*, 146 N. C. 558, 60 S. E. 509. *Hodson v. Dismukes*, 77 Va. 242. *Enders v. Brune*, 4 Rand. (Va.) 438. *Underwood v. Met. Nat.* 78 Va. 468. *Dayton v. Pueblo County*, 241 U. S. 588. *Lewis v. Chittick*, 25 Fed. 176. (*Inquiry from Va., Jan., 1920, Jl.*)

Bank's recourse against payee obtaining check on misrepresentation

3001. A bank's customer issued a check for potatoes and then stopped payment because the potatoes were not as represented, and the United States inspector afterwards valued the potatoes and estimated that there was a shortage in value of \$175. The bank inadvertently paid the check notwithstanding the stop order. *Opinion:* Upon the stated facts the bank is clearly liable to its depositor for said amount. The rule of law is clear that a bank which pays a stopped check does so at its peril and is liable to its depositor for any damages thereby resulting. In this case the depositor was damaged \$175. But it seems upon settling with him, the bank would be entitled to an assignment of his claim against the seller of the potatoes, or would be subrogated to such claim, for the amount at which they were over-valued and for which they were sold. The case is one where the goods sold were not of the value represented and the money, being paid in mistake of fact upon representation of false value, is recoverable. The depositor might ratify the payment of the check by the bank and then sue the seller himself if he would agree to do this; otherwise the bank is liable to him for the amount, and it seems the bank has a right of action to recover from the seller of the potatoes. (*Inquiry from Iowa, Feb., 1919.*)

Recovery of money paid on stopped check where payee guilty of fraud

3002. 1. Where the payee of a check had already received payment from the drawer, but had not returned same, and thereafter collected it from the drawee bank, does this fact make the payee guilty of such deceit as would render him liable to repay the money to the drawee bank, which had inadvertently paid same after a stop payment order had been received? 2. If so, would it not render the payee liable criminally for getting money under false pretenses? *Opinion:* 1. Yes. The rule is well recognized that where a check is paid through fraud or deceit on the part of the payee or holder, the amount thereof may be recovered. (Bull v. City of Quincy, 52 Ill. App. 186. Reynolds v. Rochester, 4 Ind. 43. Mut. Sav. Inst. v. Enslin, 46 Mo. 200. Citizens Bank v. Graffin, 31 Md. 507. Sheard v. Sears, 119 Mass. 143. Whiting v. Bank, 77 N. Y. 365. Sleep v. Heymann, 57 Wis. 495.) There is another rule which would justify recovery in the instant case, namely, that money paid under a mistake of fact to one not entitled thereto, and who cannot in good conscience receive and retain the same, may ordinarily be recovered back. The law raises an implied promise on the part of the payee to refund the amount of such payment. (Hinds v. Wiles, 12 Ala. App. 596. Bank v. Weber, 19 N. Dak. 702. Kane v. Morehouse, 46 Conn. 300. City v. Henning, 64 Ky. 381. Foster v. Kirby, 31 Mo. 496. Jones v. Bank, 144 Mo. App. 428. Nat. Exch. Bank v. Ginn, 114 Md. 181. Egan v. Abbott, [N. J. 1906] 64 Atl. 991. Bone v. Friday, 180 Mo. App. 577. Smith v. Lumber Co., 81 Wash. 111). 2. No specific decision is recalled where a payee has been held criminally liable for collecting money on a check for which he has already received payment from the drawer, but it would seem that this might be held to be the obtaining money under false pretenses; (see People v. Byrd, 1 Wheeler Cr. Cas. [N. Y.] 242), that is assuming the payee collected the check knowing he was not entitled to the money. However, there are many cases of fraud and deceit which will support a civil action, although there may be no criminal liability. (*Inquiry from N. J. Aug., 1916.*)

3003. The drawer of a check stopped payment. The drawee attached a slip to the item, indicating that payment was stopped and returned it to the collecting bank. Later, through the fraud of the payee

the check was presented a second time and paid by the drawee bank. *Opinion:* The drawee cannot charge the amount to the drawer's account, but where payee induced payment through fraud, the general rule that payment to a bona fide holder is a finality does not apply, and the bank has the right of recovery from the payee. Schneider v. Irving Bk., 30 How. Pr. (N. Y.) 190. People's Sav. Bk. v. Lacy, 146 Ala. 688. Nat. Bk. v. Berrall, 70 N. J. L. 757; 58 Atl. 189. Starkweather v. Emerson Mfg. Co., 132 Iowa 266. (*Inquiry from N. Y., April, 1915, Jl.*)

Payment of stopped check to bona fide holder irrevocable and not recoverable

3004. Bank which pays stopped check to a bona fide holder cannot afterwards recover back the money, but payment to fraudulent holder is probably recoverable. Where, however, holder has taken check as gift and receives payment in good faith without notice of countermand by drawer it would seem that payment is irrevocable. Nat. Bk. v. Berrall, (N. J.) 58 Atl. 189, 70 N. J. L. 757. (*Inquiry from Mont., July, 1916, Jl.*)

Payment of stopped check to innocent holder under forged indorsement not recoverable

3005. A bank was notified by its customer not to pay his check and thereafter, in violation of the stop order, makes payment to an innocent holder under a forged indorsement. The bank contends that the holder is liable upon the forged indorsement. The holder claims that, payment having been stopped, it should have been notified immediately on payment, as it might have had opportunity to protect itself. *Opinion:* It has been held that the case does not fall within the general rule allowing the drawee to recover money paid upon a forged indorsement but that the bank, making payment in face of the stop order, is precluded from setting up the forgery of the indorsement and cannot recover the money paid from an innocent holder who has received payment. Nat. Bk. of Commerce v. First Nat. Bk., (Okla.) 152 Pac. 596. Public Grain, etc., Exchange v. Kune, 20 Ill. App. 137. (*Inquiry from Miss., Aug., 1918, Jl.*)

Bona fide holder offering to refund one-half

3006. A bank through oversight paid a check the day after stop payment notice had been given. The payee who had received payment for goods he had not

delivered refused to reimburse the bank in full but offered to pay \$100, that being one-half the amount of check. What action would be best for the bank to take? *Opinion:* The courts have repeatedly held that money paid by mistake on a stopped check is not recoverable from a bona fide holder to whom paid. See, for example, *National Bank of N. J. v. Berrall*, 70 N. J. Law 757. The court in that case said: "As between the holder of a check and the bank on which it is drawn, the latter is bound to know the state of the depositor's account. Before paying the check it must take into consideration whether it was drawn against funds, and whether the order for payment, evidenced by the check, has subsequently been revoked. Therefore, where a bank receives in the ordinary course of business a check drawn upon it and presented by a bona fide holder who is without notice of any infirmity therein, and the bank pays the amount of the check to such holder, it finally exercises its option to pay or not to pay, and the transaction is closed as to the parties to the payment." It follows that legally the bank has no right of action against the payee on the check, and if there is an offer to refund \$100 out of \$200, it would be the part of wisdom to accept same. (*Inquiry from Pa., April, 1920.*)

Question of drawee's recovery from purchaser of check nine months old

3007. A bank in Texas issued a draft to a customer dated August 1, 1914, payable to a salesman of a company and drawn on a Texas correspondent. The Texas bank requested correspondent in Texas to stop payment thereof. The draft was presented and through error paid by the bank on which it was drawn. It later developed that the payee of draft had left the employ of the company, and cashed this draft at a hotel in Oklahoma on April 23, 1915. Who is liable for the loss? *Opinion:* In the case stated the check was negotiated nearly nine months after it was drawn. If it should be held that nine months was an unreasonable time for the check to remain outstanding before negotiation and that when the hotel keeper took the check he was put on inquiry and was not a holder in due course, then the check would not be chargeable by drawee to drawer, and the bank which paid the check would be the loser, unless it could recover from the hotel keeper the money paid, which is somewhat questionable. The purchaser has given value

and has committed no fraud and, although he may be put on inquiry by the age of the check, still if it is paid by the bank, possibly he might claim that such payment satisfied the duty of inquiry. It is a doubtful question whether money paid on a stopped check to a holder for value can be recovered as money paid by mistake, even though the holder could not recover from the drawer in a case where the check had not been paid, because the latter had a good defense and the holder was put on inquiry at the time of purchase. There could be no recovery if the holder had changed his position as a result of receiving payment, and it is doubtful if the bank would not be bound by the payment in any event. (*Inquiry from Mo., July, 1915.*)

Recovery of payment of stopped check made through exchanges

3008. It is the custom of banks in a certain city to cash each others checks during the day and then make an exchange about 3.00 p. m. After such exchange was made on Saturday, the inquiring bank cashed a check drawn on the X bank, and when this exchange was made, on Monday, the X bank took this check and stamped it "Paid." About half an hour later X bank sent the check back, saying payment had been stopped for the reason it had been cashed through error. Inquiry is made whether X bank is liable. *Opinion:* It is a general rule supported by numerous cases that payment of a check to a bona fide holder is a finality and cannot be recovered because the payment was in error, the check having been stopped. This rule would seem to apply to the present case in event that there is an actual final payment of the check. The only question would be whether the payment by exchange was a final payment; that is to say, when this exchange was made at 3.00 p. m., on Monday, and the check marked "Paid," was such exchange a finality or was it provisional so as to give opportunity to take the check back to the bank and ascertain if there were funds to meet it or if payment had been stopped. For example, in clearing-house exchanges in cities, after the exchange has been made, there is still opportunity to take the check back, and if it is not good, for any cause, the check can be returned to the presenting bank within a specified time. The inquiring bank does not clearly state the nature of this exchange of checks, and whether there are any rules, connected with the exchange, making the

initial payment at the exchange provisional upon verification when the check goes back to the bank. Without knowledge as to this, it is impossible to advise more definitely as to the correctness of the bank's position, in this particular case, further than to point out the general rule above stated, that the payment of a check to a bona fide holder is a finality and irrevocable because of error as to state of the account or countermand. It does not seem this rule would apply, however, where there was a mere provisional exchange of checks with right of the drawee to return within a specified time thereafter if found not good. (*Inquiry from Minn., June, 1916.*)

Limitation of bank's liability by agreement

3009. Note: The opinions which follow are largely based upon *Elder v. Franklin National Bank*, 55 N. Y. Supp. 576, the only decided case on the subject down to 1920. In the *Elder* case the agreement was as follows: "It is further agreed that the bank shall not be responsible for the execution of an order to stop payment of a check previously drawn; that the bank will endeavor to execute such orders, but that no liability shall be created by failure so to do (where the bank has exercised ordinary care in that regard) and that no rule, usage or custom shall be construed to create such liability." The words in parentheses were not in the agreement, but were read in by judicial construction. The agreement did not absolutely relieve the bank but the test of liability was held to be the exercise of due care and the bank was held liable for the failure to exercise that care. But in April, 1920, the Supreme Court of Massachusetts, in *Tremont Trust Co. v. Burack*, 126 N. E. 782, handed down a decision which upheld the validity of an agreement relieving a bank from liability because of payment of a stopped check through inadvertence or accident. The agreement in the *Tremont Trust Co.* case was as follows: The undersigned "agrees not to hold the Tremont Trust Company liable on account of payment contrary to this request if same occur through inadvertence or accident. The Tremont Trust Company will use the best methods known to it to prevent oversight and accident, but it shall not be in any way liable for its act should said check be paid by it in the course of its business." The court said: "The word 'inadvertence' in the printed agreement

embraces the effect of inattention, the result of carelessness, oversight, mistake, or fault of negligence and the condition or character of being inadvertent, inattentive or heedless. The word 'accident' is used in the sense of a happening of an event without the concurrence of the will of the person by whose agency it was caused. It is manifest the quoted words were intended to exonerate the bank from the kind of negligence shown by the record, and we are unable to see anything illegal, or anything opposed to public policy, in a stipulation or agreement which relieves a bank so circumstanced from the result of the mere inattention, carelessness, oversightedness or mistakes of its employees." Comparing the agreements in the two cases; both contain an agreement by the depositor that the bank will not be held responsible, or will be held harmless, because of payment of a stopped check—in the *Tremont Trust Co.* case, if the check is paid "through inadvertence or accident"—and also an agreement by the banks on their part that they will endeavor to comply with stop orders, the *Franklin National Bank* agreeing to "endeavor to execute such orders" and the *Tremont Trust Co.* to "use the best methods known to it to prevent oversight and accident."

The essential points of both agreements are therefore similar and the divergent decisions are based on a different viewpoint as to stipulations against negligence. The New York court is disinclined to support an agreement by any person stipulating against the result of his own negligence and therefore reads into the bank's agreement an implied contract to use reasonable care which, under the facts, it holds to have been broken because of negligence of the bank. The Massachusetts court, on the other hand, fails to see anything illegal or against public policy in a stipulation which will relieve the bank from the results of negligence of its employees and therefore holds that the agreement is valid and protects the bank.

The decision of the New York court in the *Elder* case is not by a court of last resort. (See *A. B. A. J.*, July, 1920.)

Form of disclaimer of Alabama bank

3010. In a form submitted for protection of a bank in case of payment of a stopped check, the bank acknowledges receipt of the stop payment order and states that "we will make every effort to protect you, but will not hold ourselves responsible in case of payment." *Opinion:* According

to a decision in New York the bank, notwithstanding such form of notice or agreement, will not be relieved from responsibility for payment of a stopped check unless it has been free from negligence in making payment. *Elder v. Franklin Nat. Bk.*, 55 N. Y. S. 576. (*Inquiry from Ala., March, 1913, Jl.*)

Note: But see *Tremont Trust Co. v. Burack*, referred to in previous note.

Agreement not to hold bank liable

3011. This form of agreement is submitted: "To the _____ Bank. Please stop payment on check drawn on you * * * No. _____, dated _____ issued to _____ for the following reasons: _____ and the undersigned hereby agrees to hold you harmless for said amount together with all expenses and costs, including attorney's fees, if any, incurred by you on account of your refusing payment of said check, and further agrees not to hold you liable on account of payment contrary to this request, if same occur through inadvertence or accident only." *Opinion:* With respect to the clause in the form submitted reading: "and the undersigned hereby agrees to hold you harmless, together with all expenses and costs, including attorney's fees, if any, incurred by you on account of your refusing payment of said check," it may be said that such clause is entirely unnecessary, since, according to the generally accepted view (which also obtains in Louisiana), a bank owes no duty to the holder of a check with respect to the payment thereof, and its refusal to pay gives the holder no right of action against the bank. *State v. Bank of Commerce*, 49 La. Ann. 1060. *Cast v. Henderson*, 23 La. Ann. 49; see also *Gordon v. Muchler*, 34 La. Ann. 604. The agreement not to hold the bank liable for payment, contrary to instructions, through inadvertence or accident, would be held, under a New York decision, to relieve the bank only in case it used reasonable care. (*Inquiry from La., Feb., 1919.*)

Note: But see *Tremont Trust Co., v. Burack*, decided in 1920, referred to in previous note, under which such an agreement would relieve the bank from liability.

Bank must use reasonable care notwithstanding agreement that customer will not hold it responsible

3012. A clause is inserted in a stop payment order to a bank which reads as follows: "Should you pay this check through inadvertency or oversight, it is expressly un-

derstood that you will in no way be held responsible." *Opinion:* It is doubtful whether under this clause the courts will relieve the bank in all cases of mistaken payments of stopped checks, irrespective of whether or not the bank has used reasonable care. The tendency of the courts is to attach to all agreements relieving the bank from liability an implied condition that the bank on its part must exercise reasonable care. *Elder v. Franklin Nat. Bk.*, 25 Misc. (N. Y.) 716. *Appleby v. Bk.*, 62 N. Y. 12. *Allen v. Bk.*, 69 N. Y. 314. *Mynard v. R. R. Co.*, 71 N. Y. 180. (*Inquiry from N. Y., Oct., 1916, Jl.*)

Note: But see *Tremont Trust Co. v. Burack*, referred to in previous note.

Agreement to hold bank harmless

3013. A depositor agrees to hold a bank harmless in the event the bank inadvertently pays a check after a stop payment notice has been received. In this case the stop payment agreement is not merely a statement in the pass-book, but is actually signed by the depositor. Is the bank absolved from liability? *Opinion:* The agreement, being virtually one exempting the bank from liability for its own negligence, will be strictly construed. Such exemption contracts are not favored by the courts and will, if possible, be construed in such a way as not to relieve from negligence. How a specific contract of this kind would be construed has not been decided and cannot be foretold with certainty. Contracts for immunity from negligence will be upheld in the State of New York if expressed in unequivocal terms. *Elder v. Franklin Nat. Bk.*, 55 N. Y. S. 576. *Mynard v. Syracuse R. Co.*, 71 N. Y. 180. (*Inquiry from N. Y., March, 1919, Jl.*)

Note: In *Tremont Trust Co. v. Burack*, decided in Massachusetts in 1920, referred to in previous note, such an agreement would protect the bank.

Agreement that depositor will not hold bank

3014. A bank incloses and asks an opinion as to the protection afforded by the use of the following form of stop payment notice: "_____ Bank. You will please stop payment on _____ No. _____, dated _____ to the order of _____ for \$_____ due _____. It being understood that _____ will not hold the _____ Bank for failure to comply with this request _____." *Opinion:* It is difficult to foretell whether the form submitted

would afford any added protection until tested in the courts. In the case of *Elder v. Franklin Nat. Bk.*, 55 N. Y. Supp. 576, the stipulation was "that the bank shall not be responsible for the execution of an order to stop payment of a check previously drawn; that the bank will endeavor to execute such orders, but that no liability shall be created by a failure so to do, and that no rule, usage or custom shall be construed to create such liability. Notwithstanding such stipulation, the bank was held liable for inadvertent payment of a stopped check, the court holding that such stipulations would be construed strictly against the parties who framed them and that the above clause did not absolve the bank from the duty of exercising ordinary care. Equally a court might read into the instant notice containing the stipulation that the depositor will not hold the bank for failure to comply with his request a proviso making the promise to hold harmless conditioned on the exercise of reasonable care by the bank. The form, however, contains the positive statement that the depositor will not hold the bank for failure to comply with his stop payment request and it may be the court might hold this a clear and ambiguous release from liability, binding on the depositor. (*Inquiry from N. Y., June, 1919.*)

Note: See *Tremont Trust Co. v. Burack*, referred to in previous note.

Exemption agreement construed as requiring reasonable care

3015. A bank inquires whether there is any means whereby it can escape liability respecting stop payment notices, when using utmost good faith and refraining from promises. *Opinion:* The courts hold that a customer has a right to stop payment of his check and where he does so the bank thereafter pays at its peril. Concerning an agreement limiting liability of the bank, there seems to be only one decided case in which the question has been passed upon. *Elder v. Franklin National Bank*, 55 N. Y. Supp. 576. In that case the bank inserted a clause in the pass-book containing an agreement that the bank should not be responsible for failure to execute a stop order but that it would endeavor to execute such order. The court construed the agreement as relieving the bank from liability if in good faith it paid a stopped check unless it failed to exercise ordinary care. It held in that case that ordinary care had not been exercised and that the

bank was liable. It would seem that an agreement relieving the bank from liability for paying a stopped check would be valid and protect the bank in any case where it exercised due diligence, or, in other words, ordinary care, and mistakenly paid the check notwithstanding. The trouble would be in any case where a stopped check had been inadvertently paid to prove that ordinary care had been used. This would be a question of fact to be determined by a jury. (*Inquiry from Ore., Nov., 1917.*)

Note: But see *Tremont Trust Co. v. Burack*, decided 1920, referred to in previous note.

Unconditional release of bank from liability

3016. Would the following clause attached to a stop-payment order hold good in case a check had been paid: "I ask this as an act of courtesy only, and hereby release you from any liability in case of payment or non-payment?" *Opinion:* The agreement is an unconditional release of the bank from liability in case of payment of a stopped check, and in abrogation of the rule of law that the bank must obey its depositors' instructions. It might be a court would construe it as relieving the bank, but courts are not prone to construe agreements in such a way as to support a waiver of liability for negligence. *Elder v. Franklin Nat. Bank*, 25 Misc. (N. Y.) 716. (*Inquiry from Ill., Aug., 1919.*)

Liability of drawer and indorsers to holder

Holder in due course may recover from drawer

3017. A gave B a check for \$500 which was indorsed by B to C and was supposed to cover the pay roll of B. C issued his checks payable to B's employees and later discovered that A's check was not good. C then stopped payment of his checks. *Opinion:* Under the common-law rule the payees of C's checks are protected as holders in due course and as such they are free from C's defense of fraud or lack of consideration, which he may have against B. *Sackett v. Johnson*, 54 Cal. 107. *Kerr's Civ. Code Cal.*, Vol. 2, Sec. 3123. *Bedell v. Herring*, 77 Cal. 572, 11 Am. St. Rep. 307. *Armstrong v. Am. Exch. Nat. Bk.*, 133 U. S. 433. *Brown v. Brown*, 91 Misc. (N. Y.) 220. *Boston Steel Co. v. Steuer*, 183 Mass. 140. *Ex parte Goldberg (Ala.)* 67 So. 839. *Vander Ploeg v. Van Zuuk*, 135 Iowa 350. *Charles Sav.*

Bk. v. Edwards, 243 Mo. 553. (*Inquiry from Cal., Nov., 1916, Jl.*)

Note: There is the same protection under the N. I. Act.

Drawer liable to innocent purchaser

3018. John Doe purchased from a stranger an automobile appliance, giving his check of \$50 in payment. Having become dissatisfied with the article, he stopped payment. In the meantime a bank in good faith cashed the check from the stranger, and John Doe refuses to pay the amount. *Opinion:* A bank which in good faith purchases a check from the payee without notice of any defense thereto is a holder in due course and can hold the drawer liable for the full amount thereof, free from his defense against the payee. Civ. Code Cal., Sec. 3138. (*Inquiry from Cal., Jan., 1919, Jl.*)

Recourse of holder against drawer and indorsers

3019. A bank in Colorado sold its draft on a New York bank to A, who gave it to B to close up a deal. B cashed the draft with C. Payment was stopped by A because of fraud. *Opinion:* C, as bona fide purchaser for value of the stopped draft which has been duly protested, has recourse upon the drawer and prior indorsers. (*Inquiry from Colo., Dec., 1912, Jl.*)

Check for beaver hides

3020. A gave his check in payment for beaver hides. The check was purchased from the payee by a bank. Later A was arrested for having the hides in his possession during the closed season, being contrary to law, and accordingly stopped payment of the check. *Opinion:* The bank purchasing the check from the payee may enforce payment from the drawer, if it acquired the check without knowledge of the illegal consideration. (*Inquiry from Colo., July, 1913, Jl.*)

Drawer cannot interpose defense against innocent purchaser

3021. A lumber firm sent a check for \$100 to James Salas who brought the check to the inquiring bank which, knowing Salas, the payee, cashed same for him. The check was sent to the makers through the bank's correspondent, and was returned marked "Stop payment." *Opinion:* The bank, having purchased from the payee a negotiable check, duly indorsed by him, paying full value therefor without notice that the drawer had any defense to the check against

the payee, is clearly entitled to recover the amount from the drawer. The fact that the payee obtained the check from the drawer for a specific purpose, and that he did not do as agreed, probably justified the drawer in stopping payment and would be a defense in case the payee sought to recover on the check from the drawer, but the payee having negotiated the check to an innocent purchaser, namely, the inquiring bank, no such defense would avail. The bank is a holder in due course and it has a clear right to enforce payment of the check from the drawer. (*Inquiry from Colo., May, 1918.*)

Corporation check to employee

3022. A bank cashed a check drawn on another bank, made payable to K, an employee of Y corporation, the drawer of the check. The Y company stopped payment on said check before it could be presented to the drawee bank, stating, as the reason, that it had been discovered that K was largely indebted to the corporation. Can the bank cashing this check, as an innocent holder, recover the amount thereof from the drawer? *Opinion:* Where a corporation issues its check to an employee, who negotiates the same for value to a bank, which acquires the check without notice or knowledge of any defense thereto, the bank is a holder in due course, and can enforce full payment from the drawer corporation, where the latter has stopped payment. (Neg. Inst. Law, Sec. 57.) (*Inquiry from Fla., Dec., 1920, Jl.*)

Check stopped because of fraud

3023. A issued his check to B for \$650. Before negotiation A notified B that he had stopped payment because of fraud. Disregarding the notice, B negotiated the check to C, who had no notice of the stop payment and who gave part cash and the balance for a bill owed by B to C. *Opinion:* C may recover from A, as he was an innocent purchaser for valuable consideration. (*Inquiry from Ill., Jan., 1916.*)

Check stopped because of error in amount

3024. A bank's depositor gave a check for labor and afterwards discovered he had made an error in amount and stopped payment thereof. The party holding same had, meantime, cashed it and when same was presented the bank refused payment. The merchant who cashed the check as an accommodation inquires of bank whether he can recover the money from the party for

whom he cashed it. The bank asks whether the merchant has any recourse on maker of check. *Opinion:* The merchant who cashed this check for value, being a holder in due course, has a right to recover the full amount thereof from all parties liable thereon. In other words, he can hold the maker for the full amount of this check. (*Inquiry from Ill., Dec., 1918.*)

Check stopped because drawer defrauded

3025. A check was issued in payment for certain goods. Shortly thereafter the drawer discovered he had been defrauded and stopped payment of the check. In the meantime a bank cashed the check. *Opinion:* The bank which cashed the check for the payee was a holder in due course and can enforce payment from the drawer. (*Inquiry from Kan., April, 1916, Jl.*)

Check "for labor" not performed

3026. A employs B to do certain work, and gives him a check in advance marked "For labor." B indorses and cashes the check with a local merchant. A stops payment on the check before presentment, alleging failure of consideration. Can the merchant hold A on the check? *Opinion:* Where a check is given the payee, reciting that it is "for labor," and the drawer stops payment because the payee has not performed the labor, the check is a negotiable instrument and an innocent purchaser of the check from the payee can enforce payment from the drawer. The negotiability of an instrument is not affected by the fact that it contains a statement of the transaction which gives rise to the instrument. (Sec 3, Neg. Inst. Law.) (*Inquiry from Ky., Feb., 1920, Jl.*)

Innocent purchaser may recover from drawer and indorsers

3027. Bank A issued a check payable to W. & Co. Bank B cashed same for W. & Co., but the check is returned by the bank which issued the check marked "Payment stopped." Bank B inquires whether or not the issuing bank has the right to stop payment on this check. *Opinion:* Where a bank issued a check drawn upon itself to a payee and then refused payment of the check, an innocent purchaser for value from the payee has a right, as a holder in due course, to recover the full amount of the check from the issuing bank, and also from the indorser, provided the liability of the latter has been preserved. Neg. Inst. Law,

Sec. 57. (*Inquiry from La., Nov., 1919, Jl.*)

Check of one partner to another

3028. In carrying on the business of handlers of farm products A gave to his partner B a number of checks which the latter indorsed and received cash for from bank C. On presentation, payment was refused because of a stop order given by A. B refused to reimburse the bank. What action should it take? *Opinion:* The bank purchased the checks from B in good faith, either before stoppage of payment or without knowledge thereof. As an innocent purchaser for value, the bank would have a right to recover from A as the drawer of the checks. Also from B, provided he has been duly charged as indorser. Of course, if A or B does not settle voluntarily, it would require a lawsuit to enforce the bank's rights. (*Inquiry from La., Oct., 1917.*)

Duplicate for stopped check already paid

3029. The payee of a check indorsed it in blank, deposited it in the mail and it was lost before reaching the addressee. The payee communicated with the drawer, and the latter stopped payment and issued a duplicate. Afterwards the drawee bank refused payment of the duplicate because the original had been presented and paid before the stop order was received. *Opinion:* If the duplicate was in the hands of a holder in due course, he would have a right of recovery against the drawer and payee. But if in the hands of the payee, he cannot recover because of payment of the original, indorsed in blank by him. Assuming the drawer is held liable on the duplicate, he would have recourse upon the payee, because of money twice paid. (*Inquiry from Mont. Feb. 1918.*)

Purchaser cashing check before notice of stop payment

3030. A gave B his check, which was cashed by C. C was later notified not to cash the check, because A had stopped payment. *Opinion:* C, having cashed the check for B in good faith, can recover from the drawer. (*Inquiry from Neb., Oct., 1912, Jl.*)

Recovery by holder in due course where payment stopped

3031. A gave B his check, which was indorsed by B to C. For some reason of his own, B stopped payment of the check. *Opinion:* B had no right to stop payment,

but where the drawer stops payment at the payee's request, a holder in due course may hold both drawer and payee liable. (*Inquiry from Neb., Nov., 1914, Jl.*)

Recovery by merchant cashing stopped check

3032. A customer stops payment of his check after learning he has been defrauded. The check has been given by the payee to a merchant. Can the latter recover? *Opinion:* Section 52 of the Negotiable Instruments Act defines a holder in due course, among other things, as one who takes the instrument before it is overdue, in good faith and for value, without notice of any infirmity in the instrument nor defect in the title of the person negotiating it. It follows from this that where value is given in good faith for a check, the purchaser is a holder in due course, although payment of the check has been stopped, provided the purchaser has had no notice that it has been stopped. Section 57 of said Act gives the holder the right to enforce the instrument free from defenses. The fact that a check was obtained from a drawer by fraud is not a defense against a holder in due course. *Famous Shoe Co. v. Crosswhite*, 51 Mo. App. 55. (*Inquiry from N. J., Oct., 1918.*)

Depository bank can recover on stopped check to extent of amount advanced

3033. A customer deposited a check and received credit for the amount, \$295 of which he checked out before payment of the deposited check was stopped. *Opinion:* The bank of deposit was a holder in due course to the extent of the amount paid out against such deposit, and in this case can recover \$295 from the maker of the deposited check. *N. Y. Neg. Inst. Law*, Secs. 93, 96. (*Inquiry from N. Y., July, 1912, Jl.*)

Creditor receiving stopped check may recover amount and protest fees from drawer

3034. A gives his check to B who pays a bill to C with it. In the meantime A stops payment on the check, and it is returned to C's bank and amount, with protest fees added, charged to his account. The question is—In what manner is A benefited by stopping payment? *Opinion:* A, who stops payment of his check, is of course liable to C to whom the check has been negotiated with protest fees added. The only possible advantage he gains by stopping payment is in the contingency that B, the payee, presents the check in person and that the bank would stamp thereon

"Payment stopped," which would prevent its further negotiation. (*Inquiry from N. Y. Feb., 1917.*)

Recovery by depository bank where credit of deposited check withdrawn

3035. John Jones gave a check to William Smith, drawn upon bank A. Smith deposited this check in bank B and is given credit on his account. The check is presented through clearance upon bank A and is marked "Payment stopped." In the meantime Smith draws upon the funds thus deposited, and his checks are honored. Bank B brings suit against Jones, claiming to be innocent purchasers for value. *Opinion:* Bank B would be held a purchaser for value of this stopped check with right of recourse against the drawer, having advanced value on faith thereof. See, for example, *Jefferson Bk. v. Merchants Rfg. Co.*, 139 S. W. (Mo.) 545, in which it was held that, where a bank allows the depositor of a check bearing an unrestricted indorsement to draw the amount of the check before it is collected, the bank is a holder for value and the defense of lack of consideration is not good against it. (*Inquiry from Ohio, April, 1916.*)

Stopped check given for cotton which was mortgaged

3036. The drawer of a check, who purchased several bales of cotton from A, discovered that the cotton was mortgaged and immediately stopped payment of the check. In the meantime A had received the money from a bona fide purchaser of the check. *Opinion:* The drawer had the right to stop payment of the check, but he would still be liable to the purchasing bank which cashed the check in good faith. (*Inquiry from Okla., Jan., 1912, Jl.*)

Recourse of creditor of payee upon defrauded drawer

3037. F. Brothers issued their check to A. S. Brown, who used it in payment of a bill which he owed to A. F. Brothers, discovering that they had been defrauded by Brown, stopped payment of the check. *Opinion:* A, the innocent purchaser for value of the check, can recover from F. Brothers. *Okla. Neg. Inst. Act*, Secs. 52, 57. *Famous Shoe Co. v. Crosswhite*, 124 Mo. 34. *Ketcham v. Govin*, 71 N. Y. S. 991. *Usher v. Tucker*, (Mass.) 105 N. E. 360. *First Nat. Bk. v. Osborn*, (Iowa) 142 N. W. 209. *McPherrin v. Tittle*, (Okla.)

129 Pac. 721. (*Inquiry from Okla., July, 1915, Jl.*)

Stopped check given for misrepresented animal

3038. The purchaser of an animal stopped payment of the check given for the price on the ground of misrepresentation. The payee cashed the check at a bank, which forwarded it for collection. Has the cashing bank recourse against the maker of the dishonored check? *Opinion:* The bank cashing the check, being a holder in due course, may recover from the maker, although he was defrauded by the payee and stopped payment. The effect of stopping payment merely prevents the bank from honoring the check; it does not affect the rights of an innocent purchaser for value from having recourse upon all prior parties. The underlying theory of the law of negotiable paper is that a bona fide holder for value takes the instrument free from defenses of prior parties. (*Inquiry from Okla., Dec., 1920.*)

Recovery by innocent purchaser

3039. A gave his check to B, who cashed it with C, and later payment was stopped by A. *Opinion:* C, who purchased from B without notice, was a holder in due course and can enforce payment from A. Neg. Inst. Law (Commsr's. dft.), Secs. 52, 57. Lewis v. Reeder, 9 Serg. & R. (Pa.) 193. Welton v. Littlejohn, 163 Pa. 205. Kuhn v. Gettysburg Nat. Bk., 68 Pa. 445. Ihmsen v. Negley, 25 Pa. 297. Real Est. Invest. Co. v. Smith, 162 Pa. 441. (*Inquiry from Pa., June, 1916, Jl.*)

Check stopped because goods misrepresented

3040. A purchaser gave his check in payment for some goods which were not as represented. The drawer stopped payment but in the meantime the payee of the check cashed it at a national bank. The payee was irresponsible. *Opinion:* The national bank, which purchased the check in the regular course of business, is a holder in due course and can recover the amount and protest fees from the drawer. (*Inquiry from Pa., Dec., 1913, Jl.*)

Recourse by cashing bank against drawer and identifying indorser

3041. A draws a check payable to B, who attempts to have same cashed at a bank in another town, but the bank refused for want of identification; whereupon B secured the indorsement of C, upon the

strength of which the check was cashed. A, learning of some misrepresentation of B, stopped payment on check before it was presented to drawee bank, and check was duly protested when presented. The bank which cashed the check has entered suit against the drawer, A. Would they legally have recourse against the drawer, or would not their recourse be rather against C, upon the strength of whose indorsement the check was cashed? *Opinion:* A bank which first refuses to purchase a check from the payee because of lack of identification, but later does so upon the indorsement of a third person, is a holder in due course and, where payment of the check has been stopped because of fraud of the payee, the purchasing bank has recourse for the full amount as well against the drawer as all prior parties. Sec. 57 Neg. Inst. Law. (*Inquiry from Pa., Jan., 1920, Jl.*)

Check for stolen cow

3042. A customer issued his check of \$22 to a negro in payment for a cow, and later stopped payment thereon when he learned that the cow had been stolen. In the meantime the negro had cashed the check at a bank. *Opinion:* The bank was an innocent purchaser for value and as such can enforce payment from the drawer. Robertson v. Coleman, 141 Mass. 231. Neg. Inst. Law (Commsr's. dft.), Secs. 55, 57. (*Inquiry from Tenn., July, 1915, Jl.*)

Check stopped because drawer defrauded

3043. A gave B his check for \$100. B indorsed to C, who cashed it with Jones, an innocent party. B, on discovering that C had defrauded him, requested the drawee not to pay, which request was complied with. *Opinion:* Jones can enforce payment from the drawer and prior parties, free from the defense of fraud, but cannot compel the bank to pay. (*Inquiry from Tex., Sept., 1914, Jl.*)

Check stopped because no consideration received

3044. A bank cashed a check indorsed by the payee and another. Payment of the check was stopped because the maker received no consideration from the payee. *Opinion:* The bank which purchased the check in good faith can enforce payment from the drawer, free from the latter's defense against the payee. Neg. Inst. Law (Commsr's. dft.), Sec. 57. (*Inquiry from Wash., April, 1915, Jl.*)

Depository bank can recover to extent of advances

3045. A borrowed \$500 from B and gave him a note indorsed by C. It was agreed that A would send C certain stocks as security, and in case of A's failure to send same, B was to stop payment of the check. A failed to send the stocks as agreed, but deposited the check in bank and was permitted by it to draw on the funds before collection of the check, which had been stopped. *Opinion:* In the case submitted, the bank which received the check on deposit and allowed the payee to draw out the funds in advance of collection of the check is a holder in due course. It has given value for a negotiable instrument without notice that the drawer had a defense thereto. In view thereof, the bank can compel B, the drawer, to pay the amount of the stopped check or such amount as the bank allowed A to draw thereon before notice of the refusal to pay. (*Inquiry from W. Va., Nov., 1919.*)

Holder's remedy on stopped check is against drawer—Bank not liable

3046. A customer issues his check in payment of an automobile. Finding the machine unsatisfactory, he instructs his bank not to honor the check. A third party, the collecting bank, presents the item and payment is refused. Both the bank and the customer are sued for non-payment. *Opinion:* Drawee bank must obey customer's instruction not to pay check where given before acceptance or payment and is not liable to holder for refusing payment. S. C. Neg. Inst. Act, Sec. 189. (*Inquiry from S. C., July, 1918, Jl.*)

Holder cannot recover from bank on stopped check

3047. A gives his check in payment of a horse, and later, finding the horse not as represented, stops payment on the check, which had been indorsed to a holder in due course. The bank refuses to pay. *Opinion:* Such holder has no remedy against the drawee bank, but must look to the drawer and any prior indorsers. It is not for the bank to go into the equities of the case between holder and drawer, as its duty is solely to its customer. The rule is otherwise in a few states where a check is regarded as an assignment of funds. (*Inquiry from Kan., Feb., 1910, Jl.*)

Note: The enactment of the Negotiable Instruments Law in all states except

Georgia has abolished this last stated rule.

Drawee bank not liable to holder of stopped check

3048. A depositor purchased goods, giving his check in payment. Upon discovering an error he stopped payment. The holder presented the check at the drawee bank and demanded payment. *Opinion:* The bank was in duty bound to obey the instruction and refuse payment, and it incurred no liability to the holder for such refusal. *Wagstaff v. First Nat. Bk., (Minn.) 134 N. W. 224. (Inquiry from Minn., May, 1915, Jl.)*

Stopped banker's drafts*Issuing bank liable to holder in due course*

3049. A bank purchased a New York draft of \$50 from A, who received the instrument in payment for goods delivered to B. The draft was presented and the payment was stopped by the bank issuing the draft at the request of B, the payee, who discovered that the goods had been mortgaged. *Opinion:* The purchasing bank, as a holder in due course, can recover payment if from the issuing bank and from the prior indorsers and its rights cannot be defeated by stopping payment. The drawee bank, however, is in duty bound to obey the stop payment order. (*Inquiry from Ariz., Jan., 1917, Jl.*)

3050. A purchased a draft of Bank B, drawn on Bank N, payable to C. A mailed the draft to C, who negotiated it to D, a holder in due course. Bank B at A's request stopped payment. *Opinion:* D, the holder in due course, can enforce payment of the draft against Bank B, the drawer, free from defenses available against C, the payee. (*Inquiry from Ind., Nov., 1914, Jl.*)

3051. A bank issued a draft and afterwards stopped payment because the payee gave as part payment a worthless check of a third person. *Opinion:* The issuing bank cannot be held liable by the payee for so much thereof as is represented by the worthless check; but if the draft was transferred, the bank would be liable to a holder in due course for the full amount. (*Inquiry from N. D., Jan., 1913, Jl.*)

Issuing bank should require indemnity as prerequisite to stopping payment

3052. A bank inquires whether it takes any responsibility in stopping payment of

draft sold to one of its customers and issued to a third party; and wishes to be informed as to the usual procedure in handling requests for stop-payments of this nature. *Opinion:* If payment of the draft was stopped, the bank would still be liable thereon as drawer to any bona fide holder. It appears, therefore, when the purchaser of a bank draft asks that payment be stopped he should be willing to indemnify the bank for any costs and expenses it might incur in carrying out his wishes in event the draft should be in the hands of a holder in due course who would be entitled to enforce payment by the drawer free from equities. Sometimes, of course, the purchaser of a draft finds he has been defrauded and the bank will, in an endeavor to protect his interest, stop payment; but the bank itself should be protected by the purchaser from any expense it may be put to as, in event of stop payment, it would be liable to a bona fide holder for protest fees in addition to the face of the draft, and, in event of suit, would be liable for costs thereof. (*Inquiry from Wis., Aug., 1914.*)

Stopped banker's draft not yet presented

3053. A bank sold a draft on New York to a person selling stock in an industrial concern, to which it was made payable. A check of one of the bank's customers was tendered in payment of the draft. On the same day draft was issued the bank's customer discovered that the concern had no financial standing. Upon request of customer the bank stopped payment of the draft, he assuming all responsibility. The draft remains unpaid, never having been presented. What are bank's rights against customer who asks reimbursement? *Opinion:* The question whether the customer will be the ultimate loser will depend upon whether the draft has been negotiated to a holder in due course, being a negotiable instrument. If it has been so negotiated, the bank would be compelled to pay same, notwithstanding stop payment. Until the bank's liability is determined after presentment thereof and refusal to pay, it seems nothing can be done towards reimbursing the customer. Assuming the draft was issued to a fraudulent holder, if the same could be located, it might be possible to enjoin its further negotiation; and further assuming this draft should be presented by the payee, who has no enforceable rights, and the drawee, the bank's New York correspondent, marks it "pay-

ment stopped," this would prevent its further negotiation and if, in such case, the draft was not enforceable in the hands of the payee against the bank, its customer would be saved from loss. But if on the other hand, it is in the hands of a holder in due course, the bank will have to pay same and its customer will be loser. Until the bank's liability or non-liability is determined, nothing further can be done as to settling with the customer. (*Inquiry from Minn., Dec., 1917.*)

Holder not entitled to damages from drawer, in addition to amount of draft

3054. A client purchased from a bank a draft drawn by it on its Chicago correspondent for \$2,500. Two days after said issue, upon the payee's request given at the time, the bank stopped payment on its draft, which had come into the hands of an innocent purchaser for value. The holder now seeks to recover damages from the drawer of the check, besides the amount of the draft. *Opinion:* The drawer of a check who stops its payment at the request of the payee is liable thereon to a holder in due course for its face amount, with interest and protest fees, together with court costs in case of suit; but there is no additional liability to such holder for damages because of such stoppage of payment. The rule is that where a bank wrongfully refuses payment of its customer's check, the latter has a right of action for damages in addition to the amount of the check, because of injury to his credit, but the reason for allowing damages in such a case does not apply to an indorser as in this case. The holder does not receive injury to his credit by non-payment of the check, because it is not his check which has been dishonored, but the check of someone else. Colo. Neg. Inst. Act, Sec. 5111. (*Inquiry from Colo., Nov., 1918, Jl.*)

Cashier's and certified checks and certificates of deposit

Difference between cashier's check and ordinary check

3055. A bank desires to know whether or not a bank has the same right to stop payment on its cashier's check as an individual has to stop payment on his checks. *Opinion:* The ordinary check is drawn by the customer on the bank and until it is certified it is a mere order on the bank which the customer has the right to countermand. The cashier's check is drawn by the

bank on itself, the bank being both drawer and drawee. Assuming the payee of such a check has obtained it by fraud from the bank or there is other reason why the bank should not pay it to the payee, it would, of course, be within the power of the bank to refuse payment of its own check; but if the cashier's check has been negotiated to a bona fide holder, he would have an enforceable right against the bank, and if it refused payment, the holder could compel the bank to pay by suit. Taking the case where the payee of such a check has lost it or has parted with it through fraud, and desires the bank not to pay it, he has no right to stop payment similar to the drawer of an ordinary check; but in a case where the payee has been defrauded or asserts he has lost the check, it would be a matter resting within the judgment and discretion of the bank whether it should refuse payment if the check was presented, protecting itself by taking a bond of indemnity from the payee against ultimate liability to a bona fide holder. (*Inquiry from Wis., April, 1917.*)

Bank's liability to innocent purchaser of stopped cashier's check

3056. A cashier's check upon which there were three indorsements was purchased by a bank and presented by it to the drawee, where payment had been stopped because of fraud. *Opinion:* The purchasing bank has recourse upon the drawer as well as upon the indorsers, provided they have been duly charged. Mont. Neg. Inst. Act, Sec. 5905. (*Inquiry from Mont., May, 1915, Jl.*)

Bank liable on cashier's check to innocent purchaser

3057. The customer of a bank purchased its cashier's check of \$600, payable to his order. Afterwards without giving any specific reason he wired the bank a request to stop payment and, upon presentment of the check, payment was refused and the item protested. Later the bank learned that the customer had delivered the check in some trade and, becoming dissatisfied, wired the stop payment order. The bank is threatened with a suit by the holder to enforce payment of the check. *Opinion:* Certified and cashier's checks being used in place of money, the courts refuse, as a general proposition, to permit the issuing bank to refuse payment and defend against the holder, even though he has procured the check from the bank's

customer by fraud. In New Jersey, however, it has been held—contrary to decisions elsewhere—that where a check has been certified for the drawer before delivery by him (as distinguished from certification for the holder after delivery by the drawer) the certifying bank can plead fraud of the holder upon the drawer in defense of payment. In this case the bank is the primary debtor upon the check and is liable thereon to the holder who has the legal title by indorsement. *Carnegie Tr. Co. v. First Nat. Bk., (N. Y.) 107 N. E. 693. Times Square Auto. Co. v. Rutherford Nat. Bk., (N. J.) 73 Atl. 479. Blake v. Hamilton Dime Sav. Bk., (Ohio) 87 N. E. 73. Gamel v. Hynds, (Okla.) 125 Pac. 1115. First Nat. Bk. v. Buffalo Brew. Co., 154 N. Y. S. 765. (Inquiry from Mo., Jan., 1919, Jl.)*

Bank should require indemnity before stopping payment of cashier's check at purchaser's request

3058. A bank's customer purchased from it a cashier's check, and sent it away to complete a land deal, but before same was returned for payment the customer requested the bank to stop payment thereof. *Opinion:* If the cashier's check issued by the bank should be negotiated to an innocent purchaser for value, the latter could compel payment by the bank notwithstanding the parties with whom the payee dealt did not do as they agreed to. Consequently, before refusing to pay on request of the payee, the customer should give the bank satisfactory indemnity to cover all liability which the bank might incur in case the check has been negotiated to a holder in due course. Assuming the bank had issued a draft on its correspondent, instead of a cashier's check, the bank's position would be the same. In this case, being the drawer, the bank would have a right to instruct the drawee to refuse payment, but in that event there would be an equal liability on the bank's part, as drawer, should the check be negotiated to a holder in due course. Consequently, in such a case indemnity would likewise be necessary for the bank's protection before stopping payment. (*Inquiry from Kan., Oct., 1917.*)

Cashier's check erroneously issued for too large amount

3059. A bank erroneously issued a cashier's check for \$1,000 instead of the sum of \$12.50, interest on \$1,000. When the

check came back for payment, same was refused. *Opinion:* The bank would have a right to refuse to pay its cashier's check while in the hands of the payee on the ground that it was issued in error as to amount; but should the payee wrongfully negotiate the check to an innocent purchaser, the bank would be compelled to pay the full amount to the latter. The bank should immediately take legal steps against the payee to restrain him from negotiating the check and, if legal proceedings are promptly taken, the bank may be able to impound it in his hands. The cashier had the right to refuse payment and return the check, but if the holder of the check is an innocent purchaser, he can compel the bank to pay it. If the holder is a mere confederate of the fraudulent payee, then the bank would have a defense. (*Inquiry from Ga., July, 1919.*)

Cashier's check fraudulently obtained

3060. The F bank purchased from a stranger a cashier's check drawn by a neighbor bank. The check was indorsed in blank and by the stranger. After he was properly identified and the check indorsed by a local man, the F bank paid the amount thereof and sent same to the drawee bank for payment. The check was returned protested with the words "Fraudulently obtained" written on its face. The F bank received no stop payment notice but soon afterwards received notice from the drawer bank that "this party obtained this check on a telegram which afterwards proved to be wrong." The F bank, asks whether it can look to the maker for payment. *Opinion:* The F bank, being a purchaser of the cashier's check in good faith for value, has recourse upon the drawer as well as upon the indorsers, assuming that the latter have been duly charged with liability. The Negotiable Instruments Act (Sec. 5905 Mont. Stat.) expressly provides: "A holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon." Under the above statute, the F bank has recourse upon the bank which drew the check and is not compelled to look solely to the indorsers. (*Inquiry from Mont., April, 1915.*)

Cashier's check issued for worthless check

3061. A responsible person buys a

cashier's check payable to himself, and gives in payment thereof his personal check on an out-of-town bank, which was returned protested. The question presented is whether the bank issuing the cashier's check has the right to stop its payment even though indorsed over to another party, and returned to the bank through clearing house. *Opinion:* The bank, of course, has the right to stop or refuse payment thereof, but where it has been indorsed over to another party for value, so that the transferee is a holder in due course, the bank would be liable to him therefor. In a case such as this where a check has come in for payment through the clearing house, it would seem the proper course would be to refuse payment and then to investigate the rights of the holder to whom it has been indorsed. If the bank is satisfied he is an innocent purchaser for value, then payment could be made to him as the bank would have no ground of defense should suit be brought against it; but if after investigation it should appear that the indorser did not give value for the check but was a confederate or in league with the payee, then it would be proper to defend payment. The bank's liability ultimately depends upon whether or not the indorsee of the payee is a holder in due course. If he is, the bank is liable even though the consideration failed; if not, then he takes no greater right than the payee who gave a worthless check in exchange for the cashier's check. (*Inquiry from Okla., Nov., 1914.*)

Title company stopping payment of check issued in error

3062. A title company, in closing a real estate matter, issued its check on its own banking department to one of the parties, and upon discovering an error, stopped payment of the check. In the meantime the check had passed through the hands of several holders for value. Prior to stoppage of payment, it was deposited in another bank which now presents it in due course. Is there a different liability when drawn upon an outside institution than when drawn upon the issuing bank? *Opinion:* A check by the title company upon itself is a negotiable instrument to which the rule applies that the holder in due course can enforce payment free from defenses between the original parties. There is no question of the right of an innocent purchaser for value of such a check, upon which payment has been stopped because of some failure

of consideration or otherwise between the original parties, to enforce payment from the issuing bank, and there is no difference in its liability because the check is drawn upon itself and not an outside institution. (*Inquiry from Pa., May, 1917.*)

Stopping payment of check certified for drawer

3063. A bank certified a check for the drawer, who later requested the bank to stop payment, as the agreement was not fulfilled. *Opinion:* The drawer cannot stop payment as a matter of right, but where the drawer has been defrauded the bank may in some cases comply with the drawer's request and refuse payment upon receiving proper indemnity against ultimately being compelled to pay the holder. *Blake v. Hamilton Dime Sav. Co.*, 79 Ohio St. 189. *Meridian Nat. Bk. v. First Nat. Bk.*, 7 Ind. App. 322. (*Inquiry from Ga., May, 1914, Jl.*)

3064. A contractor delivered his certified check for \$1,000 as liquidated damages prior to entering upon a contract for municipal improvements. The contract was offered to him, but he refused to sign and do the work. His certified check was deposited and returned by the bank stamped "Payment stopped." The municipality seeks to recover the amount. *Opinion:* Where check certified for the drawer and payment is stopped by the bank at the instance of the drawer, the bank can defend against a fraudulent holder, but where the certified check is delivered as liquidated damages upon failure to perform a contract according to bid, the certifying bank and drawer are both liable thereon. *Times Square Auto. Co. v. Rutherford Nat. Bk.*, (N. J.) 73 Atl. 479. *Whitfield v. Levy*, 35 N. J. L. 149. *Monmouth Park Ass'n. v. Wallis Iron Works*, 55 N. J. L. 132. (*Inquiry from N. J., Aug., 1917, Jl.*)

Bank's liability on stopped certified check

3065. A firm in New York received a certified check on a New Jersey bank in payment of merchandise. The check was forwarded through a local bank, and, when presented, payment had been stopped by the maker. *Opinion:* The courts generally hold that after a bank has certified a check, whether for the drawer or the holder, it is obligated thereon as for so much money, and cannot interpose, in defense of payment, an equity of the drawer against the payee or

holder. In New Jersey, however, where a check is certified for a fraudulent payee, the bank is liable to him and cannot plead fraud upon the drawer in defense; but where the check is certified for the drawer the bank can refuse payment and plead fraud of the payee in obtaining check from drawer in defense of liability to payee. *Times Square Auto. Co. v. Rutherford Nat. Bk.* (N. J.) 73 Atl. 479. (*Inquiry from N. Y., Feb., 1919, Jl.*)

Stopping payment of check certified for holder

3066. A purchases goods from B, giving in payment his check and B procures its certification. B fails to deliver the goods and A requests bank to refuse payment. *Opinion:* Where check has been certified for payee and drawer afterwards requests bank to refuse payment, some cases hold (a) bank liable on check even to fraudulent payee while others hold (b) bank not liable to payee who has received check through fraud or without consideration or where drawer has set off against payee. The point has not been decided in Pennsylvania. Bank is liable on its certified check in any event to an innocent purchaser for value. *Times Square Auto. Co. v. Rutherford Nat. Bk.*, (N. J.) 73 Atl. 479. *Blake v. Hamilton Dime Sav. Bk. Co.*, (Ohio) 87 N. E. 73. *Carnegie Tr. Co. v. First Nat. Bk.*, 141 N. Y. S. 745. (*Inquiry from Pa., April, 1914, Jl.*)

Stopping payment of certificate of deposit

3067. A bank issued a certificate of deposit to A who indorsed it. B obtained it from him by fraudulent means, and disposed of it to C. Can the bank refuse to pay if A stops payment? *Opinion:* A certificate of deposit represents a direct obligation of the bank to the indorsee and the depositor has no right to stop payment. Where, however, the payee has indorsed the certificate to a third party because of fraud, the bank might refuse payment of its certificate until the fact became established that the holder was an innocent purchaser for value. But the bank should not do this unless the payee tenders it a sufficient bond of indemnity to insure it against all liability. If the holder is an innocent purchaser then the bank is liable to pay the certificate even though the person indorsing it to the holder has procured it from the payee by fraud. (*Inquiry from N. D., Jan., 1921.*)

TAXATION

State taxation of national banks

Occupation tax invalid

3068. A national bank cannot be forced to pay an occupation tax imposed by the state. It has been repeatedly held that a state has no power to tax national banks except as Congress permits, and Congress has not authorized any taxation of national banks by the states, except as to real estate, but only a taxation upon the shares of national banks to the individual shareholders, subject to certain restrictions. *Schuster v. City of Louisville, (Ky.) 89 S. W. 689. State v. Bk., 21 Mont. 50. (Inquiry from Idaho, Nov., 1908, Jl.)*

3069. States or municipalities have no power to impose special or occupation taxes upon national banks. *Shelton v. Platt, 139 U. S. 591. City of Carthage v. First Nat. Bk., 71 Mo. 508. Mayor v. First Nat. Bk., 59 Ga. 648. Nat. Bk. v. Mayor, 8 Heisk. (Tenn.) 814. (Inquiry from Okla., Feb., 1911, Jl.)*

License tax invalid

3070. A state or city has no power to impose a license or privilege tax upon national banks. *Mayor v. First Nat. Bk., 59 Ga. 648. City of Carthage v. First Nat. Bk., 71 Mo. 508. Nat. Bk. v. Mayor, 8 Heisk. (Tenn.) 814. (Inquiry from Cal., Nov., 1914, Jl.)*

3071. May a national bank be subjected to a town ordinance imposing a license or privilege tax on national banks? *Opinion:* It is beyond the power of a state or town to impose a license or privilege tax upon national banks. They cannot be taxed by the states or any subdivision thereof except as congress permits, and congress has never permitted such kind of taxation. *(Inquiry from Mont., April, 1917.)*

Capital stock and workmen's compensation tax invalid

3072. The North Dakota Legislature passed a law taxing all banks \$0.50 per \$1000 on their capital stock, and a national bank has just had a notice of assessments for same. Under the Workmen's Compensation Act the bank has also been assessed a tax or premium covering accidents to employees. The bank asks advice as to whether it is obliged as a national bank to pay these

taxes or assessments, not being under the jurisdiction of the state, except as Congress gives them certain taxing power as regarding national banks. *Opinion:* A state has no power to impose a tax on the capital stock of a national bank, nor to compel a national bank to pay a tax or premium under a Workmen's Compensation Act. *Owensboro Nat. Bank v. City of Owensboro, 173 U. S. 664. U. S. Rev. St. Sec. 5209. (Inquiry from N. D., Nov., 1919, Jl.)*

State cannot tax national bank on its income

3073. Does the Mississippi income tax law apply to national banks? *Opinion:* It is established law that the states cannot tax national banks except as Congress permits, and the extent of permission given by Congress is contained in Sec. 5219 U. S. Rev. St. permitting states to tax the shares of a national bank as the personal property of the individual stockholder and also permitting the real property of such banks to be taxed by the state, county or municipality. *Owensboro Nat. Bank v. Owensboro, 173 U. S. 664,* holds that states may levy no other taxes upon national banks than those expressly permitted by such section. It follows that the Mississippi income tax does not apply to national banks. *(Inquiry from Miss., Oct., 1917.)*

3074. Income Tax Law of Missouri imposing one-half of 1 per cent. tax upon net incomes of individuals and corporations is inapplicable to national banks and not enforceable against such institutions, as the states cannot tax national banks except as Congress permits, and Section 5219, U. S. Rev. Stat., which is the measure of permission by Congress, does not authorize such a tax. *U. S. Rev. St., Sec. 5219. Owensboro Nat. Bk. v. City of Owensboro, 173 U. S. 664. City of Carthage v. First Nat. Bk., 71 Mo. 508. Mo. Income Tax Law, 1917, Sec. 22. (Inquiry from Mo., Feb., 1919, Jl.)*

Power of state to compel cashier to furnish list of stockholders

3075. Laws of Maine (1915), C. 125, applicable only to national banks, and not to state banks, requires the cashiers annually to "make return to the secretary of state of the names of all stockholders, their residences, the amount of stock owned by each and the whole amount of stock paid in on

said first day of November." Are national banks required to obey this law? *Opinion:* National banks are required to obey this law. *Waite v. Dowley*, 24 U. S. Sup. Ct. Rep. 181, is decisive of the question. The court held that national banks are subject to state legislation, except where such legislation is in conflict with some act of Congress or where it tends to impair or destroy the utility of such banks as agents or instrumentalities of the United States or interferes with the purposes of their creation. The court pointed out that the act of Congress, which requires each national bank to keep a list of its stockholders posted did not cover the same ground as the Vermont statute there in question but was merely designed to furnish the public with knowledge of the names of its incorporators and was wholly deficient in the information needed for the purposes of taxation by the State, as conceded to it by the act of congress itself. (*Inquiry from Me., Dec., 1915.*)

3076. A county tax assessor sought to compel a national bank officer to furnish a list of the names of shareholders and the number of shares held by each. *Opinion:* Under the Oklahoma statute, the county assessor had the right to compel the bank officer to furnish the list. The Supreme Court of the United States has upheld such right in a state official, acting pursuant to state law. It has been held that national banks are subject to state legislation, except where such legislation is in conflict with some act of Congress or where it tends to impair or destroy the utility of such banks as agents or instrumentalities of the United States, or interferes with the purpose of their creation. *Waite v. Dowley*, 94 U. S. 527. *Paul v. McGrau*, 3 Wash. 296. (*Inquiry from Okla., Aug., 1916, Jl.*)

Taxation of non-resident shareholders

3077. Under a North Carolina statute, a tax is assessed against the value of shares in national banks for school, county and municipal purposes to be paid by the bank and deducted from dividends. A bank questions the right of the state to collect from it taxes assessed against certain of its stockholders, resident in Alabama, where, it asserts, such stockholders are also compelled to list and pay taxes on such shares under the laws of Alabama. *Opinion:* Under the National Bank Act, shares of non-residents must be taxed in the place where the bank is located and "not elsewhere." It would, therefore, be unlawful to tax such shares in

Alabama and there would be no double taxation. It is lawful for a state to require a national bank to collect the tax out of the shareholder's dividends and pay it as his agent. *Bk. v. Commonwealth*, 9 Wall. (U. S.) 353. U. S. Rev. St., Sec. 5219. (*Inquiry from N. C., March, 1910, Jl.*)

3078. An incorporated town in North Carolina has the right to assess for town purposes the stock of national bank shareholders owned by non-residents of the state and to require the bank to pay the taxes so assessed. U. S. Rev. St., Sec., 5219. *Buie v. Commissioners*, 79 N. C. 267. *Kyle v. Commissioners*, 75 N. C. 445, N. C. Laws, 1915. Ch. 286, Sec. 42. (*Inquiry from N. C., Dec., 1916, Jl.*)

Government bonds cannot be deducted

3079. Government bonds, owned by a national bank, whether held for circulation or for investment, cannot be deducted from the taxable value of the shares. A decision in Kentucky holds that the Kentucky tax law of 1906 imposes a tax upon national bank shares which is payable by the bank and collectible from the shareholders and not upon the capital of the bank, and that the value of United States bonds owned by the bank cannot be deducted from the assessment. The court makes no distinction between bonds used as a basis for circulation and bonds held as a pure investment. *Hagar v. Citizens Nat. Bk., Ky.* Law Rep. Jan. 15, 1908. *Marion Nat. Bk. v. Burton*, 121 Ky. 876. (*Inquiry from Ky., Aug., 1908, Jl.*)

State may permit owner to deduct non-taxable state bonds

3080. It would seem that a state has a right, in providing for the taxation of national bank shares, to permit the owner to deduct the value of non-taxable state bonds owned by the bank, although denying to the shareholder the right to deduct the value of non-taxable United States Government bonds so owned, the refusal to permit such deduction in the latter case being upheld by the Supreme Court of the United States. U. S. Rev. St. Secs. 3701, 5219. Civ. Code S. C., Secs. 294, 341, 346, 347. *Van Allen v. Assessors*, 3 Wall. (U. S.) 573. *Tr. Co. v. Lander*, 184 U. S. 111. *Pullen v. Corp. Com.*, (N. C.) 68 S. E. 155. *Commsr's. v. Tobacco Co.*, 116 N. C. 447. *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232. *Merchants, etc., Nat. Bk. v. Com. of Pa.*, 167 U. S. 461. *Travellers Ins. Co. v. Connecti-*

cut, 185 U. S. 364. *Farmers, etc., Bk. v. Minnesota*, 232 U. S. 516. (*Inquiry from S. C., Nov., 1916, Jl.*)

Liberty bonds cannot be deducted

3081. Does ownership of Liberty bonds by a national bank result in the reduction of taxes? *Opinion:* The Supreme Court of the United States has repeatedly held that where a state taxes the value of national bank shares to the shareholder, the latter is not entitled to deduct the value of government bonds owned by the bank from the taxable value of such shares. There has been a recent decision by a federal court in Iowa holding, however, that in the taxation of shares of a state bank, the value of Liberty bonds can be deducted on the ground that, while the tax is nominally against the shares as the property of the shareholder, it is in reality a tax against the bank upon its property and invalid so far as the property consists of exempt government securities. A majority of the federal courts, however, take a contrary view. Wherever the laws of the state provide that the tax is against the shareholder upon his property, even though the bank pays the tax as his agent, there can be no deduction. (*Inquiry from Ky., Jan., 1919.*)

3082. In ascertaining the taxes on shares of stock in a national bank in Oklahoma, may as much of the surplus of the bank as is invested in Liberty Loan bonds be deducted? *Opinion:* The value of the Liberty Loan bonds is not deductible from the tax value. (*Inquiry from Okla., June, 1917.*)

Federal Reserve stock not deductible

3083. Are shares of stock in a national bank exempt from state taxation to the extent of the federal reserve stock owned by such bank? *Opinion:* Section 7 of the Federal Reserve Act provides that "Federal Reserve Banks, including the capital stock and surplus therein and the income derived therefrom, shall be exempt from federal, state and local taxation, except taxes upon real estate." Notwithstanding such provision it is probable there is no right of deduction. The same rule applies to exempt stock of the Federal Reserve Bank as applies to United States bonds owned by a national bank. The United States Supreme Court has held that such bonds cannot be deducted from the value of the shares for the purposes of state taxation of the stockholders. *Van Allen v. The Assessors*, 3 Wall.

573. If the tax were assessed against the bank itself, the value of the stock could be deducted but the states are not permitted to tax national banks directly, except as to real estate, but the extent of their permission is to tax the shares in the hands of the individual shareholders. The Supreme Court has held that this taxation of the shares, even though the bank pays the taxes for its shareholders, is a different thing from taxing the bank itself. (*Inquiries from Okla. and Kan., July, 1915.*)

Government bonds and Federal Reserve Bank stock cannot be deducted

3084. In making returns as basis for state taxation of national bank stock, may the bank deduct non-taxable government bonds and the amount invested in Federal Reserve Bank stock from the amount of its capital, surplus and undivided profits? *Opinion:* The Supreme Court of the United States has repeatedly held that the value of non-taxable government bonds cannot be deducted, for the reason that the tax is imposed not against the bank upon its property but against the owners of the bank stock upon their property in the shares. The same reasoning would apply to non-taxable stock of the Federal Reserve Bank. The Federal Reserve Board published an opinion of its counsel to this effect, rendered on Sept. 14, 1915. It follows that the bonds and the stock in question cannot be deducted. (*Inquiry from Iowa, March, 1917.*)

3085. Are there any government bonds which a national bank may buy which may be deducted in the assessment of state and local taxation upon its shares? *Opinion:* No such bonds are known. (*Inquiry from Okla., April, 1915.*)

Discrimination against national bank shares in taxing other property at lower rate

3086. A bank complains against discrimination of the state in taxing national bank stock on full book value, while real estate and other kinds of property are taxed only on a small percentage of actual value. *Opinion:* The taxation of national bank shares at a higher rate than moneyed capital invested in real estate, stock and other kinds of property has been held not a violation of the anti-discrimination provision of Section 529, U. S. Revised Statutes, where the "moneyed capital" so under-taxed is not used in competition with that of national banks. U. S. Rev. St., Sec. 5219.

Mercantile Nat. Bk. v. New York, 121 U. S. 138. First Nat. Bk. v. Chehalis County, 166 U. S. 440. (*Inquiry from Miss., May, 1917, Jl.*)

Note: The supreme court of the United States in Merchants National Bank of Richmond v. City of Richmond, decided June, 1921 held that Section 5219 U. S. Revised Statutes, which provides that the taxation of national bank shares shall not be at greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state, was violated where bonds, notes and evidences of indebtedness representing moneyed capital in the hands of individual taxpayers competing with national banks in the loan market were taxed at a lower rate than national bank shares. The court said:—"While the words 'moneyed capital in the hands of individual citizens' do not include shares of stock in corporations that do not enter into competition with the national banks, they do include something besides shares in banking corporations and others that enter into direct competition with those banks. They include not only moneys invested in private banking, properly so called, but investments of individuals in securities that represent money at interest and other evidences of indebtedness such as normally enter into the business of banking."

Discrimination where banks taxed at different rates in different parts of state

3087. In some parts of the state of Oklahoma, national bank shares are assessed for purposes of taxation at full valuation of 100 per cent., while in other parts of the state, shares of state and national banks are assessed at only 65 per cent. of their actual value. A national bank assessed at full value claimed that it has been discriminated against and demands relief. *Opinion:* In order to get relief from such discrimination the national bank would have to prove at least three things—(1) that the under valued capital in one part of the state is in competition with the fully valued national bank shares in another part; (2) that such under-valuation constitutes a discrimination in the proportionate amount of taxes levied for state purposes, as distinguished from county and city purposes; and (3) that such discrimination is systematic and intentional, and not merely desultory and accidental. U. S. Rev. St., Sec. 5219. Whitbeck v. Mercantile Nat. Bk., 127 U. S. 193. People

v. Weaver, 100 U. S. 539. Pelton v. Nat. Bk., 101 U. S. 143. Cummings v. Nat. Bk., 100 U. S. 153. Nat. Bk. v. Kimball, 103 U. S. 732. First Nat. Bk. v. Albright, 208 U. S. 548. (*Inquiry from Okla., April, 1911, Jl.*)

Discrimination between savings depositors in national and state institutions

3088. In California, deposits in state savings banks are exempt from state taxation. Would failure to exempt savings deposits in national banks constitute unlawful discrimination? *Opinion:* In Clement Nat. Bank v. Vermont, 231 U. S. 120, the method of taxing deposits in state banks was different from that of taxing deposits in national banks, but both classes of deposits were actually taxed, and the court found that there was no injurious discrimination. Hence, it also came to the conclusion that there was no denial to the depositors in national banks of the equal protection of the laws. The court said that the objection must rest upon the ground that the measure adopted was essentially inimical to national banks, frustrating the purpose of the national legislation or impairing their efficiency as federal agencies. "To be open to such an objection it must appear that the scheme of taxation constitutes an injurious discrimination." (*Inquiry from Cal., July, 1918.*)

Basis of value of shares

Book value vs. market value in Illinois

3089. A county board of review in Illinois took into consideration—in assessing national bank stock for taxation—capital, surplus, undivided profits, and the amount of dividends paid during a few preceding years. Objection is made to the inclusion of the dividend-earning capacity of the bank. Was the method of assessment proper? *Opinion:* The Illinois statute provides that the tax upon national bank shares shall be "upon the value of" the shares, after deducting the value of the real estate owned by the bank. It is the practice in many states, where a tax is imposed upon the value of stock, to take the book value in preference to the market value. By the book value is meant the value based upon capital, surplus and undivided profits. If the board of review insists upon its ruling, then the relief, if any, is with the courts. There are not many decisions upon the question, which depends to some extent on the wording of the particular statute. In New Jersey a former law required taxation upon the "true value."

In *Mayor v. Tunis*, 81 Atl. (N. J.) 722, it was held that it was erroneous to take the "book value," since this disregarded the elements of good will, dividend-earning power, ability and management, etc., that ordinarily tend to give the stock a selling value in excess of pure book value. The market value was adopted as the basis of assessment. The Illinois courts might follow this case and uphold the board of review or they might hold that the legislature in using the term "the value" meant the actual "book value." (*Inquiry from Ill., March, 1917.*)

Book value vs. market value in Wisconsin

3090. The Wisconsin statute provides that all property shall be assessed at its "true value." Does this mean that the market value or merely the book value, excluding the item of good will, shall be taken as the valuation of national bank stock? *Opinion:* First Trust Co. of Lincoln v. Lancaster County, 142 N. W. (Neb.) 542, is an authority in point. The official syllabus states with reference to ascertainment of the true value by the assessor that "if the stock has a 'market value' he must consider that, and must also consider 'the surplus and undivided profits.' He must consider these things but is not concluded by them. . . . All property and assets and everything of value is included in this true value of the stock." (*Inquiry from Wis., Jan., 1919.*)

State taxation of state banks

License tax on state bank in Alabama

3091. Is the imposition of a city license of \$15 on a bank and trust company, which is capitalized at \$15,000 and has a surplus of \$5,000, an overcharge? *Opinion:* Art. 18, Sec. 2361, subd. 26 of the Alabama Code of 1907 provides: "All corporations organized under the laws of this state and doing business in this state, not otherwise specifically required to pay a license tax, shall pay annually the following privilege taxes. . . . corporations whose capital stock exceeds ten and is less than twenty-five thousand dollars, fifteen dollars. . . ." If the tax referred to is levied under the above statute, the \$15 imposed is in accordance with the wording of the statute, since your "capital stock exceeds ten and is less than twenty-five thousand dollars." The tax may, however, have been imposed by some city license tax under city ordinance. (*Inquiry from Ala., Jan., 1919.*)

Tax on bank stock in Iowa—Place of assessment

3092. What is the law with respect to reports for assessment of taxes when some of the stockholders of a bank live in another county in Iowa than that in which the bank is located? *Opinion:* Section 1322 of the Iowa Code, Suppl. 1913, provides: "Shares of stock of national banks and state and savings banks, and loan and trust companies located in this state, shall be assessed to the individual stockholders at the place where the bank or loan and trust company is located." The section then provides for reports for assessment by the officers of banks or loan and trust companies. The owner is not required to make a return on the stock. Assessment is made where the bank or company is located. (*Inquiry from Iowa, Feb., 1920.*)

Deduction of real estate in Massachusetts

3093. In Massachusetts the law provides that bank shares shall be assessed to the owner in the city or town in which the bank is located and not elsewhere, in the assessment of state, county and town taxes, whether such owner is a resident of such city or town or not. They shall be assessed at their fair cash value on the first day of May, first deducting therefrom the proportionate part of the value of the real estate belonging to the bank, at the same rate as other moneyed capital in the hands of individuals is by law assessed. The banks pay the tax and have a lien on the shares for reimbursement. Rev. L. Mass. 1902. Ch. 14, Secs. 9-11. (*Inquiry from Mass., Nov., 1908, Jl.*)

Recovery of illegal taxes voluntarily paid in Missouri

3094. A county board of equalization in Missouri raised the assessments on banks from 50 to 65 cents. A bank paid the tax and later asked a refund to the amount of the excess, which was refused on the ground that it had been applied to different funds. Is the bank entitled to a refund? *Opinion:* The supreme court of Missouri, in *Mercantile Trust Co. v. Schramm*, 190 S. W. 886, held that the ruling of the state board of equalization fixing the basis of bank assessments at fifty cents for the purpose of equalizing assessments for the state was mandatory and that a local board could not change the rate to seventy cents. It would seem that the bank in the case submitted could not have been compelled to pay the higher rate. However, as it was paid voluntarily and not

under protest, there would seem to be no right of recovery. It is a well settled rule that a tax paid voluntarily cannot be recovered in an action at law. *Gibson Abstract Co. v. Chochise County*, 100 Pac. (Ariz.) 453. *State v. Chicago, etc., R. Co.*, 165 Mo. 597. If Missouri has not followed the states passing legislation allowing a refund of such payments, the bank is without redress. Even where recovery of a tax voluntarily paid is permitted, the rule seems to be that it can be recovered only while the fund remains in the possession of the defendant or county and, if the county has divided up and paid over the funds, there can be no recovery. *Cleveland, etc., R. Co. v. Marian County*, 19 Ind. App. 58. The ground of refusal would indicate that recovery would be precluded under this rule in the case submitted. (*Inquiry from Mo., April, 1917.*)

Non-deduction by Montana bank of stock of real estate company

3095. A bank does not hold title to real estate, but holds title to one-half the shares of a corporation which owns the building in which the bank is located. The Montana statute on taxation of banks provides that the value of the real estate to which the bank holds title shall be deducted from the total value of the bank shares and the real estate assessed to the bank. *Opinion:* The statute does not authorize deduction of the value of the bank's holding of stock of the company which owns the bank building. *Laws Mont.* 1915, Ch. 31, p. 45. In re First Nat. Bk., (N. Dak.) 146 N. W. 1064. *Wis. St.* 1911, Sec. 1057. *Sec. Ward Sav. Bk. v. Leuch*, (Wis.) 144 N. W. 1119. *State Bk. v. Leuch*, (Wis.) 144 N. W. 1122. (*Inquiry from Mont., Sept., 1915, Jl.*)

Deduction by New Jersey bank of amount invested in mortgages

3096. The New Jersey Act of March 29, 1917, provides that "No mortgage or debt secured by mortgage on real property which is taxed in this State shall be listed for taxation; and no deduction from the assessed value of real property shall be made by the assessor on account of any mortgage debt, but the mortgagor or owner of the property paying the tax on mortgaged real property shall be entitled to credit on the interest payable on the mortgage for so much of the tax as is equal to the tax rate applied to the amount due on the mortgage, except where the parties have otherwise agreed, etc." May

a trust company deduct from its capital and surplus the mortgages held by it when making its statement for taxes? *Opinion:* Under the provisions of the statute quoted, the tax is ultimately borne by the holder of the mortgage but is directly paid by the owner of the property. This being so, the bank would seem to be entitled to deduct from its capital and surplus the amount invested in mortgages on New Jersey realty, for otherwise it would be virtually paying double taxes on the assets represented by such mortgages. (*Inquiry from N. J., April, 1917.*)

Deduction of real estate by New Jersey bank

3097. Under chapter 90 of the Laws of 1914 (New Jersey), banks are taxable upon the value of their capital stock, which is "determined by adding together the amount of the capital, surplus and undivided profits of such bank... and deducting therefrom the assessed value of the real property of such bank." In 1913 the real estate of a particular bank was assessed at \$2200 while in 1914 it was assessed at \$9000, owing to the erection of a building. In 1914 the collector allowed a deduction of \$2200 only, although a deduction of \$9000 was claimed. Should not the bank have been allowed a deduction of \$9000? *Opinion:* The bank seems to have been entitled to a deduction of \$9000; otherwise the value of the building would be doubly taxed. (*Inquiry from N. J., May, 1915.*)

Double taxation of bank real estate in N. Y.

3098. A bank pays a state tax of 1 per cent. on its capital stock, surplus and undivided profits. It is also assessed for local and state taxes on its building which is part of its capital and surplus. The bank objects to the assessment on the ground of double taxation of its real estate. *Opinion:* The bank must pay taxes on its real estate, notwithstanding such real estate is included in the value of its shares upon which 1 per cent. tax is levied. In re First Nat. Bk., 182 N. Y. 460. (*Inquiry from N. Y., Oct., 1914, Jl.*)

3099. Banks in New York must pay tax, assessed against the shareholders, at the rate of 1 per cent. of the taxable value of the shares and, in arriving at such taxable value, the value of real estate owned by the bank cannot be deducted, nor can the bank deduct the value of real estate mortgages owned by it upon which mortgage tax has been paid

nor the value of government, state or village bonds owned by the bank. N. Y. Tax Law, Secs. 183, 251. Rep. Atty. Gen. N. Y., Vol. 2, p. 565. Matter First Nat. Bk., 182 N. Y. 460. People v. Supervisors, 182 N. Y. 556. Aff'd 105 App. Div. 319. (*Inquiry from N. Y., Oct., 1918, Jl.*)

Secured debts tax law of New York

3100. The question is raised whether national and state banks, because of the 1 per cent. tax on bank shares in lieu of all other taxation, except real estate taxed directly to the bank, do or do not come under the provisions of the newly enacted Secured Debts Tax Law of New York because of secured debts owned by the bank; and whether there is any difference in the status of national and state banks in this regard. *Opinion:* A national or state bank owning secured debts is not taxable under the Secured Debts Tax Law, the latter because exempted from all taxation on personal property by Section 24 of the Tax Law, in view of the tax on shares, and the former class of banks for the additional reason that the state cannot, in any event, tax a national bank upon its personal property. N. Y. Laws 1915, Chaps. 169, 465. N. Y. Tax Law, Sec. 24. (*Inquiry from N. Y., Nov., 1915, Jl.*)

Tax for fraction of year

3101. The stockholders of a state bank organized after April 1 are not liable to taxation for the current year, according to a statute passed in North Dakota in 1913. Comp. Laws N. Dak., 1913, Sec. 2115. Gaar v. Sorum, (N. Dak.) 90 N. W. 799. (*Inquiry from N. D., March, 1917, Jl.*)

Right of state to tax bank shares

3102. In Richardson v. Shaw, 209 U. S. 365, the statement is made that "the certificate of shares of stock is not property itself, it is but evidence of property in the shares," and this is quoted with approval in Gorman v. Littlefield, 229 U. S. 19. How does this affect the right of a state to tax a certificate of bank stock? *Opinion:* The question as to the taxability of certificates of stock was not involved in the Richardson and the Gorman cases. Hawley v. Malden, 232 U. S. 1, holds directly that the property of shareholders in their respective shares is distinct from the corporate property, franchises and capital stock of the corporation itself and may be separately taxed. The North Carolina cases are to the same effect:

Belo v. Commissioners, 82 N. C. 415. Commissioners v. Tobacco Co., 116 N. C. 447. Pullen v. Corporation Commissioners, 152 N. C. 548 (decided two years after Richardson case quoted). (*Inquiry from N. C., July, 1916.*)

Taxation of bank deposits

Savings deposits not exempt in Pennsylvania

3103. The statutes of Pennsylvania do not exempt savings deposits from taxation and such deposits are subject to the four mill tax for state purposes as part of the personal property of the depositor under the Act of May 11, 1911. (*Inquiry from Pa., May, 1917, Jl.*)

Exemption in N. Y. does not include savings deposits in national banks

3104. *Opinion:* that savings deposit in interest department of national bank not exempted from taxation by provision of tax law of New York exempting "the deposits in any bank for savings which are due depositors." People v. Peek, 157 N. Y. 51. People v. Dederick, 158 N. Y. 414. People v. Cameron, 140 N. Y. App. Div. 76. Yazoo, etc., R. Co. v. Adams, 180 U. S. 1. (*Inquiry from N. Y., Aug., 1914, Jl.*)

Taxation in New York of bank accounts of non-residents

3105. What is the law in New York with reference to the taxation of bank accounts of non-residents and foreign corporations? *Opinion:* There is no specific provision of the New York Tax Law which expressly taxes the bank accounts of non-residents and foreign corporations. Sec. 182 of that law imposes a franchise tax on foreign corporations based on capital employed within the state and Sec. 197 makes the tax a lien upon the real and personal property of the corporation. (*Inquiry from N. Y., June, 1917.*)

Other state taxation

Treasury notes subject to taxation

3106. United States Treasury notes are subject to state taxation as money on hand or on deposit. U. S. Rev. St., Sec. 3701. (*Inquiry from N. C., May, 1915, Jl.*)

Taxation of choses in action

3107. Oklahoma session law, passed in 1917 providing for payment of a tax on bonds, notes and choses in action and excluding from the courts all such instruments

not registered and upon which the tax is not paid in accordance with the Act, has for its underlying purpose the taxation of a class of intangible personal property which would otherwise escape taxation. Registration is compulsory. It does not provide for double taxation of banks holding such bonds, notes or choses in action. A similar law exists in Connecticut, and there is a general movement among the states to provide methods by which a larger share of personal property is subject to taxation. Okla. Sess. L., 1915, Ch. 105. Okla. Sess. L., 1913, Ch. 246. (*Inquiry from Okla., July, 1915, Jl.*)

Transfer tax in New Jersey on deposit of non-resident decedent

3108. A deposit of a non-resident decedent in a New York savings bank is subject to the transfer tax. The same rule applies to similar deposits in a trust company. *Matter of Houdayer*, 150 N. Y. 37. *Matter of Blackstone*, 171 N. Y. 682. *People v. Merchants, etc., Inst.*, 92 N. Y. 7. *Whitlock v. Bowery Sav. Bk.*, 36 Hun N. Y. 460. (*Inquiry from N. J., May, 1911, Jl.*)

Taxation of trust estate in Maryland where beneficial ownership in North Carolina

3109. A resident of North Carolina died, leaving his estate, composed largely of stocks and bonds, in trust to a Maryland trust company, the beneficiaries residing in North Carolina. It is stated that the bulk of the trust estate consists of stock issued by a New Jersey corporation, and that certain of the stocks and bonds have been pledged as collateral for loans granted by New York banks. The questions asked are: (1) Whether this estate is subject to tax under the Maryland laws; (2) to what extent the stocks issued by a corporation organized under the laws of New Jersey are taxable under the laws of that state, and whether subject to inheritance tax; and (3) whether the stock and bonds pledged as collateral for loans granted by New York banks are taxable under the law of the State of New York. *Opinion:* (1) The Maryland statute (Art. 81 Code of Md., Sec. 2) taxes shares of corporations located in other states owned by residents of the state to the owners thereof in the county or city where the owners reside. It has been held that property held by a trustee in Maryland is properly assessed to such trustee, he being the holder of the legal estate. *Latrobe v. Baltimore*, 19 Md. 21. It has also

been held that personal property of a ward in the hands of a guardian appointed and residing in another state is not taxable in Maryland, the situs of such property for taxation being where the guardian was appointed. *Kinehart v. Howard*, 90 Md. 4. (2) It has been held in New Jersey that the stock of corporations of that state held by inhabitants of another state are not liable to taxation in New Jersey. *State v. Ross*, 23 N. J. L. 517. *State v. Thomas* 26 id. 181. Contra, under the inheritance tax law of New Jersey in cases where "the transfer is by will or intestate law of property within the state, and the decedent was a non-resident of the state at the time of his death." See *Neilson v. Russell*, 76 N. J. L. 655. In *re Delano's Estate*, 74 N. J. Eq. 365. (3) It seems that securities owned by a non-resident and pledged as collateral with a New York bank would not be subject to taxation as personal property situated or owned within the state. See Section 270, N. Y. Tax Law. (*Inquiry from N. C., Aug., 1918.*)

Taxation in Iowa of mortgage held in foreign jurisdiction

3110. An opinion is asked on the following question of taxation between parties in Iowa and Nebraska: A, residing in Iowa, holds a \$1,500 mortgage on a piece of land in Nebraska, and pays taxes on the mortgage in Iowa. Later he was notified to pay taxes thereon in Nebraska under a statute taxing B, the holder of the land (valued at \$3,000), for \$1,500, B's equity in same. A claims he should not pay taxes in Iowa thereon under those conditions. *Opinion:* Mortgages, before foreclosure, are choses in action, and, as such, attach to the person of the holder, and are taxable at the place of his domicile. In the absence of statute, they are not taxable in the state where the property is situated where the owners of such mortgages are non-residents. *City of Davenport v. Miss. & Mo. R. R. Co.*, 12 Iowa, 539. *Kirtland v. Hotchkiss*, 100 U. S. 491. A state, however, has power to tax a mortgage as such, in the county where recorded, irrespective of the residence of the owner of mortgage. *Mumford v. Sewall*, 11 Ore. 67. See also *City of Dubuque v. C. D. & M. R. Co.*, 47 Iowa 196, holding that the legislature has the power to fix the situs of property for the purpose of taxation. In the case submitted there can be no doubt of the liability of the mortgage to taxation in the state of Iowa, since the domicile of the mort-

gagee is there, and, by the overwhelming weight of authority, mortgages are taxable at the mortgagee's domicile. (*Inquiry from Iowa, July, 1916.*)

Agreement by mortgagor to pay taxes

3111. A mortgage on realty contained a provision that, in addition to the payment of principal and lawful interest, the mortgagor would pay and satisfy such taxes as may be assessed against the mortgaged premises during the life of the mortgage. The question asked is whether said clause makes the instrument usurious. *Opinion:* When the lender requires of the borrower that he pay, in addition to the highest legal interest, such taxes as may be assessed to the lender on account of the loan, thus foisting upon the borrower his own obligation, it is clear, on principle, that the lender is guilty of usurious exaction. *Green v. Grant*, 134 Mich. 462. *Mortimer v. Pritchard*, Bailey Eq. (S. C.) 505. *Meem v. Dulaney*, 88 Va. 674. However, a provision in a mortgage securing notes which require the mortgagor to pay the taxes on the mortgaged property does not render the notes usurious where the mortgagor is by statute the holder of the legal title, and liable for taxes. *Union Mtg., etc., Co. v. Hagood*, 97 Fed. 360. The Nebraska statute on this subject provides: "In the absence of stipulations to the contrary, the mortgagor of real estate retains the legal title and right of possession thereof." *Cobbey's Anno. Stat. Neb.* (1903) Vol. 2, Sec. 10257. (*Inquiry from Neb., Nov., 1915.*)

Federal taxation

Canadian bank notes and currency

3112. Bank which pays out, in the United States, Canadian bank notes which have been received by it must pay tax of ten per cent. on all notes so paid out. (*Inquiry from Idaho, Jan., 1911, Jl.*)

Ten per cent. tax on Canadian bank notes

3113. A bank in the United States which pays out over its counter Canadian bank notes which it has received on deposit is subject to the Federal tax of 10 per cent. on all notes so paid out, but a bank in the United States may receive Canadian bank notes on deposit and send them to Canada for redemption without being required to pay tax thereon. (*Inquiry from N. D., Sept., 1910, Jl.*)

Ten per cent. tax on Canadian currency

3114. A national or state bank which receives on deposit and pays out Canadian currency is liable to the 10 per cent. tax thereon under U. S. Rev. Stat., Sec. 3412, but a bank may receive on deposit and send such currency to Canada for redemption without being required to pay tax thereon. U. S. Rev. St., Sec. 3412. 34 Internal Rev. Record, pp. 53, 61, 77, 93, 94. (*Inquiry from Wash., Sept., 1918, Jl.*)

Federal income tax

Income tax on state bankers associations

3115. Has the question ever been raised as to whether state bankers associations are subject to the federal income tax? *Opinion:* The Income Tax Law exempts business leagues, chambers of commerce or boards of trade "not organized for profit or no part of the net income of which enures to the benefit of the private stockholder or individual." It would seem that a state bankers' association is a business league not organized for profit, and hence exempt. (*Inquiry from Tenn., July, 1915.*)

Liability of trust company absorbing national bank for latter's income tax

3116. A national bank went into voluntary liquidation at the close of business June 30, 1916, and was succeeded by a trust company which purchased all its assets and assumed all its liabilities. Is the trust company liable for the federal corporation tax on the income of the national bank from January 1 to June 30, 1916? *Opinion:* The trust company would seem to be liable for the tax on this income. A corporation cannot evade liability by dissolving before the time when it is required to make a return. *U. S. v. General Inspection, etc., Co.*, 192 Fed. 223. As the trust company assumed all the liabilities of the national bank it would doubtless be liable for the tax on income for the period in question. (*Inquiry from N. J., Feb., 1917.*)

Income tax—Credit of dividends received from corporation

3117. Under what circumstances may a stockholder in a corporation deduct from his income, for purposes of the federal income tax, dividends received. *Opinion:* The Federal Income Tax Law of 1916 allows the individual taxpayer to credit the income embraced in his personal return with the amount received as dividends upon the stock of any

corporation which is taxable upon its net income. This applies to the normal tax only. Under the War Revenue Act of 1917, the stockholder is entitled to a like credit for computing the income subject to the additional 2% tax.

Corporations owning stock in other corporations which receive dividends are not allowed such credit under the act of 1916, but the act of 1917, imposing the additional 4% tax provides that "for the purpose of the tax imposed by this section the income embraced in the return of the corporation... shall be credited with the amount received as dividends upon the stock or from the net earnings of other corporations... which is taxable upon its net income as provided in this title." In other words, the individual taxpayer has the right of deduction by way of credit of dividends received from corporations, and a corporation has the like right in case of the 4% but not the 2% tax. (*Inquiry from Pa., Feb., 1918.*)

Deduction of loss caused by shrinkage of securities

3118. Does a shrinkage in value of securities during a tax year constitute a "loss" to be deducted from gross income in ascertaining the federal income tax? *Opinion:* The treasury department has changed its view as to what constitutes a "loss actually sustained" and where formerly it allowed a shrinkage to be charged off during the year and deducted from gross income as a loss, the new requirement is that the loss, to be deductible, must be ascertained by actual sale or disposal of the securities. (*Inquiry from N. J., Jan., 1915.*)

Contributions by national bank to Red Cross not deductible

3119. May a national bank deduct, in ascertaining its income tax, contributions to the Red Cross? *Opinion:* By act of May 22, 1918, it is made lawful for any national banks during the continuance of the war to contribute to the American National Red Cross out of any net profits otherwise available under the law for the declaration of dividends.

But under Treasury Decision 2847, as amended May 24, 1919, a corporation is not entitled to deduct from gross income contributions to the Red Cross. In the Digest of Income Tax Rulings No. 10, issued June 1920, appears the following: "Corporations which erroneously deducted contributions to the Red Cross and other war organizations

in their returns filed prior to the issuance of T. D. 2847 need not file amended returns, but should immediately file with the collector a statement showing the amount of such deductions claimed, the amount of net income as reported and as corrected, and the amount of additional tax due by reason of the erroneous claiming of such deduction, accompanied by the additional tax and interest on the first and second installment." (*Inquiry from Iowa, Oct., 1920.*)

Exemption of fees of executors and administrators

3120. Are individuals and corporations acting as administrators and executors subject to federal taxation in respect to income resulting from their services in those capacities? *Opinion:* By Art. 85 Reg. 45 Rev., April 17, 1919, "compensation paid its officers and employees by a state or political subdivision thereof, including fees received by notaries public commissioned by states and the commissions of receivers appointed by state courts are not taxable."

The Revenue Act of 1918, Sec. 213 (a), provides that gross income shall include "gains, profits and income derived from salaries, wages or compensation for personal service... of whatever kind and in whatever form paid." However, under the well settled rule that governmental agencies of the states are not subject to taxation by the federal government, the salaries of state officials and the salaries and wages of employees of a state are not subject to federal income tax. Op. Atty.-Gen. May 6, 1919 (T. D. 2843, May 17, 1919).

Compensation of a lawyer employed by a municipality as special counsel to act in connection with the regular city attorney in handling particular litigation is not exempt, as he is not regarded as an officer or employee of a political subdivision of a state. Ruling of Assistant Commissioner Callan, April 15, 1919.

With regard to the precise question submitted, letters testamentary and of administration issue from a court; but it is very doubtful if executors and administrators are to be regarded as state officials or employees, so that their fees and commissions are exempt income. (*Inquiry from Ill., Dec., 1920.*)

Reduction of taxes paid by bank on shares

3121. A bank in Tennessee, in making its return under the United States Income Tax Law, deducted as expenses from its gross

income the taxes assessed against its shareholders, but paid by the bank to the state. A provision of said law allows a corporation to deduct from the gross income "all sums paid by it during the year for taxes imposed." The department of Internal Revenue claimed that such deduction was not lawful. *Opinion:* Where taxes are assessed against bank stockholders as upon their property, though paid by the bank, the Federal courts hold the bank cannot deduct the taxes so paid from its gross income, such taxes not being assessed against the corporation or its property. *Elliott Nat. Bk. v. Gill*, 218 Fed. 600, 210 Fed. 933. (*Inquiry from Tenn., April, 1915, Jl.*)

3122. The Federal Income Tax Law imposing a tax on the net income of corporations provides for the deduction of "(fourth) all sums paid by it within the year for taxes imposed under the authority of the United States or of any State or territory thereof." May a bank deduct state or municipal taxes assessed against its shareholders and paid by it for them? *Opinion:* No such deduction is permitted; it is limited to taxes which have been assessed against the bank itself upon its own property. The question is the same as that arising under the similarly worded provision of the Corporation Tax Law of 1909. The following cases have held that there is no right to the deduction contended for. *Northern Trust Co. v. McCoach*, 215 Fed. 991. *National Bank of Commerce v. Allen*, 211 Fed. 743. *Eliot National Bank v. Gill*, Collector, 210 Fed. 933. (*Inquiries from Mont. and N. Y., March, 1911, Jl., March, 1915, Jl.*)

*Deduction by stockholders of taxes
paid by banks on shares*

3123. May the stockholders of a bank or trust company deduct taxes on their stock paid for them by the bank or trust company, without accounting for them as additional dividends? *Opinion:* Article 192, Regulations 33, Revised, promulgated January 2, 1918, provides: "Banks paying taxes assessed against their stockholders on account of their ownership of the shares of stock issued by such banks cannot deduct the amount of taxes so paid in making their returns for the purpose of the income tax imposed by this title unless and to the extent that the laws of the State in which they do business by specific terms make the tax a direct liability of such banks, that is, a lien upon its property. The shares of stock are the property of the stockholders, and to the

extent that the taxes assessed on the value of the shares of stock are property taxes the holders are primarily liable for their payment." Article 7 of the same regulations contains a provision as follows: "Taxes on bank stock paid under legal requirement by bank for its stockholders are deductible by the stockholders and not by the bank. Such payments are regarded as in the nature of additional dividends and should be included by the stockholder in his dividends received."

Shareholders, while allowed the deduction of the taxes in question, will have to account for them as additional dividends. (*Inquiry from Ind., Mar., 1919.*)

*Deduction of taxes paid by trust company, in
individual return of stockholder*

3124. The Treasury Department has ruled that, for the purpose of making income tax returns by bank stockholders, "taxes assessed against stockholders of a bank and paid by the bank itself is an allowable deduction under the heading of 'Taxes Paid.'" The New York State law levies a tax on trust companies based upon their franchises. May the stockholders of such companies deduct this tax? *Opinion:* In the case of national and state banks, state taxes imposed upon the stockholders may not be deducted by the banks in making their returns under the Federal Income Tax Law because not paid upon their property (except as to real estate) but paid as agents of the stockholders, and for this reason the shareholder is allowed the deduction in making his individual return. However, under the New York law the stockholders of trust companies are not taxed, but a franchise tax is imposed upon the trust company itself. Hence, it would seem that the franchise tax may be deducted in the income tax return of the trust company itself but not in the income tax returns of the individual stockholders. (*Inquiry from N. Y., Feb., 1915.*)

*Deduction from income tax of interest on
government bonds*

3125. Sec. 2 of the Federal Income Tax Law of 1913 provides "That in computing net income under this section there shall be excluded the interest . . . upon the obligations of the United States." Are banks entitled to this deduction? *Opinion:* Although the quoted provision is contained in that part of the law relating to individuals, it applies equally to corporations, as it refers to all net

income computed under "this section," namely, the Income Tax Law. Hence a bank may deduct interest received from governmental obligations. A letter was received by general counsel of the American Bankers Association from Deputy Commissioner of Internal Revenue Speer relating to the deduction of such interest by banks, which contained the following: "You are informed that such interest is not to be taken up, in either gross income or deductions, on blank, Form 1031, for the annual return of net income of corporations. However, for the information of this office, the amount should be entered under 3 (c), 'gross income from interest,' in the 'supplementary statement' on back of the return blank." (*Inquiry from N. Y., March, 1915, Jl.*)

Constitutionality of federal income tax law

3126. The Federal Income Tax Law, approved September 8, 1916, is not unconstitutional because it imposes a tax of 2 per cent. upon incomes received during 1916, prior to the enactment of the law. *Brushaber v. Union Pac. Ry. Co.*, 240 U. S. 1. *Stockdale v. Insurance Companies*, 20 Wall. (U. S.) 323. (*Inquiry from Porto Rico, Feb., 1917, Jl.*)

Penalty for delayed return

3127. A bank mailed its corporation tax return to the Collector of Internal Revenue on March 1. The same was not received by the collector until a day late and a penalty of fifty per cent was imposed. *Opinion:* That the return was made on March 1 by placing it in the post office at that time. The safest course is for the bank to pay the tax, plus the penalty, under protest and to request of the Commissioner of Internal Revenue that the penalty be remitted, because the facts do not warrant the imposition of such a heavy penalty. (*Inquiry from Miss., July, 1910, Jl.*)

Stamp taxes

Stamp tax on notes secured by mortgage

3128. In the matter of the war tax revenue bill is there any ruling upon the taxation of promissory notes given in connection with mortgage security? One section of the bill imposes a tax on promissory notes of two cents for each one hundred dollars or fractional part thereof; another section exempts the tax upon any instrument or writing given to secure a debt. As this tax goes into effect on December 1, it is well for all savings banks to be advised of

the departmental interpretation of these conflicting sections of the law. *Opinion:* There has been no ruling by the Treasury Department as yet upon the taxation of promissory notes given in connection with mortgage security, but that in case of a note secured by mortgage there would be a stamp tax on the note of two dollars per one hundred dollars as provided in the paragraph on promissory notes, but there would be no tax on the mortgage, which is expressly exempted from taxation in the Act of 1914 by the provision in the paragraph on conveyances that nothing therein shall be construed to impose a tax upon any instrument given to secure a debt.

There is no inconsistency between the provision taxing promissory notes and the provision exempting instruments given to secure a debt. Where a note and mortgage are given to a savings bank, the note is the borrower's promise to pay and is given as an evidence of the debt, while the mortgage is the instrument given to secure the debt. The note, technically speaking, is not given to secure the debt, but only as an evidence thereof and therefore the provision exempting instruments given to secure a debt would not apply to promissory notes.

It may be of interest to note the change in policy as to the taxation of mortgages between the former war revenue law of 1898, and the present law of 1914. Under the law of 1898, mortgages as well as notes were taxed, the rate on mortgages to secure sums above \$1,000 being fifty cents for each \$500. and a provision was subsequently added to the law that "Whenever any bond or note shall be secured by a mortgage, or deed of trust, but one stamp shall be required to be placed upon such papers: Provided, That the stamp tax placed thereon shall be the highest rate required for said instruments, or either of them."

The present law retains the provision of the law of 1898 taxing promissory notes, but omits the provision specifically taxing mortgages and it changes the provision of the law of 1898 as to conveyances by the insertion of the words in **bold face**:

"Conveyance: Deed, instrument, or writing, whereby any lands, tenements, or other realty sold shall be granted, assigned, transferred, or otherwise conveyed to, or vested in, the purchaser or purchasers, or any other person or persons, by his, her, or their direction, when the consideration or value **of the interest or property conveyed, exclusive of the**

value of any lien or encumbrance thereon, exceeds \$100 and does not exceed \$500, 50 cents; and for each additional \$500 or fractional part thereof in excess of \$500, 50 cents: *Provided, That nothing contained in this paragraph shall be so construed as to impose a tax upon any instrument or writing given to secure a debt.*"

Under the present law, therefore, mortgages are not taxed and a deed of land subject to a mortgage is taxed on the value of the property conveyed exclusive of the value of the mortgage. (*Inquiry from Md., Dec., 1914, Jl.*)

Note: The revenue act of 1918 imposes the same tax as the Act of 1914.

Authority in note to confess judgment

3129. Does the giving of authority in a note to confess judgment require an additional revenue stamp? *Opinion:* An additional stamp is not required under T. D. 2081, revoking an earlier inconsistent ruling. See *Treat, Collector v. Tolman*, 113 Fed. Rep. 892. (*Inquiry from Tenn., Dec., 1914.*)

Note dated prior to and negotiated after stamp tax law

3130. Is it necessary for a promissory note made payable to a bank to bear a revenue stamp where the note is dated prior to December 1, 1914, but presented or negotiated to the bank on or after December 1, 1914? If stamp is necessary, what date should be used in cancelling the same? *Opinion:* Where a note payable to a bank was made before December 1 but presented or negotiated to the bank on or after December 1, the affixing of the necessary stamp would be required. Section five of the Act of October 22, 1914, provides that on and after December 1, 1914, "there shall be levied, collected and paid for and in respect of the several" instruments and documents described in Schedule A "by any person who shall make, sign or issue the same or for whose use or benefit the same shall be made, signed or issued," the prescribed tax. Although the note in question is made or signed before December 1 it is not issued until it is delivered to the bank. The Negotiable Instruments Act defines "issue" as follows:

"Issue" means the first delivery of the instrument, complete in form, to a person who takes it as a holder." It seems clear, therefore, that the delivery of the note to the payee bank on or after December 1 is an

issue of the same, which calls for affixing of the necessary stamp.

It is further asked, if stamp is necessary, what date should be used in cancelling the same. It would seem in this case that the date of issue would be the date for cancellation of the stamp. The following regulation concerning the cancellation of documentary stamps was published by the Treasury Department under date of November 23, 1914: "In any and all cases where an adhesive stamp shall be used for denoting any tax imposed by Schedule A of the act of October 22, 1914, the person using or affixing the same shall write or stamp thereon, with ink, the initials of his name and the date (year, month, and day) in which the same shall be attached or used; or shall, by cutting and cancelling said stamp with a machine or punch, which will affix the initials and date as aforesaid, so deface the stamp as to render it unfit for re-use. The cancellation by either method should not so deface the stamp as to prevent its denomination and genuineness from being readily determined. In addition to the foregoing, stamps of the value of 10 cents or more shall have three parallel incisions made by some sharp instruments lengthwise through the stamp after the stamp has been attached to the document: *Provided*, This will not be required where stamps are cancelled by perforation." (*Inquiry from Ark., Jan., 1915, Jl.*)

Interest coupon notes

3131. Is it necessary to place internal revenue stamps on interest coupons, that is, notes given in connection with a principal note for interest thereon given at the time the principal note is made? *Opinion:* The latest ruling of the commissioner of internal revenue under date of Dec. 24, 1914 (T. D. 2101) is to the effect that coupons or interest notes attached to and forming part of the bond or principal note are not subject to tax as promissory notes even though they are in the form of promissory notes. (*Inquiry from N. D., Oct., 1915.*)

Note: See Art. 58, Regulations, No. 55, Revised October, 1920.

Payment of interest on demand notes

3132. Is a demand note subject to the war stamp tax each time that interest is paid thereon? *Opinion:* Whether payment of interest subjects a demand note to the Stamp Tax Act depends upon whether it acts as a renewal of the note. Deputy Com-

missioner Fletcher ruled January 30, 1915, that unless the interest on a demand note is paid in advance it does not operate to renew the note, or necessitate new tax stamps. (*Inquiry from N. Y., Aug., 1916.*)

Note: Art. 59, Stamp Tax Regulations, No. 55, Revised October, 1915, provides: "The mere payment of interest on a demand note without any agreement in writing extending the note is not a renewal within the meaning of this act."

Stamp tax on municipal notes

3133. Is the stamp tax applicable to promissory notes of boroughs, townships, counties, and other municipalities? *Opinion:* Sec. 15 of the War Revenue Act provides that all bonds, debentures or certificates of indebtedness issued by the officers of the United States government or by the officers of any state, county, town, municipal corporation or other corporation exercising the taxing power are exempt from stamp taxes. Under this it would seem that promissory notes of municipalities would be exempt. This conclusion is fortified by T. D. 2180, holding that notes issued by the Swedish government are not subject to the tax. (*Inquiry from N. J., Aug., 1916.*)

Note: Section 1101 Revenue Act of 1918 exempts bonds, notes and other instruments issued by the United States or any foreign government or by any state, territory, or the District of Columbia, or local subdivision thereof, or municipal or other corporation exercising the taxing power.

Exemption of notes secured by U. S. obligation

3134. All promissory notes, including demand notes, are subject to stamp tax of 2 cents for \$100 or fraction thereof, except that promissory notes issued on or after April 6, 1918, secured by United States bonds and obligations issued after April 24, 1917, are exempt from stamp tax. U. S. Treas. Dec. No. 2543, Oct. 19, 1917. U. S. Treas. Dec. No. 2701, April 16, 1918. (*Inquiry from Minn., Jan., 1919, Jl.*)

Note: Art. 55, Reg. 55, rev. October, 1920, exempts promissory notes secured by U. S. bonds and obligations issued after April 24, 1917, of a par value of not less than the amount of such notes.

Liability of collecting bank to penalty for unstamped notes held for collection

3135. Is a bank liable to a penalty where there are no federal revenue stamps on notes left with it for collection? *Opinion:* Sec-

tion 1102, Title XI, of the Revenue Act of 1918 provides "that whoever makes, signs, issues, or accepts . . . any instrument . . . without the full amount of tax thereon being fully paid . . . is guilty of a misdemeanor."

When a bank receives an unstamped note for collection, it neither makes, signs, issues, nor accepts the note, unless the word "accepts" can be construed as broad enough to include not only a person who accepts an instrument for value but also one who accepts it for collection. It is very doubtful that the word will be given the latter meaning, and if not, the bank receiving an unstamped note for collection, being merely agent of the owner whose duty it is to affix the stamp, would not be subject to the penalty. The ruling of the department to the contrary has not been backed by any judicial decision. (*Inquiry from Ida., June, 1919.*)

Stamp tax on non-negotiable notes

3136. The federal law provides for a stamp tax on "promissory notes," and this term is defined by the Treasury Department as follows: "A promissory note is an *unconditional* promise in writing made by one person to another, signed by the maker, engaging to pay on demand, or at a fixed or determinable future time, a sum certain in money to such other person or to order or to bearer, free from restrictions as to registration or transfer and usually without coupons." Art. 48, Reg. 55. Approved Feb. 24, 1919. Under the statute and the regulations, is a note without words of negotiability, such as "order" or "bearer," or restricted as to transfer or conditional taxable? Is it advisable to use a non-negotiable non-taxable note in place of the regular negotiable promissory note which is taxable? *Opinion:* It might be a debatable question whether some forms of non-negotiable notes would not be taxable. The fact that the regulation defines a promissory note as an unconditional promise in writing made by one person to another engaging to pay "to such other person or to order or to bearer" might not exclude an interpretation of the regulation that a note payable to a specified person without the words "order" or "bearer" would come within the definition. If there was some condition attached to the promise, however, it probably would not come within the definition of a promissory note.

As to advisability of using non-negotiable forms of instruments, there is no legal objection to their use. Banks generally find it preferable to take negotiable instruments,

as the liability of indorsers thereon is clearly defined by law; if acquired from a payee before maturity, the note is enforceable free from defenses of the maker; it is protestable; and if in negotiable form, the bank may itself negotiate it. The nature of a bank's business might be such that a non-negotiable note would be satisfactory. Each bank must judge for itself whether, from the nature of its business, it should take non-negotiable paper. (*Inquiry from Mich., Dec., 1920.*)

Unstamped note not "complete and regular on its face"

3137. A note payable to the order of the maker was indorsed by him in blank and offered for sale by another person. The purchaser called attention to the lack of the required revenue stamps and the seller replied that the maker had paid for them and asked to have them put on and cancelled. The purchaser then put them on and cancelled them and bought the note. Did such purchaser take subject to the defense of failure of consideration? *Opinion:* Lutton v. Banker, 174 N. W. (Ia.) 599, holds that, where necessary revenue stamps are not affixed, the instrument is not "complete and regular upon its face" within the meaning of the Negotiable Instruments Act and that a purchaser of such a note takes subject to any defenses available against the payee. It is assumed that the note was payable otherwise than at sight or demand, which would seem to make the Lutton decision applicable, although the purchaser put on the stamps before purchasing the note. (*Inquiry from Iowa, May, 1921, Jl.*)

No stamp tax on certificate of deposit

3138. Are interest bearing certificates of deposit payable on demand subject to the stamp tax? *Opinion:* The commissioner of internal revenue has ruled under date of Nov. 14, 1914, that under the act of Oct. 22, 1914, stamps are not required to be affixed to certificates of deposit issued by banks. This ruling seems to be correct. (*Inquiry from Pa., Dec., 1914.*)

Note: Art. 62, Reg. 55, Rev. Oct., 1920, provides: "A certificate of deposit is not subject to tax as a promissory note."

3139. Are certificates of deposit subject to the stamp tax? *Opinion:* Internal Revenue Commissioner Roper has ruled under date of Nov. 16, 1917, that "certificates of deposit issued by banks and trust companies are not taxable under Schedule A, Act of

October 3, 1917, whether they are time certificates or contain clause reserving the right of thirty days' notice for payment." A prior ruling was to the effect that certificates of deposit payable on sight or demand are not subject to tax as certificates of indebtedness under the War Revenue Act of October 3, 1917. This ruling was made October 20, 1917. It would appear that certificates of deposit are not subject to the stamp tax either as certificates of indebtedness or as promissory notes. (*Inquiry from Kan., May, 1918.*)

Stamp tax on deed where consideration \$5000 but mortgage \$2000

3140. The consideration stated in a deed is \$5000, without any reference to a \$2000 mortgage on the premises conveyed. Does this deed call for stamps on a \$5000 or a \$3000 consideration? *Opinion:* Although there is no specific ruling on this point it would seem that the consideration to be taken would be \$3000. The law provides a tax on the consideration or value of the property conveyed exclusive of the value of any lien or incumbrance thereon. The value of the property here is \$5000, and excluding the value of the \$2000 encumbrance thereon leaves \$3000 to be taxed. The law does not provide that the value of the encumbrance must be stated in the deed in order to be deducted or excluded and, as the mortgage is recorded, the existence of the lien is a matter of public knowledge. (*Inquiry from Kan., Feb., 1915.*)

Note: See Art. 67, Reg. 55, Revised October 1920.

Where consideration of deed \$1500 cash and assignment of \$2500 mortgage

3141. The consideration for a deed was \$1500 cash and an assignment of two mortgages for the amount of \$2500 dated prior to Dec. 1, 1914. What is the basis for the stamp tax? *Opinion:* It would seem that the seller would have to pay revenue tax on the entire \$4000, as that is the amount of the consideration. The case would be different if the buyer paid \$1500 and gave a purchase money mortgage for \$2500. Then only \$1500 would be taxable. (*Inquiry from Wis., March, 1915.*)

Consideration \$400 per year for life

3142. How much revenue tax is required on a deed to 200 acres of land, really worth \$200 per acre, which a man is dividing among his three children? The consider-

ation is two dollars an acre per year for the grantor's lifetime. *Opinion:* If the conveyance were a gift there would be no tax. Ruling of Deputy Commissioner Fletcher, Jan. 8, 1915. However, the deed seems to be for a consideration, namely, \$400 per year during the lifetime of the grantor. It would seem that the tax should be based not on the value of the property, that is \$40,000, but on the consideration. It is difficult to say just what the law would require in a case like this, but if the property were valued at what the grantor expects to receive before he dies, stamps upon this value would seem to be sufficient. (*Inquiry from Ill., Jan., 1916.*)

Tax on stock transfer

3143. A shareholder in a bank has a certificate for 13 shares of stock and wishes one share transferred to another person. Do both new certificates require revenue stamps? How much is the tax? Who pays for the stamps? *Opinion:* It has been ruled that the tax imposed is on the transfer of the shares by the owner to another person and that there is no tax where a new cer-

tificate is issued to the holder who already owns the shares. That is, the stamp tax would be on the new certificate for one share transferred to a third person, and there would be no tax on the certificate for the remaining twelve shares issued to the original stockholder. The amount of tax is two cents on each \$100 of face value or fraction thereof. No specific ruling can be found on the question as to who should pay for the stamp but it would seem that the transferrer should pay, and that it would be the duty of the bank to see that the stamp was affixed before delivering the new certificate. (*Inquiry from Pa., Jan., 1915.*)

3144. A transferred shares of stock to B with a 10 cent internal revenue stamp affixed. A new certificate was issued to B and the old certificate was cancelled. The question was raised whether or not the new certificate required a 10 cent stamp. *Opinion:* Under a ruling by the Commissioner of Internal Revenue, no stamp is required on the new certificate. Treas. Dec. No. 2073, Nov., 1914. (*Inquiry from N. J., Jan., 1915, Jl.*)

3145

WAREHOUSE RECEIPTS

Forms Recommended by American Bankers Association and the American Warehousemen's Association

NEGOTIABLE

Consecutive
No. _____

JOHN DOE WAREHOUSE COMPANY

A warehouseman as defined in the Uniform Warehouse Receipts Act of the State of _____

New York _____ 192_____

This is to certify that we have received and hold on storage the following described merchandise and will deliver same to _____ or order upon the surrender of this receipt properly indorsed and on payment of storage and other charges as indicated below:

MARKS OR LOT NUMBERS	PACKAGES SAID TO CONTAIN	MERCHANDISE	LOCATION

Storage Rate _____

Labor _____

Other charges for which lien is claimed: _____

(Signature of warehouseman which may be made by h
authorized agent)

Storage from _____

PARTIAL DELIVERIES NOTED ON THE BACK OF THIS RECEIPT

REVERSE SIDE

INDORSEMENTS

Released hereon, the following merchandise; balance of goods in store to be responsible for all unpaid charges hereon.

DATE	NUMBER	PACKAGES	MERCHANDISE	MARKS OR LOT NUMBERS	SIGNATURE OF WAREHOUSEMAN OR AUTHORIZED AGENT

Note: The word "Negotiable" is printed across the face of the receipt.

NOT NEGOTIABLE

3146

Consecutive

No. _____

JOHN DOE WAREHOUSE COMPANY

A warehouseman as defined in the Uniform Warehouse Receipts Act of the State of _____

New York _____ 192 _____

Received on storage from _____ and deliverable to _____
 the merchandise described below, subject to delivery on written authority without the return of this receipt:

MARKS OR LOT NUMBERS	PACKAGES SAID TO CONTAIN	MERCHANDISE	LOCATION

Storage Rate _____

Labor _____

Other charges for which lien is claimed: _____

 (Signature of warehouseman which may be made by his
 authorized agent)

Storage from _____

Note: The words "Not Negotiable" are printed across the face of the receipt.

Form of transfer of warehouse receipt

3147. What is the form of transferring warehouse receipts as a pledge or otherwise? *Opinion:* At common law a valid assignment of a warehouse receipt could be made without indorsement by mere delivery with intent to pass title to the goods. Statutes authorizing a transfer of warehouse receipts by indorsement, passed in a number of states, have been generally construed not to prevent a valid transfer by any method previously effectual. Under the South Carolina statute (Code Laws, 1912, Chap. VI, Sec. 2590), warehouse receipts are properly transferred by the indorsement of the person to whom the receipt was originally drawn, without more. (*Inquiry from S. C., Oct., 1917.*)

Warehouse receipt for mortgaged goods

3148. A bank inquires if a bona fide holder for value of a warehouse receipt has title to the goods against a mortgagee. *Opinion:* Where the owner of goods which are subject to a chattel mortgage, duly recorded, deposits the goods in a warehouse, and takes out a negotiable warehouse receipt therefor, which he subsequently negotiates, the rights of a bona fide purchaser for value of the receipt are subject to the claim of the mortgagee, and the warehouseman is entitled to interplead the adverse claimants before making delivery to either. (Uniform Warehouse Receipts Act, Secs. 17, 18, 41.) The person taking out and negotiating such receipt without disclosing the existence of the mortgage is criminally liable. (Ibid., Sec. 55.) (*Inquiry from Miss., Feb., 1921, Jl.*)

Forged elevator storage ticket

3149. The agent of an elevator company borrowed money upon a forged elevator storage ticket, which was issued without authority by him in the name of the company to a fictitious person and indorsed by the same name. The agent also indorsed the ticket in his own name. *Opinion:* The elevator company is not liable to the purchaser. The ticket is not negotiable and is not transferable as a bearer instrument because the supposed goods are made deliverable to a fictitious person. The purchaser required no title as in case of a negotiable instrument, and was put in inquiry in any event because of negotiation by the issuing agent. *Jasper Tr. Co. v. R. R. Co.*, 99 Ala. 416. (*Inquiry from S. D., June, 1914, Jl.*)

Warehouse collateral note

3150. The following note is submitted and the question raised as to its negotiability and eligibility for rediscount by a Federal Reserve Bank.

"\$5,000

Topeka, Kansas,
Sept. 16, 1918.

Ninety days after date we promise to pay to the order of ourselves Five Thousand Dollars at First National Bank, Topeka, Value Received. Having deposited as collateral security Warehouse Receipt No. 1721, of even date, covering 3,000 bushels of wheat which the holder of this note is authorized to sell, etc., in case of non-payment. The A. B. Milling Company,
By John Doe, President.

Attest: John Roe,
Secretary.

Indorsements by the Company and Joe Doe, President, and John Roe, Secretary."

Opinion: A note which contains a provision authorizing sale of collateral upon non-payment is negotiable but where the note is issued by a warehouse corporation, to its own order and is secured by a warehouse receipt issued by the same corporation, it is ineligible for rediscount by a Federal Reserve Bank. The Federal Reserve Board has ruled that paper secured by warehouse receipts may be rediscounted if otherwise eligible, but the warehouse receipt must be issued by a warehouse which is independent of the borrower. (*Inquiry from Kan., Oct., 1918, Jl.*)

Receipt issued by milling company on its own grain

3151. A milling company owning three warehouses issued receipts upon its own grain and pledged the receipts to a bank as security for a loan. In the event of the bankruptcy of the company, the bank wishes to hold the grain as against the bankrupt's creditors. *Opinion:* Warehouse receipts issued by grain warehouseman on his own goods in store are generally held invalid and are insufficient security to a bank as against the trustee in bankruptcy of the issuing warehouseman. An additional provision might be framed in connection with the Uniform Warehouse Receipts Act, when presented for enactment in Arizona, which in substance would validate receipts of warehousemen, whether or not issued for their own grain in store, upon a proper system of registry of such receipts. *Bell v. Ky. Glass Works Co.*, 106 Ky. 7. *Fourth St. Bk. v. Milbourne Mills, etc., Co.*, 172 Fed. 177.

Kastner v. Fashion Livery Co., (Ariz.) 85 Pac. 120. Cochran v. Ripy, 76 Ky. 495. (*Inquiry from Ariz., Feb., 1912, Jl.*)

Receipt issued by warehouseman on his own whisky

3152. A bank loans money upon the security of whisky certificates issued by the proprietor of a bonded warehouse representing his own whisky. The warehouseman goes into bankruptcy. *Opinion:* Under a recent decision the pledge of such whisky certificates is valid and protects the bank as against the trustee in bankruptcy. Such certificates are distinguishable from warehouse receipts for grain or flour issued by a warehouseman upon his own goods, pledge of which is invalid as against creditors. The delivery of the last stated certificates does not, while that of bonded warehouse receipts does, operate as delivery of the goods, sufficient to constitute a valid pledge. Fourth St. Bk. v. Milbourne Mills Co., 172 Fed. 177. Miller Pure Rye Dist. Co., 176 Fed. 606. Miller Pure Rye Dist. Co., 187 Fed. 689. (*Inquiry from Wash., Oct., 1911, Jl.*)

Receipt issued by bankrupt warehouseman to himself

3153. A bank loaned money upon the security of warehouse receipts for grain and flour, issued by the warehouseman to himself. The warehouseman became bankrupt. *Opinion:* Such receipts are invalid as against creditors and the trustee in bankruptcy, and do not protect the bank. Fourth St. Bk. v. Milbourne Mills, etc., Co., 172 Fed. 177. Miller Pure Rye Dist. Co., 175 Fed. 606. In re Rohrer, 186 Fed. 997. (*Inquiry from Wash., Sept., 1911, Jl.*)

Warehouse receipt issued to owner on his own goods

3154. Should a warehouse company be organized and operated as a separate concern for the purpose of issuing negotiable warehouse receipts? *Opinion:* The courts have repeatedly held that a man cannot be a warehouseman of his own goods; that is to say, a receipt issued by a concern upon its own goods would not be a valid warehouse receipt. It is only warehouse receipts issued by persons engaged in the business of warehousing for profit that constitute valid warehouse receipts. (*Inquiry from Iowa, Oct., 1918.*)

Limitation of liability in warehouse receipt

3155. A warehouse receipt contains the

clause: "Loss or damage by riot or insurrection, fire, water, ravage, leakage, shrinkage or from inherent qualities of the property, or from being perishable, at owner's risk." Is this permissible under the Uniform Warehouse Receipts Act? *Opinion:* This clause would seem to be permissible as these limitations of liability are not contrary to any of the provisions of the Uniform Warehouse Receipts Act. (*Inquiry from Iowa, March, 1917.*)

Responsibility of warehousemen for weather damage

3156. Note: An act of the Texas legislature, which became effective January 2, 1920, creates responsibility upon the part of warehousemen to protect goods stored from weather damage. A statement issued by the Federal Reserve Bank of Dallas states: "In considering notes secured by cotton, other produce and merchandise submitted for rediscount, the Federal Reserve Bank will give careful consideration to the manner in which such goods are stored and the responsibility of the warehousemen as defined in this act." (*Sept., 1920, Jl.*)

Insurance clause in warehouse receipt

3157. A warehouse in its contract with the depositor expressly excludes loss or damage by fire, by the use of the phrase "fire excepted"; but itself carries insurance on contents of warehouse. Does this protect the bank? *Opinion:* The courts have held that where a warehouseman or carrier insures for the benefit of "whom it may concern," the owners of the property covered by such a policy are entitled to share pro rata in the proceeds. Symmers v. Carroll, 101 N. E. (N. Y.) 698; Snow v. Carr, 61 Ala. 363 (where the owner never requested any insurance on goods stored with another, did not know that it was taken out until after the loss, and failed to ratify, expressly or otherwise, the acts of the warehouseman in taking out the policy, before the payment of the loss). In the case submitted, if in fact the warehouseman carried insurance to cover all cotton in the warehouse and the insurance was taken out for the benefit of whomsoever might be the owners, as well as for himself, the holder of the receipt would seem to be protected, unless the words "fire excepted" in the receipt should be construed to exclude the bailor from all participation in the proceeds of any policy so taken. However, the bank ought to have

a form of receipt more clearly protecting it in case of fire, by providing that the goods were insured for the benefit of the owner or the holder of the receipt. (*Inquiry from Ala., Oct., 1915.*)

Necessity for Factor's Acts in cotton states

3158. Is a Missouri bank safe in loaning money upon receipts, issued to cotton factors in Tennessee, on which they have made no advances to their principals? *Opinion:* In view of the fact that there is no Factor's Act in Tennessee, the bank would seem not to be protected where the factor, so receiving the goods, deposits them in a warehouse and negotiates the receipt to such bank in violation of the rights of the owner of the goods. The Uniform Warehouse Receipts Act does not seem to afford the necessary protection or take the place of a

Factor's Act. Under the Warehouse Act, if the owner of a negotiable warehouse receipt should intrust it to a factor and he should wrongfully pledge it to a bank, it would be protected under Sec. 41; but where the factor is intrusted with the goods themselves and the factor obtains a warehouse receipt which he wrongfully pledges, the act does not seem to afford protection. In *re Dreuil*, 205 Fed. 568. The enactment of a Factor's Act would change this rule and afford protection to the pledgee bank. (*Inquiry from Mo., Nov., 1913.*)

Uniform Warehouse Receipts legislation

3159. Statement: The only states which have not yet adopted the Uniform Warehouse Receipts Act are Georgia, Kentucky, New Hampshire, Porto Rico, South Carolina, and Hawaii.

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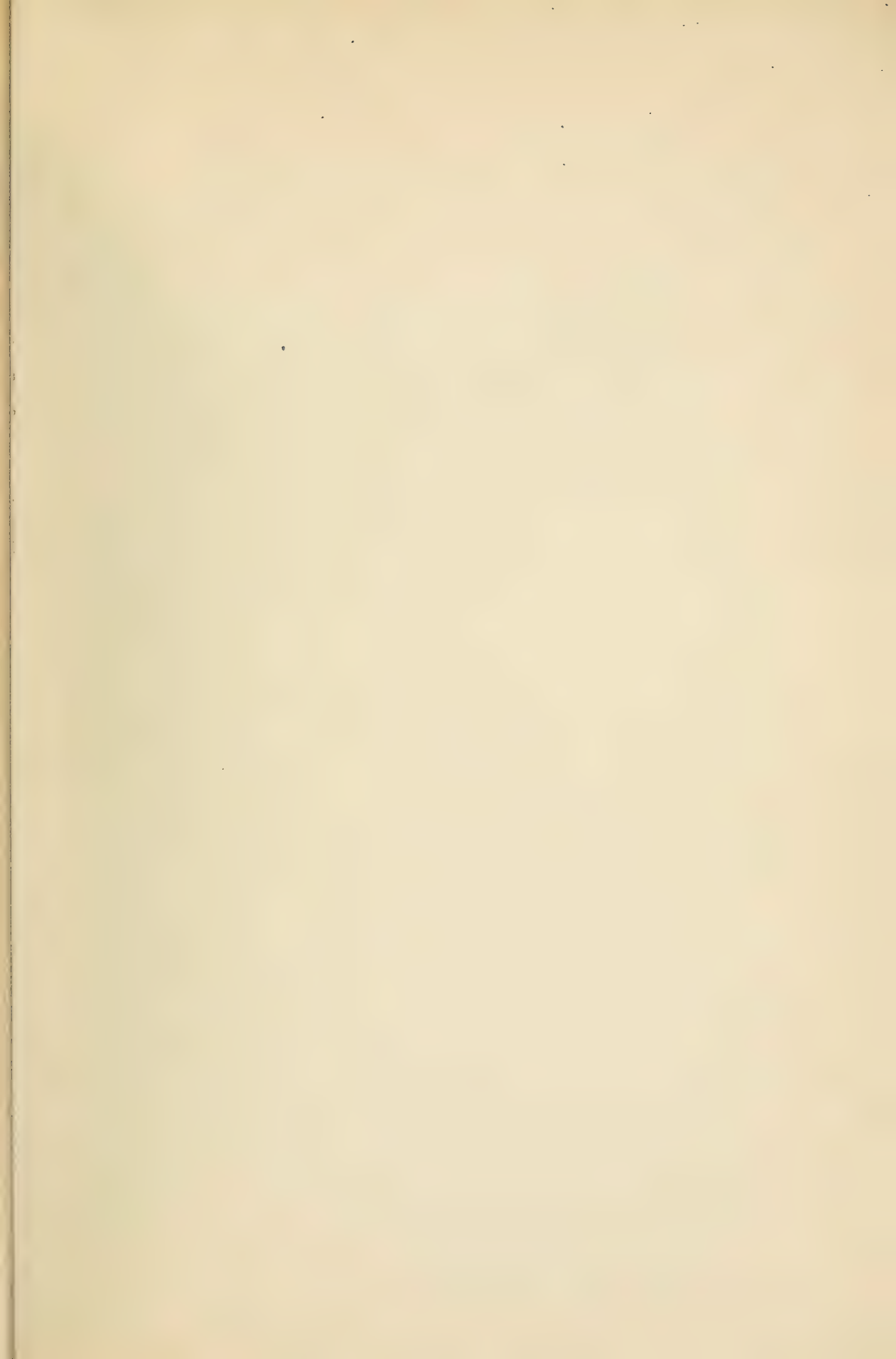
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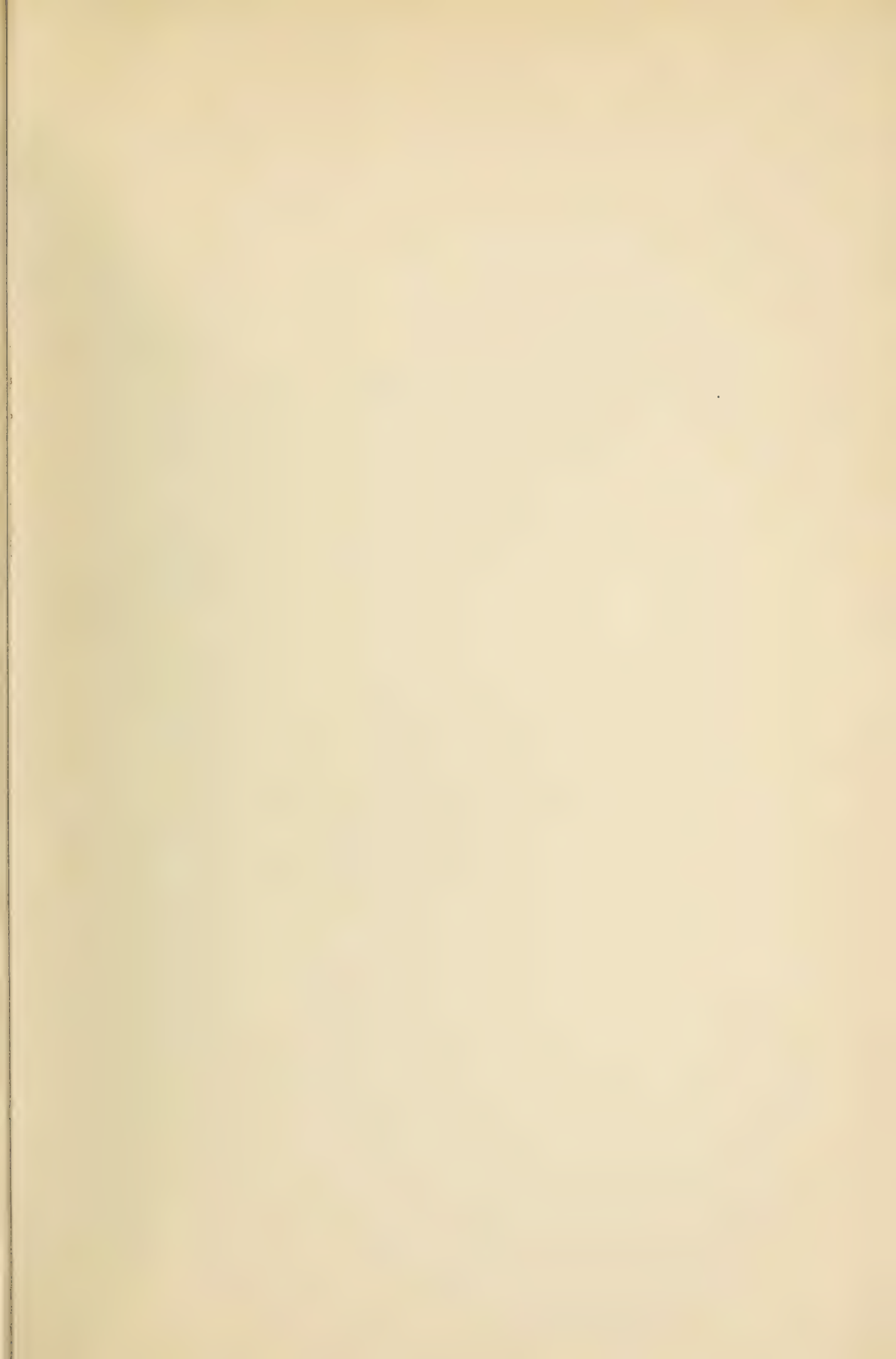
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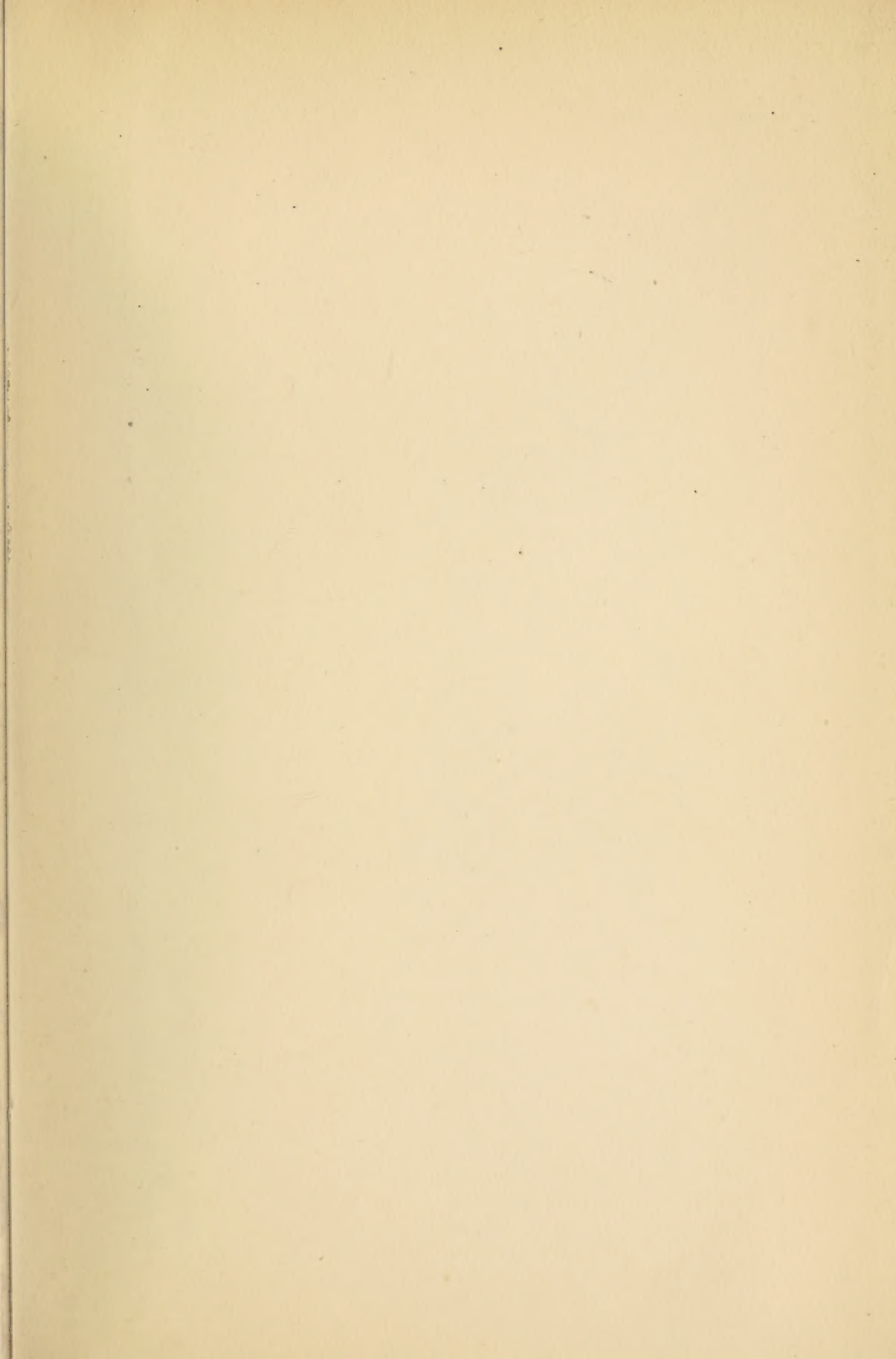
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